Human Rights Legislation

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Executive Summary

The UK was one of the first countries to ratify the European Convention on Human Rights (ECHR), but it has never been incorporated into our law. Successive UK Governments have adopted the position that compliance can be achieved without incorporation. The Labour Party and the Liberal Democrats have said that they would introduce a bill to incorporate the ECHR if returned to power at the next general election, and that the development of a domestic bill of rights would follow. Technically, incorporation of the ECHR is not difficult. There are, however, different ways of achieving the goal of incorporation, and decisions have to be made between competing options. The successful development and implementation of a domestic bill of rights may prove more complex than incorporation of the ECHR. It would depend on the extent to which a domestic bill of rights' provisions exceeded the UK's existing human rights obligations.

Objectives

The case for incorporation rests on the need to provide effective remedies within the domestic legal system for the individual whose basic rights and freedoms are infringed. This need is all the more important because the effects of enlargement of the Council of Europe will be to increase the existing 5-6 year average delay in cases reaching the Court in Strasbourg.

Policy decisions about the respective roles of the executive, legislature and judiciary in enforcing the ECHR will depend on the political objectives of incorporation. These objectives might include:

- reducing the number of cases lost by the UK at Strasbourg.
- allowing the courts scope to develop the common law through human rights norms.
- paving the way for a domestic bill of rights.
- promoting a 'rights culture'.

These are not mutually incompatible; but a clear view of the key objectives is required.

Entrenchment

In other countries, and in particular those with a written constitution, bills of rights usually have a special status, both superior to ordinary legislation and less susceptible to amendment. There is no precedent within the British constitution for formally entrenching legislation in this way.

However, the issue of entrenchment is not an obstacle to incorporation of the ECHR:

- bills of rights in other Commonwealth countries have demonstrated that the traditions of Parliamentary sovereignty can co-exist with a degree of entrenchment.
- in the UK, parliamentary sovereignty has been used to give a superior status to EC law. The European Communities Act 1972 has enabled the courts to declare invalid existing and subsequent UK legislation which is inconsistent with EC law.
- the UK is already bound by the ECHR in international law: when the European Court of Human Rights rules that a particular law or provision is in contravention the Government must act to remedy the situation.

Certainly, any statute incorporating the ECHR into domestic law could be reversed by a future UK Parliament, so to that extent it would not be 'entrenched'. But the incorporating statute could assert that the ECHR's relationship with other laws would be different from that of 'ordinary legislation'. This would not undermine the doctrine of parliamentary sovereignty - because the nature of that relationship could subsequently be changed if Parliament so desired.

Relationship Between ECHR and Other Laws

The incorporating statute must define the status of the ECHR as part of UK domestic law. In most cases, it will be perfectly easy to interpret domestic laws and legislation in such a way that they comply with the ECHR. The experience of other countries suggests that direct challenges to the validity of primary legislation are likely to be extremely rare. When they do occur, the incorporating statute could:

- simply be a tool of interpretation for the courts - where it was impossible to interpret legislation consistently with the ECHR, the legislation would nevertheless be applied (as in New Zealand).
- empower the courts not to give effect to pre-existing legislation that is inconsistent with the ECHR and require that all subsequent legislation should be construed as consistent with the ECHR unless manifestly impossible (as in Hong Kong).
- empower the courts not to give effect to pre-existing legislation and legislation enacted after incorporation if inconsistent with the ECHR, subject to Parliament having the power to insist that legislation should be applied 'notwithstanding' the inconsistency (as in Canada).

The report recommends that the incorporating statute should require conformity between the ECHR and:

- the common law.
- all subordinate legislation, past and future, with a power for the courts not to give effect to inconsistent provisions.
- all existing primary legislation, with a similar power not to give effect to inconsistent provisions - in accordance with the existing convention that if an Act of Parliament is inconsistent with an earlier one, the courts are required to uphold and give effect to the more recent provisions.

As regards future primary legislation, the political and constitutional traditions of the UK will require an active 'political' role in the protection and furtherance of human rights, to complement the judicial role. Any judicial powers to disapply primary legislation must be subject to parliamentary override. This might best be achieved by protecting legislation from implied repeal by including a 'notwithstanding clause' as in Canada. If this option is not favoured, the Hong Kong model could be adopted.

The incorporating statute should require UK courts to have regard to the judgments of the European Court of Human Rights and decisions of the Commission at Strasbourg. In order to limit the number of adverse decisions at Strasbourg, such judgments should be binding on all domestic courts.

The Role of the Courts

Little substantial change would be required within the judicial system. Ordinary courts and tribunals should be able to hear ECHR issues, in the same way as all courts can consider matters of EC law. No separate procedures or special jurisdiction is required. There is no need to establish a Constitutional Court; nor is it necessary to have a Judicial Appointments Commission as a concomitant of incorporation.

The incorporating statute should bind the government and all public authorities; and private bodies exercising public powers. The scope of applicability could subsequently be extended in

the light of developing Strasbourg jurisprudence. ECHR rights should be capable of being asserted by companies as well as by individuals.

There is no need for a special filter to weed out unmeritorious cases. Most ECHR issues will be raised by way of collateral challenge in cases that would anyway have come before the courts - for example, in criminal trials. 'New' ECHR cases will mainly be by way of judicial review, which is already subject to a leave procedure. That existing procedure, plus the costs of litigation, will provide a sufficient filter. The Law Commission recommendation that the courts should have discretion to award costs out of central funds in public interest cases should be implemented, and additional means of securing affordable access to the courts should be considered.

Enforcement by Government

The active participation by all three branches of government - executive, legislature and judiciary - is necessary to ensure the effective protection of human rights. Within Whitehall, implementation of an incorporated ECHR should be the responsibility of a senior Cabinet Minister; and there needs to be a unit in one of the central departments to drive the 'enforcement culture'. Human rights impact statements should be produced by Departments before submitting legislation to Cabinet Committees; and where appropriate, published to accompany draft bills.

Enforcement by Parliament

In addition to the existing procedures for scrutiny of legislation by Parliament, a new or existing committee should be given responsibility for ensuring compliance with human rights standards - both the ECHR and other international obligations. This might the responsibility of the House of Lords Delegated Powers Scrutiny Committee or a new Joint Committee of both Houses of Parliament. Bills should be referred to the committee at an early stage in their parliamentary passage - certainly before committee stage. Any additional legislative scrutiny will need to be matched by wider arrangements for timetabling of bills to ensure that the legislative programme is not unduly delayed. A specialist human rights committee might also undertake research and inquiries leading to reports; and monitor the activities of Government departments in relation to human rights standards including, but not limited to, the ECHR.

Enforcement by Independent Bodies

In cases of maladministration affecting human rights issues, the Ombudsman could provide a very useful adjunct to litigation in the courts, at no cost to the complainant. If necessary, the incorporating statute could include a provision that maladministration includes non-compliance with the ECHR. The Government should also establish a Human Rights Commission. Initially, its primary functions should be public education and litigation - bringing proceedings in its own name and assisting individual complainants. The Commission should be free standing and not merged with existing anti-discrimination quangos. It should be accountable to Parliament, rather than to a Government Department.

The Process of Incorporation

The incorporating bill would almost certainly count as a 'first class constitutional measure' whose committee stage in the House of Commons would need to be taken on the floor of the House, under current conventions. The Unit has suggested in an earlier report *(Delivering Constitutional Reform)* that these procedures would need to be reviewed in the context of a wide ranging programme of constitutional reform, as proposed by the opposition parties.

The Government should conduct a review prior to incorporation to determine whether existing reservations and derogations should be preserved; and whether or not to ratify those Protocols so far unratified by the UK. The statute would also need to provide for any future derogation to have effect within our domestic law.

The Government would also need to assess the resource implications of incorporation, under the following heads: the extent of costs likely to be incurred by public authorities for failure to comply with the Convention i.e. costs over and above those already incurred as a result of decisions of the Strasbourg organs; the costs of a Human Rights Commission; the costs of the increase in publicly funded litigation; and the likely volume of cases.

But access to remedies should not be restricted on the grounds of cost, and the potential impact on the courts should not be over-estimated. Incorporation of the ECHR is unlikely to give rise to a large number of cases that would otherwise never have been brought before the domestic courts.

The Wider Context

Incorporation of the ECHR raises a number of additional issues over the longer term. These include:

- the cumulative case for a constitutional or supreme court if other significant constitutional reforms are implemented.
- the possible development of different bills of rights within devolved nations.
- the future relationship between the ECHR and EC law - including the prospect of accession by the EU to the ECHR, on the agenda at the current Inter-Governmental Conference.

Developing a Domestic Bill of Rights

Drafting a domestic bill of rights will involve discussion not only of its contents but of the enforcement mechanisms. There are two distinct aspects to the development of such a bill - the production of a skeleton bill, drawing on international standards, and the use of a consultative forum that engages the public as well as parliamentarians. A commitment to the development of a domestic bill of rights should be included either in the legislation incorporating the ECHR or in a White Paper; with the consultation processes and timetable being declared as soon as possible. But ultimately, the successful adoption of a bill of rights will depend upon it having genuine political backing within the Government; deft political execution of the process of development; and positive reactions to the operation of the ECHR in practice.

The recurring objections to the adoption of a bill of rights in the UK have been its possible impact on parliamentary sovereignty and the perceived risk of 'politicizing' the judiciary. These fears are likely to be greater in relation to a domestic bill of rights, newly created, as compared

to the rights set out in a 50 year old instrument; but they might be lessened if the ECHR has been seen to operate without threat to the constitutional fabric. There would also be advantage in relying on the international human rights instruments that already bind the UK as the basis of a domestic bill of rights.

Chapter 1

Introduction

"To begin, however, the context does not help. The words 'constitutional' and 'unconstitutional', as used in political debate in England are terms of political argumentation, they are not normally legal terms."

Professor Robert Stevens, *Judges, Politics, Politicians and the Confusing Role of the Judiciary*, Lecture delivered on 21 May 1996

Introduction

1 This report takes as its starting point an assumption that if there is a change of Government at the next election, a bill to incorporate the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) will be introduced within the term of the next Parliament, and the development of a domestic bill of rights will follow. This, in summary, is the policy position of both the Labour Party and the Liberal Democrats. The report's objective, as with other Constitution Unit reports, is to appraise the possible means of achieving the parties' stated goals. In considers not only the legal implications of incorporation, but also the administrative and institutional framework within which an incorporated ECHR will have effect - and possible changes to this framework that might assist in promoting a 'culture of compliance'.

2 The report leaves to one side the arguments for and against a bill of rights, and the question of the balance between rights and responsibilities, important though both those debates are. It focuses on the practical and the technical: how to provide for a bill of rights; and specifically how to provide for incorporation of the ECHR into UK law.

3 It is important to say at the outset that, technically, incorporation of the ECHR is easy to achieve. The bulk of this report focuses on the possible different ways of achieving the goal of incorporation, and points out where decisions have to be made between competing options. But the significant problems are essentially political, rather than technical. And even political objections - and specifically, those arising from the perceived impact of incorporation of the ECHR on the sovereignty of Parliament - can be overcome and need not "make the constitutional roof fall in."[1] There will, however, be an inevitable shift in the balance of responsibility for the protection of human rights standards that will need to be both understood and accepted. Finally, it should be noted that the successful development and implementation of a domestic bill of rights may prove more complex than incorporation of the ECHR. It would depend on the extent to which a domestic bill of rights' provisions exceeded the UK's existing human rights obligations. This report examines the process of development, but does not attempt to devise a specific model for such a bill.

Fundamental Rights in the UK

4 The United Kingdom lacks a written constitution or bill of rights, distinguishing itself in this way from nearly every other Western democracy, and all Commonwealth countries. The Bill of Rights of 1688, and the Scottish equivalent, the Claim of Right of 1689, provided some narrow measure of protection for citizens (for example, against the imposition of excessive bail) but were principally concerned with the relationship between the monarch and the English and Scottish Parliaments. Indeed, the UK has traditionally relied on the reverse presumption - a British citizen has the freedom to do as he or she pleases, enjoying an endless array of unspecified rights, subject only to the limited restrictions set down in statute and common law.

5 This apparent disregard for the positive definition and protection of rights has been eroded over the last fifty years. Rights have come to be stated increasingly in positive terms in domestic legislation, such as the Sex Discrimination and Race Relations Acts and fair employment

legislation in Northern Ireland. The UK has also become party to a number of international covenants and treaties concerning human rights - all binding in international law. The mode and efficiency of their enforcement varies. The most well known of these human rights instruments, and the only one which provides a system of judicial enforcement open to aggrieved individuals, is the European Convention on Human Rights. A range of UN and ILO Covenants and Conventions has also been ratified by the UK - notably, the International Covenant on Civil and Political Rights (ICCPR); the Convention on the Elimination of all Discrimination against Women (CEDAW); the Convention on the Elimination of all Racial Discrimination (CERD); the Convention on the Rights of the Child (CRC) ; the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention against Torture; as well as the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948 but not in itself legally binding.

6 Nevertheless, the United Kingdom is clearly out of step with the rest of the Commonwealth, as well as the rest of Europe, in having neither an enforceable Bill of Rights of its own, nor having incorporated the European Convention on Human Rights (or any other international human rights treaty). Britain's isolation in this respect is particularly stark when it is considered that even some Dependent Territories (and most Commonwealth African and Caribbean countries) have rights provisions in their constitutions based on the ECHR, and Hong Kong enacted its Bill of Rights Ordinance based on the ICCPR in 1990.

The European Convention on Human Rights

7 The European Convention on Human Rights was drafted as a response to the atrocities committed during World War Two. The original draft, submitted to the Committee of Ministers of the Council of Europe in July 1949, drew heavily on the rights and freedoms detailed in the UN Universal Declaration of Human Rights which had been adopted in December 1948. But it also provided for a system of legally enforceable international guarantees and remedies of these substantive rights, including the establishment of a Commission and a Court based in Strasbourg, with enforcement responsibilities. The Committee of Ministers opposed a number of the original provisions, which it regarded as too radical, and the British Government in particular was opposed to the establishment of the Court and Commission. The original draft was revised to provide for a number of detailed exceptions to the rights and to provide member states with the option of 'opting out' of the right of individual petition to the Commission and the Court. Most of the detailed drafting on the final text was undertaken by two British Government lawyers.

8 The Convention was ratified by the UK in 1951, largely for political reasons (namely because it was in the interests of British foreign policy to show that we were in favour of the Convention as a beacon of hope for those then under Communist rule. It came into force on 3 September 1953. There have been a number of significant developments since. In particular, the acceptance of the compulsory jurisdiction of the Court and of the right of individual petition (obligatory under the Eleventh Protocol, which has yet to come into force). The number of cases going to Strasbourg has also increased markedly since the Convention was first operational. By the end of the 1960s, the Court was delivering only two or three judgments a year, but thirty years on the volume of cases has increased to hundreds each year. The result is that from registration of an application to the Commission to a hearing by the Court takes an average of 5-6 years. These delays, and the significant costs, involved in finalising cases in Strasbourg (as

well as the problems created by the rapid enlargement of the Council of Europe) have led to the recent scheme for restructuring the Commission and Court (also provided for under the Eleventh Protocol).

9 The UK is bound by the Convention as a treaty in international law. However, because of its origins as a response to wartime outrages, it was ratified by the Government in the expectation that (with the possible exception of the 1st Protocol) the UK would never contravene its provisions. This attitude is, of course, not unique to the European Convention nor to the UK. Because of the assumption of compliance, and because unlike some other countries the UK does not automatically give domestic legal status to international treaties, the Convention has never been incorporated into UK law.

10 Because the ECHR is not part of UK law, the domestic courts have no formal recourse to it in making decisions. UK judges do now take account of the provisions of the ECHR in certain circumstances, and in cases of ambiguity attempt to construe legislation consistently with its provisions (paragraph 42) below sets out the position in more detail). But there is no domestic legislation which gives the courts the proper legislative - and therefore democratic - mandate within which to interpret and apply the Convention. And there is a particular gap in relation to the exercise of administrative discretion. In the 1991 *Brind* case,[2] which concerned a ministerial ban under the Broadcasting Act on broadcasting the words spoken by representatives of Irish organisations, the House of Lords held that where Parliament has conferred on the executive an administrative discretion (without indicating the precise limits within which it should be exercised) it could not be presumed that Parliament intended it to be exercised within the limits prescribed by the ECHR. At the same time, although UK citizens have no direct access in UK courts to the rights established by the ECHR, they may assert them by means of an application to the European Commission of Human Rights once all avenues of appeal in the UK are exhausted.

The Prospect of Incorporation of the ECHR

11 Increasingly, there is dissatisfaction with this "half-in, half-out position"[3] which has led in turn to demands for incorporation of the ECHR into the domestic law of the UK. Incorporation would mean that British courts would be able to give direct application to the Convention's provisions, and so that individuals might obtain remedies more quickly and less expensively than currently possible through the Strasbourg enforcement machinery. (Article 13 of the ECHR states that "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"). There are also other positive arguments for incorporation. For example, incorporation would provide closer conformity with our international obligations; and the judgments of the UK's higher courts in applying the Convention would exercise a more general influence over the interpretation of the ECHR by the Court and Commission in Strasbourg. The adoption of the ECHR as part of the domestic legal order might also prompt a more systematic concern with the protection of human rights at all levels of government and society.

12 The weight of the demand for incorporation has also been increased by the fact that the expectation that the UK would never fall foul of the Convention has not proved to be true. Adjudications by the European Court have, in a number of cases, pronounced actions which were lawful under the common law, administrative arrangements, or statute, to be contrary to

the Convention. These include complaints about restrictions on the correspondence of prisoners, inhumane treatment in Northern Ireland of suspected terrorists, birching by judicial order, criminal laws prohibiting homosexual acts between consenting adults, telephone tapping by the police, the detention of mental patients, trade union 'closed shop' legislation, and the Sunday Times thalidomide case which concluded that the law of contempt of court infringed ECHR provisions regarding freedom of expression. To date, the UK has lost 41 cases before the European Court of Human Rights (see **Appendix A**). Other cases in the pipeline are concerned with courts martial, binding over procedure in magistrates' courts, corporal punishment in the home, and the police's duty of care towards their sources. In the face of this track record it is less and less credible to maintain the position that "to incorporate the broad provisions [of the Convention] into the UK's domestic law would be unnecessary. For our laws - common and statute - secure the freedoms and rights set out in the Convention."[4]

13 Nevertheless, it is difficult to make an objective assessment of the UK's record, as the figures are inflated by the fact that we do not adjudicate breaches in the domestic courts (so the first port of call for an ECHR case is Strasbourg) and by the fact that the number of cases lost can include several groups dealing with the same point of challenge. Additionally, any comparison must take into account the differing dates of acceptance of the right of individual petition - the UK was one of the first to do so. A further factor may be the different 'rights cultures' in member states, which may result in different propensities to litigate (for example, there is a relatively high level of awareness in the UK of the right to go to Strasbourg, largely through NGOs and advice bodies). In fact, the actual number of cases lost is less important than the fact that because we lack effective domestic remedies, the European Court of Human Rights is used as a substitute. This means that more significant cases are brought and won in Strasbourg than is the case in other countries.

14 Of the many attempts by parliamentarians in both Houses of Parliament to secure the incorporation of the Convention into domestic law, none has yet been supported by any Government - Labour or Conservative. As a consequence, all attempts have failed - although the House of Lords has approved incorporating legislation on more than one occasion. Incorporation of the ECHR continues to be strongly resisted by the current Conservative Government, on the grounds that: "our present arrangements already provide for our commitments under the Convention to be taken into proper account in our governmental, legislative and judicial systems" and pointing out that there is no necessary correlation between incorporation and compliance.[5] As John Major has recently made clear, the objection is also one of principle: "We have no need of a bill of rights because we have freedom... [it would] diminish Parliament's historic role as the defender of individual freedoms...the supremacy of the elected representatives of the people in Parliament would - for the first time since the 17th century - be eroded."[6] Lord Mackay, the Lord Chancellor, has expressed a number of specific objections: the advantage of flexibility inherent in unwritten principles of legal interpretation; the lack of evidence that incorporation would lead to an increase in the "real standard of legal protection afforded by the state to individuals"; allowing the courts wide discretion over matters that are properly the preserve of Parliament; the likely consequential pressure to choose judges on the grounds of their social or political views rather than legal qualities; and the danger of creating the impression that the Strasbourg Court was in the nature of a court of appeal from the House of Lords.[7]

15 However, supporters of incorporation now include many senior members of the judiciary - including the present and immediate past Lord Chief Justice and Master of the Rolls. Both the Labour Party and the Liberal Democrats are committed to the incorporation of the ECHR, in the words of the Shadow Lord chancellor, Lord Irvine of Lairg, "so that our citizens can secure their human rights guaranteed under the Convention, not from a court in Strasbourg but from our own judges."[8] The most recent detailed proposals of the opposition parties are set out in the policy papers *A New Agenda For Democracy* (The Labour Party: September 1993) and *Here We Stand* (Liberal Democrats: September 1993). Anti-European sentiment has also led some Conservatives to advocate incorporation of the ECHR to 'repatriate' the judicial application of the rights it protects (albeit the ECHR is an instrument of the Council of Europe, not the EU).[9]

Beyond the ECHR: Other Human Rights Instruments and a Domestic Bill of Rights

16 In addition to incorporation of the ECHR, both opposition parties have pledged - in significant part as a result of successful lobbying by pressure groups and campaigning organisations - the subsequent development of a domestic bill of rights. The precise text of such a domestic bill of rights would be determined through public and/or parliamentary consultation.

17 The case for regarding incorporation of the ECHR as only a first step towards the development of a bill of rights designed specifically for the UK rests on the belief that the ECHR is inadequate as a statement of fundamental rights. It has been pointed out, for example, that the ECHR fails to tackle issues of freedom of information, the right to a fair trial in deportation or extradition cases, includes only a limited reference to discrimination, applicable only where another Convention right has been violated, and makes no reference to children's rights. This collection of perceived omissions, gaps and weaknesses has led campaigners to urge that a bill of rights based solely on the ECHR would be inadequate - it would be preferable to incorporate the ICCPR alongside the ECHR or to develop a new UK bill of rights drawing on 'best practice' from both international rights instruments and the example of countries like South Africa, which has recently developed a set of human rights standards as part of its interim constitution.[10] Support for incorporation of the ECHR from some activists is thus partly tactical rather than substantive - a means of 'starting the ball rolling' rather than an end in itself.

18 Of course, a Government could choose to incorporate any of the other international human rights treaties listed at paragraph 5 above at the same time as incorporation of the ECHR. Their provisions overlap with the ECHR to some extent, especially in the case of the ICCPR, but are differently formulated. However, ratification of these Covenants by the United Kingdom has been subject to a large number of important reservations. This is partly because of their application to the UK's Dependent Territories and partly because the obligations are more extensive than those imposed by the ECHR. (The number of reservations entered by the UK Government to these international human rights treaties is however steadily decreasing over time). The European Convention of Human Rights also stands out as the only one of the UK's international human rights obligations in relation to which we have accepted a system of judicial enforcement. Indeed, successive UK Governments have refused to ratify the Optional Protocol to the ICCPR giving individuals the right to make a complaint against the Government to the UN Human Rights Committee, in order to obtain redress. The UK has distinguished itself in this respect from other European or Commonwealth countries including Australia, New Zealand and Ireland. The various UN treaties require the UK Government simply to provide a five yearly report to the respective Committees, who then review developments since the

previous report and publish their assessment of the progress made. The last time the UN Human Rights Committee considered the UK's record in relation to compliance with the ICCPR, it agreed that: "the legal system of the United Kingdom does not ensure fully that an effective remedy is provided for all violations of the rights contained in the Covenant."[11]

19 Given that there is no international judicial enforcement of these instruments (or where it is available, the option has been rejected by successive UK Governments), our judges are less aware of their importance than they are of the ECHR and the pressure for their domestic incorporation is less widespread than support for incorporation of the ECHR. As Mr. Justice Sedley has commented: "the off-the shelf solution of incorporation of the European Convention heads the list of possible measures if only on the practical grounds that adherence to a set of standards enforceable on the state by an international tribunal but not by its own citizens in its own courts makes no sense at all."[12] *Political* consideration of human rights issues also still tends to focus on the question of incorporation of the ECHR - whether for or against - rather than any more broadly based bill of rights. Incorporation of more than one treaty in separate bills would also present problems of precedence; and it is therefore more likely that effective recognition of their provisions in UK law will be achieved through their use as a benchmark in the development of a domestic bill of rights.

Scope of this Report

20 In 1976, the Home Office published a consultative document, *Legislation on Human Rights with particular reference to the European Convention.* The paper presented the conclusions of an inter-departmental working group of civil servants, providing what Roy Jenkins - then Home Secretary - referred to in his Foreword as: "a useful summary and analysis of the issues raised by any attempt to frame general legislation for the protection of human rights - issues not only regarding the scope and extent of the rights to be protected, but also affecting the functions and relationship of Parliament and the courts."[13] This Home Office paper is particularly interesting because it represents the only public account of Whitehall's assessment of the implications of legislating to protect human rights. It was followed within a year by the Northern Ireland Standing Advisory Commission on Human Rights' (SACHR) report, *Protection of Human Rights by Law in Northern Ireland* (November 1977), and in 1978 by the Report of the House of Lords Select Committee on a Bill of Rights, which had been prompted by Lord Wade's Bill of Rights Bill. Both concluded (SACHR unanimously and the Select Committee by a single vote) that the ECHR should be incorporated into UK law. Together these documents represent the high-water mark of 'official' consideration of the practicalities of implementing a bill of rights in the UK, and specifically the incorporation of the ECHR. Their collective fates also provide important indicators of the difficulties facing those intent on constitutional reform. Anthony Lester QC, Special Adviser to Roy Jenkins at the time of the Home Office Green Paper and later Special Adviser to SACHR, points out:

> *"When we produced a thoroughly balanced Green Paper on the incorporation of the European Human Rights Convention into UK law, there was a sustained attempt to prevent it from being published, lest it should give the people dangerous ideas. By a bare majority, Ministers overcame official opposition, but the Home Office won in the end. The Green Paper was published not by HMSO but by the Home Office, and read by almost no-one. The recommendations by the Standing Advisory Commission...were similarly obstructed by hostile senior civil servants and ultimately buried."*[14]

21 This report revisits the issues raised by the three reports, and in particular the Home Office Green Paper, with the aim of charting the process of implementing a commitment to incorporate the ECHR and develop a domestic bill of rights. It does not consider the nature of the rights that should be protected in a domestic bill of rights, nor does it enter the debate about the practicability of economic and social rights. It is concerned solely with how best to achieve the stated objectives of those parties committed to reform in this area. This report also complements other reports produced by the Constitution Unit which consider the implementation of other constitutional reforms including devolution to Scotland and Wales, the creation of English regional assemblies, and reform of the House of Lords, as well as considering the conduct of referendums, and the mechanics of delivering a wide-ranging programme of constitutional reform.

22 In considering the practicalities of incorporating the ECHR and developing a domestic bill of rights for the UK, there is much to be drawn from international experience. Although the UK is the only member state of the EU which has neither a written constitution nor an enforceable bill of rights (the majority of the other member states have both incorporated the ECHR into their national legal systems and adopted their own national Bills of Rights) this is not to suggest the UK faces unique difficulties in adopting fundamental rights as part of domestic law. Both politically and legally, there is much common ground. For example, the Scandinavian countries have traditionally adopted a position similar to that taken in the UK in refusing to incorporate the ECHR, arising from opposition to the concept of legally enforceable fundamental rights, but these countries have recently revised their position (see paragraph 39 below). Moreover, there is a wealth of experience in current and former Commonwealth countries - notably Canada, New Zealand, Hong Kong and South Africa, all of whom have developed and adopted their own bills of rights in the last 15 years - the value of which lies particularly in the fact that they retain the familiar elements of a Westminster parliamentary system.

23 Chapter 2 examines the provisions of the ECHR and its current status in UK law and in the domestic law of other signatory states. It then considers the concept of 'entrenchment' and how the doctrine of parliamentary sovereignty would affect incorporation of the ECHR, before reviewing the international models for judicial enforcement of human rights instruments and how these might be adapted in respect of incorporation of the ECHR. Chapter 3 looks at the changes that might be necessary or desirable in the existing judicial system to ensure efficient and effective enforcement. Chapters 4 and 5 look in more detail at the role of the executive, legislature and independent bodies in enforcing human rights, including the operation of new machinery (such as a Human Rights Commission and Parliamentary Committee) that might be introduced to complement the role of the courts in enforcement.

24 Chapter 6 charts the process of incorporation, including the timetable, the assessment of resource implications and the contents of the incorporating statute. Chapter 7 takes a wider view, situating the incorporation of the ECHR in the context of the comprehensive programmes of constitutional reform advanced by both main opposition parties, and developments within the European Union. It examines the ways in which this context might affect decisions about incorporation of the ECHR and the development of a domestic bill of rights, including the potential need for a constitutional court and the implications of devolved Parliaments developing bills of rights separately from the Westminster Parliament. The report concludes in Chapter 8 by reviewing the options for consultation - with the public, Parliament and experts - on the development of domestic human rights legislation, again drawing on international experience and UK precedents.

Conclusion

25 The starting point for consideration of human rights legislation today differs from that adopted by the drafters of the various official reports produced at the end of the 1970s. This is because of the extent to which other countries have moved ahead to leave the UK isolated in its resistance to the adoption of fundamental rights; and as a result of the changing constitutional backdrop of the UK's relationship with Europe. This report examines the key questions of implementation in the light of this new experience. It identifies the range of decisions that must be taken by a Government intent on introducing human rights legislation, and the possible answers.

26 Consideration of how best to enforce the provisions of the ECHR within the UK following their incorporation into domestic law must be informed by two factors. First, the case for incorporation rests on the need to provide effective remedies within the domestic legal system for the individual whose basic rights and freedoms are infringed, especially by public authorities. This objective must underpin the model of enforcing both an incorporated ECHR and any domestic bill of rights. The need to provide domestic remedies is made all the more important because the effects of enlargement of the Council of Europe, including the admission of the Russian Federation and Croatia, will be to greatly increase the delays in Strasbourg. Second, the nature of the ECHR itself. As with most constitutional bills of rights, the substantive rights provided for by the Convention more closely resemble a moral code in their style of drafting than a traditionally detailed and prescriptive English statute: the ten commandments rather than the Theft Acts. The enforcement agencies - judicial, parliamentary and otherwise - must therefore have sufficient stature and expertise both to give it authority in the first instance and to withstand possible criticism arising from decisions made in implementing the Convention. International models of entrenchment and enforcement will also be influential.

27 To some extent, decisions about the balance of powers between the executive, legislature and judiciary are susceptible to objective analysis. Incorporation of the ECHR brings with it three consequentials - a shift from a culture of 'freedoms' to a culture of 'rights'; a move away from precise legal instruments as the source of specific rights and towards more generally worded instruments; and an increased reliance on the courts to deliver the rights so described. But within this framework, policy decisions about the balance of powers between the executive, legislature and judiciary will depend on the **political objectives of incorporation.** Is the objective simply to reduce the number of cases lost by the UK at Strasbourg by providing a domestic remedy; is it to allow the courts scope to develop the common law through human rights jurisprudence, extending into such issues as privacy; is it to pave the way for a domestic bill of rights which would go beyond the ECHR's limited provisions; is it to promote a general 'rights culture'? These are not necessarily mutually incompatible, but a clear view of the strategic objectives must be taken by a Government planning incorporation to ensure a cogent and consistent approach to the model of incorporation and the detail of its implementation. This point will be returned to throughout the report.

Chapter 2

Status and Judicial Enforcement of Human Rights Legislation

"What is proposed is that Parliament's right to govern should be restricted by the Convention. I find that constitutionally unacceptable. I have often thought that Parliament - and I use these words colloquially and in quotation marks - 'had taken leave of its senses'. However, I recognise and still ultimately believe that it is the right of Parliament to make some stupid decisions."

Lord Donaldson of Lymington, House of Lords, *Official Report*, 25 January 1995, col. 1146

Introduction

28 The importance of any bill of rights lies not simply in the articulation of fundamental rights and freedoms, but in the use of that statement as a benchmark to determine the legality or 'constitutionality' of other laws and actions. It is this fact that makes the prospect of incorporating the ECHR an unusual one for the UK, and an unwelcome one for some: the first step down the path of a written constitution, the 'subordination' of Parliament to a higher order, and the imposition of limits on the wide discretionary powers conferred upon public officials. This chapter opens by considering the content of the European Convention on Human Rights; the extent to which it has been implemented by the UK; and the status of the Convention in international law, in other contracting states, and in the UK. Against this backdrop, the chapter concludes by considering the critical question of entrenchment: the scope for establishing the ECHR as a form of fundamental law within the UK legal and constitutional tradition and the consequences for judicial enforcement of its provisions.

Content of the ECHR

The Convention and its Protocols

29 The Convention includes a total of 66 Articles, most of which are concerned with procedural questions relating to the Commission and the Court. The nature of the substantive rights protected by the Convention will inevitably inform discussion about potential incorporation into the domestic law of the UK and will influence decisions about the model of entrenchment and other more specific matters, such as the jurisdiction of the courts. The key substantive provisions are set out below:

- the obligation of the 'High Contracting Parties' to secure for everyone within their jurisdiction the rights and freedoms provided for in the Convention (Article 1).
- the right to life (Article 2).
- freedom from torture or inhuman and degrading treatment or punishment (Article 3).
- freedom from slavery, servitude or forced or compulsory labour (Article 4).
- the right to liberty and security of the person (Article 5).
- the right to a fair trial (Article 6).
- freedom from retroactive criminal offences and punishment (Article 7).
- the right to respect for private and family life, home and correspondence (Article 8).
- freedom of religion (Article 9).
- freedom of expression (Article 10).
- freedom of assembly and association (Article 11).
- the right to marry and to found a family (Article 12).
- the right to an effective remedy (Article 13).
- freedom from discrimination in respect of protected rights (Article 14).

The substantive guarantees in the Convention have been extended by the addition of further rights in the form of a series of supplementary Protocols which are binding on the states that have ratified them. These Protocols deal both with matters of substantive rights (the First, Fourth, Sixth and Seventh Protocols) and with procedure in the European Court of Human Rights and the European Commission on Human Rights (the Second, Third, Fifth, Eight, Tenth and Eleventh Protocols). Not all Protocols have been ratified by all Member States, and four of the eleven have not been ratified by the UK (see **Appendix B**). The Convention also permits states when ratifying to make reservations in relation to its provisions, and the UK has entered one reservation to the Convention (see **Appendix B**).

30 Like other Member States, the UK is also entitled to derogate from certain rights and freedoms during periods of serious public emergency, under Article 15 of the Convention:

> *1. In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*
>
> *2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (para.1) [no one shall be held in slavery or servitude] and 7 shall be made under this provision.*
>
> *3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.'*

31 Since 1957, successive UK Governments have used this clause to derogate from the ECHR in relation to the declared state of emergency in Northern Ireland. After the UK Government lost the *Brogan* case at the European Court of Human Rights in 1988, the UK entered a specific derogation in relation to the detention of suspected terrorists for more than five days, which was subsequently upheld by the European Court of Human Rights. Powers enabling detention without charge on the authority of the Secretary of State for up to five days are currently provided for in Section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989.

32 Key questions are whether the ECHR should be incorporated along with all its Protocols; and whether the incorporating statute should preserve the effect of any existing derogations and reservations. Most attempts via Private Members Bills to incorporate the ECHR have assumed that the incorporating statute would include only the First Protocol (which is the only one of the Protocols currently ratified by the UK that deals with non-procedural matters) and perhaps the Fourth Protocol; and would maintain existing reservations and derogations. Decisions on the ratification of Protocols, reservations and derogations taken since 1979 (which includes decisions on the Sixth, Seventh and Ninth Protocols) to some extent reflect the political stance of Conservative Governments. Another Party in Government might therefore take a different view of the UK's national interest and a process of review would be appropriate prior to incorporation to determine whether existing reservations and derogations should be preserved; and whether or not to ratify those Protocols so far unratified by the UK. One would expect a Government in favour of incorporation to be sympathetically disposed to ratifying the other Protocols to the ECHR (and thus also incorporating the human rights obligations of the ICCPR insofar as they are reflected in the Seventh Protocol of the ECHR). The incorporating statute would also need to provide for any future derogation to have effect within our domestic law; this might simply be achieved by incorporating Article 15 of the Convention.

Distinction between Ratification and Incorporation

The Convention as an International Obligation

33 At present, the liability of the UK Government to observe the Convention is an international obligation arising from our ratification of the instrument. The sanctions for breach of the Convention include, *in extremis*, expulsion of the UK from membership of the Council of Europe. In some ways, the UK's obligations under the ECHR are similar to those resulting from ratification of other international treaties. There are three principal ways in which the relationship between the ECHR and domestic law reflects general practice in relation to international treaties:

- on the international level, the Convention is superior to any national law; no State can refer to its domestic law to escape obligations derived from the Convention.
- each State decides - at least in principle - in precisely which manner its internal law should give effect to the obligations derived from the Convention. (However, in respect of the ECHR Contracting States do have an obligation under Article 1 to give effect to the obligations derived from the Convention and to secure them effectively in domestic law and under Article 13 to provide effective domestic remedies before national authorities).
- in practice, there is a considerable variety in national constitutional law concerning the relationship between international treaty law and domestic law (it may be superior to domestic constitutional law, have an intermediate position between constitutional and statute law, have the same force as statute law, or as with the ECHR in the UK it may lack legal effect in domestic law). All of these options are compatible with the principles of international law, as long as the results achieved are in compliance with the obligations. In fact, the European Court has repeatedly held that there is no requirement for Member States to incorporate the Convention into domestic law.

34 But as Rudolf Bernhardt (a distinguished judge and member of the European Court) has explained, the relationship between the ECHR and domestic law is more than simply "one subchapter in the general discussion of the relations between public international and national law."[15] It has distinctive features of its own, which influence both its current operation and the debate about incorporation. There are four important ways in which the ECHR differs from most international treaties in its relationship with domestic law:

- unlike most international law obligations, the ECHR is designed to protect individuals against the improper actions of state authorities.
- the Convention often refers to the legal order within states by referring (for example) to the need for a right to be established or protected by law, or for restrictions of rights to be authorised by law.
- the Convention establishes organs - especially the Court and the Commission - for supervising the conformity of national actions with the Convention; and provides for individual petitions to the Commission.
- decisions of the Court and Commission often find incompatibilities between domestic law and practice, and Convention law; effectively requiring immediate (or early) changes in domestic law.

35 To reflect these specific features, the Strasbourg enforcement bodies have developed in such a way as to acknowledge the interrelationship between domestic law and the Convention. The 'margin of appreciation' doctrine, for example, provides a degree of flexibility in the interpretation of the Convention through the recognition of national differences (see paragraph

131 below). Earlier this year, following a number of high profile losses at the European Court of Human Rights, the UK Government announced a series of proposals for resisting what it saw as the encroachment of the Strasbourg institutions into the domestic political sphere, and specifically for encouraging the "wider and more consistent application of the margin of appreciation." The UK Government is lobbying for the margin of appreciation to be widened, and has called for a resolution to be passed by the Council of Europe's Committee of Ministers, which would seek to persuade the Court to (a) acknowledge that national democratic institutions and tribunals are better placed to determine moral and social issues in accordance with regional and national perceptions, (b) pay heed to the decisions of the member states' democratic legislatures and differing legal traditions, and (c) give greater deference to long-standing laws and practices.

The Approach of Other Member States

36 The European Convention on Human Rights has now been ratified by 33 of the 39 Member States of the Council of Europe - and nearly all of these 33 States have adopted the Convention as part of their domestic law. However, this has been achieved in different ways.

37 The Convention has been expressly incorporated into the constitutional law Austria and a number of the new Member States. This has the effect that no statute or secondary legislation is valid if it contravenes rights provided for in the Convention, thus guaranteeing the Convention rights in the domestic legal system. It does not avoid the possibility that the Convention may conflict with other constitutional laws. In the great majority of Member States, treaties in general - and the Convention in particular - are accorded an intermediate position in the hierarchy of laws, as a direct result of ratification. They have a higher rank than ordinary domestic law, but below the constitution. In such cases the rules will usually provide for the Convention to prevail where a conflict with domestic law arises.

38 In some states, however, the Convention is part of domestic law with the same rank as normal legislation; in theory, the Convention has precedence over existing laws but does not prevail over legislation subsequently enacted. In practice, the Convention is usually regarded as supreme except in cases where a later statute is clearly intended to be in contradiction to the Convention. In Germany, for example, the Federal Constitutional Court has held expressly that priority must be given to the Convention over later statutes, "because it cannot be assumed that the legislature, without clearly stating so, wanted to deviate from Germany's obligations under public international law."[16]

39 Finally, a minority of member states (mostly Scandinavian) regard domestic law and treaty law as distinct legal areas, and treaties are not usually made part of the domestic legal order. However, the position is changing even in these countries. In 1992, Denmark decided to incorporate the ECHR, following the recommendations of an independent Commission; and in Norway a bill to incorporate the ECHR will probably be presented to Parliament before the end of this year (again following a Commission recommendation, and Parliament's approval in 1995 of a constitutional amendment paving the way for such a move). Both Iceland and Sweden have incorporated the Convention into their domestic law in the last two years - leaving only the UK, Ireland (which may be moving towards effective incorporation - see Appendix D) and Poland that have not done so.

The Approach of the UK

40 The UK - along with Ireland - differs in an important way from the other State Parties to the Convention in being a common law jurisdiction, and - unlike Ireland - in not having a written constitution. As David Kinley has pointed out, these factors affect the UK's approach to the ECHR: in civil law countries "matters of constitutional importance, including (indeed especially) the protection of human rights, are seen as essentially legal problems, or at least ones that can be resolved by the courts" whereas in the UK "the constitution, precisely because it lacks legal expression, is defined in political terms."[17] Since the point of ratification, successive UK Governments have adopted the position that compliance can be achieved without incorporation of the ECHR into domestic law, reflecting what the Home Office Green Paper referred to as "the dominant principle...that our domestic law should match our international obligations, and this is not necessarily - indeed, not usually - achieved by direct incorporation of the international obligation into domestic law."[18] It remains usual in respect of international treaties for incorporating legislation to be introduced only where, in the Government's view, the treaty demands a change in English law, or if the treaty requires the raising of revenue or alteration of taxation.

41 According to the 1976 Green Paper, the conformity of UK law with Convention obligations was asserted at the point of ratification and was reviewed in 1966 when the right of individual petition was accepted and every time the right of petition has been renewed since (at five year intervals). Since then, this has remained formally the procedure, although the nature of the exercise is certainly not 'root and branch', nor in any sense forward looking - merely a question of confirming that the previously asserted conformity of legislation had not been undermined by subsequent decisions of the European Court or Commission. It is also the case that the current UK Government's response to rulings against it in Strasbourg is increasingly characterised by a tone of indignation,[19] whereas others are more concerned to *be seen* to comply to the letter with such rulings (even if, in practice, their record of compliance is little different to the UK's).

42 The use made of the ECHR in UK courts in consequence of its non-incorporated status was explained succinctly by Lord Bingham of Cornhill, the new Lord Chief Justice, in his maiden speech in the House of Lords, in July 1996.[20] He identified six respects in which the Convention, although not directly enforceable in the courts, can and does have an influence over domestic proceedings:

- where a UK statute is capable of two interpretations, one consistent with the Convention and one inconsistent, the courts will presume that Parliament intended to legislate in conformity with the Convention and not in conflict with it.[21] If the common law is uncertain, unclear or incomplete, the courts have to make a choice. In declaring what the law is, they will rule wherever possible in a manner which conforms with the Convention and does not conflict with it.[22] (However, it should be noted that there are few cases that demonstrate this in operation and where the common law is completely silent, this rule does not appear to apply).
- when the courts are called upon to construe a domestic statute enacted to fulfil a Convention obligation, the courts will ordinarily assume that the statute was intended to be effective to that end.
- where the courts have a discretion to exercise, and one course open to them violates the Convention and another does not, they usually (but not invariably) seek to act in a way which does not violate the Convention.
- when the courts are called upon to decide what, in a given situation, public policy demands, it has been held to be legitimate for the courts to have regard to international obligations as a source of guidance.[23]

- matters covered by the law of the European Community on occasion give effect to matters covered by Convention law, as EC law is required to be in compliance with the Convention and the UK is bound by EC law under the European Communities Act 1972 (see paragraph 51 below).

The ECHR is also relevant when determining the manner in which judicial powers are to be exercised.[24]

43 Common law rights reflected in the Convention have been recognised by our courts, not only in relation to the right to freedom of expression (notably in the 1993 case, Derbyshire CC v Times Newspapers[25]), but also in relation to the right of access to courts and to solicitors, derived from Article 6.[26] Article 6 of the Convention may also have implications for widening the circumstances in which discovery should be ordered in judicial review cases.[27] It is possible that a right to personal privacy, derived from Article 8, will also be developed.[28] As previously noted, however, the rights and freedoms guaranteed by the Convention cannot be directly invoked in English courts to determine whether administrative discretion, exercised under broad statutory powers, has unnecessarily interfered with those rights or freedoms, or has been disproportionate to the decision-taker's aims. This is because a statute conferring broad discretionary powers is regarded as unambiguous, and the international principles and standards are irrelevant in construing the purpose of the legislation.[29]

44 However, this latter point may now be open to challenge in respect of decisions taken after 1 January 1996. As Lord Lester of Herne Hill QC has suggested, it could be argued that with effect from this date "ministers in this country have created a legitimate expectation that both they and civil servants will comply with the international human rights treaties to which the United Kingdom is party", arising from the fact that Questions of Procedure for Ministers and the new Civil Service Code "expressly place ministers and civil servants under a duty to comply with the law, 'including international law and treaty obligations'" and a formal statement by the Government that "it is expected that ministers and civil servants will comply" with Questions of Procedure for Ministers and the Civil Service Code.[30]

Entrenchment and the British Constitution

45 Over the last twenty years, the debate on incorporation of the ECHR has pivoted on the question of what exactly its new status would be. Much has been made of the fact (especially by opponents of incorporation) that in other countries, and in particular those with a written constitution, legislative instruments which confer fundamental rights on citizens usually have a special status as a quasi-permanent document, both **superior to ordinary legislation** and **less susceptible to amendment.** The last may be achieved through a variety of constitutional mechanisms e.g. a requirement for a referendum, or a special majority in the legislature, to approve amendments to the legislation.

46 There is, however, no precedent within the British constitution for formally entrenching legislation. The central feature of the modern British constitution, the sovereignty of Parliament, is widely understood to mean not only that Parliament has an unfettered right to do as it pleases, but also that there is no power residing in any other authority - including the courts - to set aside laws made by Parliament. Parliamentary sovereignty therefore means that

one Act of Parliament cannot bind a future Parliament and prevent it from changing the law. (Attempts at a form of 'moral entrenchment' have been made. For example, the Ireland Act of 1949 included a declaratory provision to the effect that Northern Ireland would not cease to be part of the United Kingdom without the consent of its own parliament - modified in 1973 to the consent of its people voting in a poll). The reverse is also true: if an Act of Parliament is inconsistent with an earlier one, the courts are required to uphold and give effect to the more recent provisions (although the notion of implied repeal is qualified in relation to the European Communities Act 1972, see paragraph 51 below). Thus, the argument runs, any legislation purporting to offer a statement of fundamental rights could be used to override other legislation only in respect of legislation already in existence; future legislation could not be circumscribed by any rights instrument.

47 The Home Office Green Paper considered the question of entrenchment, and offered the following conclusions:

> *"Some proposals seek to provide complete protection for a Bill of Rights against the action of temporary Parliamentary majorities by 'entrenching' it: it has for example been suggested that:*
>
> *a. provisions for the statute could impose specific requirements for its alteration (e.g. a two-thirds majority in both Houses of Parliament);*
>
> *b. the statute could be enacted by a constituent assembly established by Parliament with the necessary authority, including authority to specify the procedures for alterations;*
>
> *c. there could be a new 'constitutional settlement' worked out by Parliament on the lines recommended by Lord Justice Scarman in the Hamlyn Lectures (Part VII) i.e. Parliament should put through a programme of constitutional change after consulting the widest possible range of interests. The changes could include entrenched provisions.*
>
> *It is doubtful whether any such attempt would be wholly effective - certainly without a new constitutional settlement. Unless a method can be found which changes the present constitutional doctrine, it does not seem possible to restrain a future Parliament from repealing the entrenching statute."*

48 The debate about entrenchment has, however, moved on. The first reason for this is that, although the Strasbourg enforcement bodies have no authority to strike UK legislation down, they may rule that a particular law or provision is in contravention and require that the Government act to remedy the situation. In practice, therefore, the ECHR has a superior status to ordinary law. Strasbourg decisions have often led to changes in the law intended to prevent future infringements - for example, legislation prompted by ECHR rulings includes: the Contempt of Court Act 1981, the Interception of Communications Act 1985, the Homosexual Offences (Northern Ireland) Order 1982. There have been no cases where the UK Government has failed completely to act in response to a Strasbourg ruling, although it may not always go as far as the Court or human rights activists would like (or may even result in a levelling down rather than up, as in *Abdulaziz* (1985) where the action taken in response to a ruling that immigration rules were discriminatory as between male and female spouses was to remove the rights of the previously 'advantaged' group). The most striking example of the Government taking repeated minimalist action consequent on judgments of the European Court of Human Rights is that of prisoners' correspondence.[31]

49 The second reason for reconsidering questions of entrenchment is the development of alternative models of quasi-entrenchment - examined in more detail in paragraphs 58 to 65

below - which enable the traditions of Parliamentary sovereignty to co-exist with a degree of entrenchment. And third, the UK's membership of the European Community has prompted significant recasting of what is to be understood by Parliamentary sovereignty.

Membership of the European Community

50 UK membership of the European Community has changed the nature of the argument about incorporation of the ECHR in two very important ways. First, the need to deal with EC law in the UK domestic courts has resulted in the judicial approach to the interpretation of statutes shifting in areas affected by Community law. The approach has become increasingly 'purposive', in line with European traditions of statutory interpretation, developing the policy of legislation by reference to the apparent intention of the political policy-makers, rather than rigidly applying the letter of the law. This adaptability has undermined one of the main arguments presented by opponents of incorporation - that the UK courts would not be able to deal with interpretation of the ECHR.

51 Second, since the judgment in *Factortame* in 1990, the effect of the European Communities Act 1972 - under which courts may override any rule of national law found to be in conflict with any directly enforceable rule of Community law - has become more generally understood.[32] The fact that EC law is regarded by British courts as capable of 'overriding' domestic legislation has effectively diminished the argument that Acts passed by Parliament cannot be overridden without the eradication of Parliamentary sovereignty. (Although the Government does not accept the analysis that the *Factortame* decision signals the existence of law of a higher order; merely that in the absence of an express override provision, the European Communities Act should be given precedence over all other enactments. This has been the position of all UK Governments since 1972).[33]

52 Another consequence of the supremacy of EC law has been to shift the arguments (at least in academic and judicial circles) about incorporation of the ECHR into UK law. Specifically, the 1972 Act, together with the jurisprudence of the European Court of Justice which holds that the principles of the ECHR must be taken into account in interpreting EC law, has already given the ECHR legal effect indirectly in relation to those areas covered by EC law. As Lord Browne-Wilkinson has expressed it: "..in those areas affected by the EEC Treaties, the ECHR is already indirectly incorporated into English domestic law...[in these areas] we already enjoy a full Bill of Rights: the Convention is directly enforceable in our courts"[34] - although in practice it has resulted in very few cases. It should also be acknowledged that the areas of law so affected are limited as compared to the range of issues that total incorporation would cover.

53 The co-existence of the reality of the supremacy of EC law and the doctrine of parliamentary sovereignty suggests that incorporation of the ECHR will present fewer practical and 'constitutional' obstacles than might have been considered the case twenty years ago. Even if the ECHR cannot be **legally entrenched against amendment**, the question of the **status of the incorporating statute** in relation to other laws is a different matter.

54 Parliament has exercised its sovereign legislative powers to command our courts to give effect to paramount and directly effective EC law unless and until Parliament repeals the European Communities Act 1972. The courts give effect to that command without any difficulty and do so in relation to legislation passed since 1972, as well as before 1972. That means there is a

very substantial degree of actual, if not formally legal, entrenchment, since the repeal of the European Communities Act 1972 would involve the UK having to leave the European Community and European Union. This acceptance that EC law is effectively a category of 'supreme law' (even if Parliament could override this) means that a decision must be taken about whether the ECHR is to be similarly regarded, is to have no more force than any other statute, or is to have a new status somewhere between the two. As seen in paragraphs 38 to 39 above, there is a variety of ways in which other signatories to the ECHR have provided for its application domestically. In the next section, the approaches taken by other countries in respect of their domestic bill of rights are examined.

Status of Human Rights Instruments in Other Countries

Judicial Entrenchment

55 Under a system of judicial entrenchment, the courts have the ultimate power over interpretation of legislation and are entitled to strike down legislation they consider does not comply with the rights instrument. As already noted, this is widely regarded as the effective status of EC law in the UK following the European Communities Act 1972. However, because it is part of UK law only by the enactment of ordinary legislation, Parliament could in theory have the final say.

56 The American Bill of Rights is subject to a stronger form of judicial entrenchment, as the legislative instrument from which these judicial powers are derived is the federal constitution, which has a superior legal status to Acts of the Congress. Germany also provides for judicial entrenchment of its own constitution. A system of judicial entrenchment operates most effectively in the context of a written constitution and a clear separation of powers. Such a system does not completely prevent a subsequent political decision to reverse the outcome of a judicial decision to strike down legislation. But it could only be achieved by changing the constitution, requiring the observance of set procedures for constitutional revision which are usually designed to ensure that amendments have wide support in Parliament and/or amongst the public.

57 A significant number of the constitutions of new Commonwealth countries (including some with Westminster-style parliamentary systems) also have or have had Bills of Rights that can be enforced by the courts striking down contradictory legislation. Some of the courts in these countries have been very innovative in the use of their powers, notably India and recently Zimbabwe, and increasingly have regard to international and comparative case law on human rights in giving life to their constitutional guarantees.

Judicial Entrenchment Subject to Parliamentary Override

58 A variant on this approach is the use of a 'notwithstanding clause' procedure - effectively providing for judicial authority to be exerted but only to the extent permitted by Parliament in respect of specific primary legislation. The most prominent example of its use is in the Canadian Charter of Rights and Freedoms of 1982. The Charter is enforced through the courts, which are explicitly empowered to "obtain such a remedy as the court considers appropriate and just in the circumstances." As a supreme law it prevails over all existing and future legislation which may

conflict with it. The Charter therefore placed some limitations on the concept of parliamentary sovereignty, as the validity of laws passed through Parliament can now be tested before the courts to assess compliance with the Charter; and the courts now have the power to declare legislation ultra vires. However, Section 33 of the Charter also allows the federal Parliament or any provincial legislature to declare, for five year renewable periods, that legislation should be given effect by the courts regardless of the fact that it infringes certain (prescribed) rights:

Canadian Charter of Rights and Freedoms 1982: Extract

33. - (1) Exception where express declaration
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 [fundamental freedoms] or sections 7 to 15 [legal and equality rights] of this Charter.

59 To this extent, parliamentary sovereignty is still intact because Parliament and the provincial legislatures are still the bodies which are authorised, in accordance with the constitution, to express the higher standards of the state. Parliamentary supremacy has not been replaced by judicial supremacy: the two principles co-exist in the Charter and the Supreme Court must strike a proper balance between them. If a notwithstanding clause is not reaffirmed after five years, the clause automatically ceases to have effect. Such a procedure allows for derogation from certain rights provided that derogation is subject to some form of democratic check.

60 This legislative override provision was included in the Charter in order to convince the Canadian provinces to agree the patriation project of which the Charter was part - the direct product of hard political bargaining and compromise. When the Charter was introduced to the House of Commons, the Justice Minister stressed that section 33 would be an infrequently used "safety valve" to ensure that "legislatures rather than judges would have the final say on important matters of policy", allowing the legislature to "correct absurd situations without going through the difficulty of obtaining constitutional amendments."[35] In fact, the circumstances leading to the first use of the notwithstanding clause were quite different. Only nine weeks after the Charter had been proclaimed law in April 1982, the Quebec National Assembly (Quebec had opposed the new constitutional settlement) passed legislation amending all existing Quebec statutes to include a notwithstanding clause.

Limited Judicial Entrenchment

61 An alternative system of partial entrenchment would involve distinguishing between different categories of legislation. The Hong Kong Bill of Rights Ordinance 1990, for example, ensures that the courts are not entitled to strike down legislation passed after the Bill of Rights has come into force, but are required to make every effort to construe legislation so as to comply. All pre-existing legislation is to be interpreted consistently with the Bill of Rights. If such an interpretation is not possible, then such legislation will be declared by the courts to have no effect. Subsequent legislation is also to be interpreted consistently with the Bill of Rights. However, if such an interpretation is not possible, the courts have no power to declare that legislation ineffective and must apply it.

Hong Kong Bill of Rights Ordinance 1990: Extract

3. Effect on pre-existing legislation
(1) All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction.
(2) All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed.

4. Effect on subsequent legislation
All legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be construed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong.

62 To some extent, the Hong Kong Bill of Rights Ordinance must also be judged within the context of its own political environment. Raymond Wacks, commenting on the limited impact of the Bill of Rights Ordinance, reflects the sense that any assessment of the Ordinance depends on whether the yardstick is the Western democracies or its Asian neighbours: "...the history of this colony is studded with legislative inroads into the freedoms that are taken for granted in most democratic societies. It is difficult to deny the significance of the Bill of Rights Ordinance in the development towards greater protection of individual liberty. But it is by no means adequate."[36] Similarly, because the Bill of Rights "is going to function outside the normal backdrop of democratic institutions"[37] it is rarely seen as a model for incorporation of the ECHR. However, it deserves to be taken seriously as a potential model for the incorporation of the ECHR in the UK, not least because it represents the most recent attempt by a UK Government to give effect to an international human rights instrument by which the UK is bound (in this case the ICCPR).

Interpretative Tool Only

63 Some bills of rights simply share the status of ordinary legislation and operate solely as a tool of interpretation for the courts. Judges cannot overrule any other law to provide for compliance; individuals cannot take cases simply to challenge legislation for non-conformity with the rights granted in the instrument; the courts are simply entitled to refer to the bill of rights in cases that would otherwise come before them. The advantage is that it does not present the political difficulties associated with any form of entrenchment, but the main disadvantage is that it can be seen as little more than a symbolic gesture.

64 The New Zealand Bill of Rights 1990 requires the judiciary to interpret statutes consistently with its provisions, although the courts are not given any power to use it to render any enactment invalid or ineffective or to decline to apply any provision. Parliament objected to the original proposal for an entrenched Bill of Rights that would have established itself as supreme law, protected from amendment unless a specific proposal was approved by 75% of members of the House of Representatives or by means of a referendum.

New Zealand Bill of Rights 1990: Extract

4. Other enactments not affected - 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 provision of the enactment to be impliedly repealed or invoked, 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.

5. Justified limitations - Subject to section 4 of the Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6. Interpretation consistent with Bill of Rights to be preferred - 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.

65 The New Zealand model of entrenchment has been commended by a number of members of the senior judiciary, including the current Master of the Rolls, as sitting comfortably within the traditions of parliamentary sovereignty.[38] However others - notably Andrew Butler[39] - have identified flaws in its operation. It is claimed, in particular, that the interrelationship between the three sections has given rise to problems. For example, sections 5 and 6 pull in different directions (the one allowing reasonable limitations on rights, the other requiring legislation to be interpreted consistently with those rights wherever possible). These difficulties arise from experience rather than academic reflection; and Butler reports that "many judges have commented on the enormous difficulties which the interrelationship of sections 4, 5 and 6 pose to the interpretative process." Another point worth noting in relation to the New Zealand legislation is that because it refers specifically to "enactments", it does not address the question of the status of the common law vis a vis the Bill of Rights (nor does it deal directly with subordinate legislation). It can also be seen that in contrast to the Canadian Charter of Rights model, in which Parliament has specific powers to direct the courts' interpretation of a particular provision by the inclusion of a notwithstanding clause, the New Zealand model relies almost exclusively on the courts to take decisions on how to interpret legislation as there is no requirement for Parliament to indicate its view on potentially inconsistent provisions (although the bill provides for the Attorney General to draw attention to such provisions). However, the problems of interpretation presented by the text should not be overstated.

66 This limited role of a bill of rights as an aid to interpretation also applies in some European states: for example, under the Danish constitution the judiciary has a subordinate role to the Parliament in the enforcement of the rights provided for in their constitution and in Belgium, the courts are constrained from overturning legislation passed by the national or regional parliaments.

Status of the ECHR in the UK Following Incorporation

67 Most critics of incorporation are concerned about the courts striking down primary legislation. In fact, the experience of countries with bill of rights is that most cases brought before the courts are concerned not with primary legislation, but with the exercise of administrative discretion. In most cases, it will be perfectly easy to interpret legislation to comply with the Convention. However, the possibility of a challenge to the validity of provisions in primary legislation does need consideration. The following questions need to be answered:

- should the courts be entitled to strike down primary legislation when they judge it to be non-compliant?
- if the courts are to have such powers, should they extend only to Acts of Parliament passed before the incorporation of the ECHR?
- if the courts are to have such powers, should they extend to Acts of Parliament passed both before and after the incorporation of the ECHR?
- if the courts' role in determining the validity of legislation is to be restricted, what alternative means of deciding such issues should be adopted?

68 Equally, it is important to consider whether an incorporated ECHR should have precedence over the common law, and subordinate legislation. Previous breaches of the Convention identified by the European Court of Human Rights have arisen from secondary legislation (for example, the refusal of legal aid to appeal against conviction: *Granger* 1990) and the common law (for example, contempt of court: *Sunday Times* 1978).

69 The Labour Party has proposed that the incorporating statute should include an express statement that the Human Rights Act would apply to and override all legislation existing at the time it was passed, and a requirement that any subsequent Act that is intended to introduce laws inconsistent with the Convention must do so specifically and in express terms - following the example of the Canadian Charter of Rights. The policy document does not make any explicit comment on the relative statement of subordinate legislation and the common law, but it can be inferred that the ECHR would be ·garded as overriding any inconsistencies.[40] The Liberal Democrats' policy document *Here We Stand,* ·· sets out their commitments to constitutional reform, does not specify their preferred model for ·tion of the ECHR, although it makes clear that the Bill of Rights they plan to draw up · ECHR) would "give the rights and freedoms enshrined within the European Convention · inconsistent statute and common law...[and] provide that a subsequent Act of the absence of a direct declaration to the contrary contained in it, be construed ·nfringe the rights and freedoms guaranteed by the Human Rights Act."

64 ·gard a weaker form of incorporation (along the lines of the New ·· with the UK's constitutional framework. Yet others assert ·n responsibility for acting as constitutional protector ·quipped to fulfil the function of defining the ambit of · is not democratically accountable and it should ·olicy making - which would be the effect of ·assed by Parliament, and could result in the ·rs intended, not just excesses. This view was ·ollowing publication of J.A.G.Griffith's influential , and (although less prominent in the contemporary by some.[41]

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71 As will be clear from this brief overview, any analysis of the options for entrenchment is to some degree impeded by ideological differences between those in favour of incorporation and those opposed. Moreover, the views of those opposed in principle to incorporation of the ECHR or to a bill of rights of any kind exert an influence on the proposals made by those seeking to advance the case for incorporation. It is, however, helpful to return to the question of the objectives of incorporation: if it is intended that incorporation should simply deal domestically with matters that currently go to Strasbourg, the powers of UK courts might mirror those of Strasbourg organs and stop short of powers to declare legislation invalid; if it is intended to create a more proactive 'rights culture' that asserts the supremacy of rights, then a more rigorous set of enforcement arrangements may be needed (including agencies of positive development as well as defensive *post facto* guardianship). The various models of entrenchment are considered in detail below.

Judicial Entrenchment

72 The courts in England have started to move towards an assumption that the Convention reflects the fundamental rights that are already part of our common law.[42] The incorporating statute should provide that common law decisions that are in conflict with the Convention (which will have been passed by the legislature) should be disregarded, thereby strengthening common law rights and ensuring that those rights recognised by Parliament as basic human rights are accorded appropriate recognition in the development of judge-made law. The domestic courts are also already entitled to question whether subordinate legislation made under delegated powers in primary legislation exceeds those powers. The incorporating statute should similarly provide that, any instrument made by or under an Act of Parliament or an Order in Council should not be enforced by the courts, or relied upon in legal proceedings to the extent that it infringes the rights set down in the ECHR. If the parent Act could be held to have specifically authorised or allowed the exercise of delegated legislative powers in ways that lead to non-compliance with the ECHR, it might also be necessary for the courts to review that primary legislation.

73 An argument can also be made for incorporating the ECHR in such a way that allows the courts to strike down primary legislation that conflicts with its provisions, whether enacted before or after incorporation. If Parliament in the incorporating statute indicated its clear intention that the ECHR should prevail over all other inconsistent legislation, it would follow that the courts would then simply be giving effect to this expression of Parliament's intention when subsequently holding an Act of Parliament to be invalid on the grounds of non-conformity. Logically, given that the British courts are already empowered by the European Communities Act 1972 to strike down (for example) broadcasting legislation that conflicts with the Broadcasting Directive (itself reflecting Article 10 of the European Convention) they should be able to do the same where European Community law was not engaged. The clearest model to follow would be the European Communities Act 1972, sections 2(1) and 2(4), making clear that it would be subject to future express repeal. A similar clause was suggested by Lord Lester QC in his recent Human Rights Bill. The fate of this clause is considered in further detail in paragraph 83 below.

European Communities Act 1972: Extract

(1) All such rights, powers, liabilities, obligations and restrictions 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; and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies.

(4) ...any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section....

There are essentially three other options for defining the scope of judicial responsibility for enforcement. These are considered in turn below.

Judicial Entrenchment Subject to Parliamentary Override or Limited Judicial Entrenchment

74 The option favoured by most reformers in the UK is to provide a measure of entrenchment without making domestic derogation an impossibility. This could be achieved in two ways. The first would emulate the Hong Kong model. The incorporating statute might, as some Private Members' Bills have done, include an interpretation clause stating that "no provision of an Act passed after the passing of this Act shall be construed as authorising ... [an infringement of this Act] unless such a construction is unavoidable if effect is to be given to that provision and to the other provisions of the Act." The courts would then be entitled to rule legislation invalid where it was enacted prior to incorporation, and be required to construe legislation enacted thereafter in such a way as to ensure compliance with the ECHR. Where this was impossible, it would be assumed that Parliament had deliberately legislated in contravention of the ECHR, and the courts would not challenge it. In practice, this would leave the courts very wide discretion for reading legislation in a manner which ensures compliance.

75 Alternatively, as proposed by the Labour Party and adopted in Canada's Charter of Rights and Freedoms, the incorporating statute could require that subsequent legislation should expressly include a notwithstanding clause where it was intended by Parliament that it should be given effect regardless of the terms of the ECHR. In all other cases, the ECHR would prevails over all existing and future legislation and law which may conflict with it. A notwithstanding clause would usually be used in circumstances where the European Court of Human Rights had not established firm principles in relation to a particular issue or where the chance of a subsequent finding of breach by the Strasbourg enforcement bodies may be justified by reference to domestic legal traditions: in effect, providing for domestic application of the 'margin of appreciation' doctrine.

76 There are several attractions in the notwithstanding clause procedure. The courts would have powers similar to those held in respect of EC law, but Parliament would be able to expressly indicate where it wished the courts should disregard any potential breach of the ECHR. At the same time, the requirement for specific Parliamentary endorsement of each notwithstanding clause should ensure that they would not be used wantonly. The House of Lords Select Committee certainly reached this view:

"The Committee do not accept the view that has been expressed that if such a clause were included in a Bill of Rights, Governments would have no hesitation in including in future Acts the necessary express formula to ensure that the Act would override the Bill of Rights. They do not believe that in practice any Government would readily bring itself to take such a course. They think that, if a Bill of Rights were enacted, then whatever form it took, there would in practice be the strongest political restraint against any acknowledged attempt to overturn it in a future Act. All the more would this be the case if, as the Committee have concluded that it should, such a bill took the form of an Act giving domestic effect to the European Convention on Human Rights."[43]

77 The experience of Canada - coloured as it is by local politics - does however need to be borne in mind. If a notwithstanding clause approach is adopted, a balance needs to be struck between allowing for the reasonable use of a legislative override provision and preventing its use to frustrate the purpose of fundamental rights. In Canada the notwithstanding clause lost political legitimacy, to the point where "outside of Quebec, a binding constitutional convention is emerging against using the notwithstanding clause."[44] But this was influenced by the historical accident that "Canadians experienced a use of the notwithstanding clause that they found outrageous before they experienced a Supreme Court decision of equivalent political unpopularity."[45] Providing for a five year renewal would certainly assist in preserving the legitimacy of such a tool, by enabling its application to be regularly reviewed. Alternatively or additionally, the override could expire automatically after a general election, forcing reconsideration by the new executive and legislature. Another lesson that might be learnt from Canada is to ensure that the legislature is not permitted to introduce a notwithstanding clause to pre-empt judicial review (i.e. immediately following an application), thus undercutting the courts' function. However, an extensive range of safeguards would not be necessary given that the UK must also consider the possibility of a further application by an aggrieved individual to an external court. The inclusion of a notwithstanding clause in domestic legislation would not preclude - although it might diminish - the possibility of an adverse Strasbourg decision.

78 Other issues are also raised by the use of notwithstanding clauses. First, under Article 15 of the Convention derogations are allowed only in specific circumstances and in relation to particular articles. Under Article 1 of the Convention, the parties undertake to secure the rights and freedoms of the Convention to individuals within their jurisdiction and, under Article 13, to provide effective domestic remedies before national authorities. This means that including a notwithstanding clause in domestic legislation (and acting on it) in circumstances other than those set out in Article 15 of the Convention would be tantamount to breaching international law obligations. The notwithstanding clause would be unlikely to sway the European Court were a relevant case to reach it. It is therefore recommended that the use of a notwithstanding clause should be limited to those rights from which derogation is possible at the international level. However, the grounds for using a notwithstanding clause in domestic legislation need not be restricted to those extreme circumstances set out in Article 15 of the Convention i.e. war or public emergency. The reasons for the use of the notwithstanding clause might be required to be given in the text of the clause; or might simply be available to the courts through reference to Hansard. Of course, this would not prevent the Strasbourg enforcement bodies from subsequently overruling the notwithstanding clause, but they in turn would be informed by the arguments in support of its inclusion and by their application of the margin of appreciation doctrine.

79 The second issue arises from the Labour Party's specific policy proposals. Writing earlier this year, the Shadow Lord Chancellor, Lord Irvine of Lairg (echoing the most recent detailed statement of Labour Party policy)[46] asserted: "it would in practice be almost impossible for existing or subsequent law to be interpreted as inconsistent with the Convention. Judges would know that Parliament had to hand a means of making clear that it was derogating from the Convention, but did not use it. It should therefore in practice be impossible for the judges to hold that any legislation was intended to breach the Convention, unless the legislation stated that in express terms." The only logical reading of this statement is that where legislation did not include a notwithstanding clause, and the courts identified a potential breach, the courts should not assume that Parliament intended to legislate in contravention of the ECHR. They would be bound to interpret legislation consistently with the Convention and it necessary to override the legislation if it was impossible to interpret consistently with the ECHR.

80 However, the statement is not entirely clear. One possible alternative reading of it would suggest that where there was no notwithstanding clause in a statute, this was a conscious decision by Parliament to approve the legislation as consistent with the ECHR and the courts should therefore not object to its provisions even if - in the court's view - it conflicted with the ECHR. This cannot be what is intended because it would clearly be perverse to incorporate the Convention and then to insist that no primary legislation can be found by the courts to be inconsistent with it. In practical terms, it is improbable that Parliament could foresee all the ways in which a potential conflict might arise. These often only become apparent in a particular factual setting and after counsel have applied their ingenuity to the particular circumstances. So it would be difficult if not impossible to insist that the courts should regard the absence of a notwithstanding clause as a direction from Parliament to regard the statute as in conformity with the ECHR. The statement might usefully be clarified in any future Labour Party policy document.

Interpretative Tool Only

81 Some consider that it is not necessary to provide for a high degree of judicial authority vis-‡-vis legislation in order to protect the ECHR. Parliament would be deterred from diverging from the ECHR due to European pressure that would ensue from any such action; and the European Court would still retain the power to rule against legislation found to breach the Convention, and require compliance with its ruling. On this basis, there would be no need to involve the UK courts in 'political' questions of the validity of legislation. New Zealand style incorporation would certainly have the effect of overturning the decision in *Brind*, thereby requiring that the Convention be taken into account when a public authority is exercising a discretion.[47] It would also allow for the development of the common law in areas such as privacy.

82 The 1978 House of Lords Select Committee report on a Bill of Rights preferred the option of using the ECHR simply as an interpretative tool, because it would preserve parliamentary sovereignty and because they believed it impossible that any other approach could have legal effect. Despite its comments on the efficacy of notwithstanding clauses (recorded at paragraph 76 above) it concluded - in effect - that providing for the use of notwithstanding clauses in subsequent legislation was inappropriate, as:

> *"Parliament cannot bind itself as to the future and a later Act must always prevail over an earlier one if it is inconsistent with it, whether the inconsistency is* express or implied*....[The Committee's] view is that there is no way in which a Bill of Rights could*

protect itself from encroachment....by later Acts. The most that such a Bill could do would be to include an interpretation provision which ensured that the Bill of Rights was always taken into account in the construction of later Acts and that, so far as a later Act could be construed in a way that was compatible with a Bill of Rights, such a construction would be preferable to one that was not."

83 Adopting a New Zealand style approach with the Convention having interpretative effect only would ensure a 'path of least resistance' in the parliamentary passage of the incorporating statute. In recent attempts to bring forward legislation through Private Members' Bills to incorporate the ECHR, it is on these clauses that debate has tended to focus. Thus, the Human Rights Bill introduced into the House of Lords by Lord Lester in 1995 initially stated:

> (2) The provisions set out in Schedule 1 shall have effect notwithstanding any rule of law to the contrary.
> (3) An Act of Parliament or any instrument made by or under an Act of Parliament or an Order in Council (whether passed or made before or after the passing of this Act) shall not be enforced and may not be relied upon in any legal proceedings (including those commenced before this Act comes into force) and to the extent that to do so would deprive a person of any of the rights and freedoms defined in Schedule 1.
> (4) For the purposes of all legal proceedings (including those commenced before this Act comes into force) any question as to the meaning or effect of any provision set out in Schedule 1 shall be treated as a question of law and shall be determined in accordance with the principles enunciated by the European Court of Human Rights.

but was amended in Committee to a weaker version of incorporation, modelled on the New Zealand provisions:

> (2) The provisions set out in Schedule 1 shall have effect notwithstanding any rule of law to the contrary.
> (3) So far as the context permits, enactments (whenever passed or made) shall be construed consistently with the rights and freedoms defined in Schedule 1.
> (4) For the purposes of all legal proceedings (including those commenced before this Act comes into force) any question as to the meaning or effect of any provision et out in Schedule 1 shall be treated as a question of law and shall be determined in accordance with the principles enunciated by the European Court of Human Rights.

and was further revised at Report:

> (2) The provisions set out in Schedule 1 shall-
> (a) be an aid to the interpretation of any enactment; and
> (b) be taken into account in equity and at common law, so that effect may be given to them in legal proceedings in accordance with the principles established by the jurisprudence of the European Court of Human Rights.
> (3) For the purposes of this section the procedure at first instance and on appeal shall be governed by such Rules of Court or Practice Directions as may be made.

Thus the bill moved from providing for complete judicial authority to providing only a guide to interpretation (weaker in its eventual form than the New Zealand model), largely as a result of

pressure from Peers opposed in principle to incorporation. During the Third Reading Debate, Lord Scarman "repaired the damage, so that the Bill might leave the Lords in an acceptable form"[48] but the Bill was never considered by the House of Commons.

84 It is likely that even in a Government backed bill to incorporate the ECHR, there would be pressure from both Houses of Parliament for the form of interpretation to be limited to the New Zealand model. An interpretative model of incorporation could be effective - but much depends on the exact drafting of the bill, its scope of application, and on the attitude of the courts (supported by the academic community and public attitudes). Most commentators agree that adopting a New Zealand model for incorporation of the ECHR would do little in itself to change the existing approach of the domestic courts in statutory interpretation; any significant changes would depend on the particular view that the UK judiciary took of the competing provisions of the statute. In New Zealand, the judiciary has been particularly active in extending the parameters of the Bill of Rights and the courts have used their powers "to make it far more effective than anyone would have thought."[49]

85 However, it must be questioned whether this form of incorporation would be appropriate in respect of the ECHR. As already noted, the changing position in respect of the status of EC law within the UK legal order has led to reconsideration of the potential status of an incorporated ECHR, and the possibility of allowing for a greater degree of judicial authority than a New Zealand model implies. It has also been pointed out that "it is hardly defensible for Parliament to qualify its own sovereignty in commercial and employment matters while refusing to do so in matters of human rights."[50] It would be illogical to give a different and lesser status and effect to European Convention law than has been given to European Community law, not least since European Convention law is now part of European Community law in substance if not in form (see paragraph 52 above).

Hybrid Models

86 Concern in the UK about the preservation of parliamentary sovereignty on the one hand, and the democratic 'illegitimacy' of the judiciary on the other have prompted support for a model of parliamentary regulation alongside limited judicial enforcement. For example, Liberty has proposed a hybrid model in which "some decisions would be retained in the Parliamentary sphere. Such decisions would, however, be subject to special procedures which set them apart from the usual processes involved in the operation of parliamentary sovereignty. On the other hand, some articles in the bill of rights would be fully entrenched with the ultimate power to strike down primary legislation in the hands of the courts."[51] They propose that the first group of rights would include some or all of those Articles of the ECHR that are susceptible to derogation; whilst the second group would include all those Articles protected by Article 15 from derogation, plus any others that it was considered advisable to protect domestically in this way (for example, those that are "not questions of moral or political debate"). A parliamentary committee drawn from both Houses of Parliament would consider judicial declarations of breach of Articles in the first category, and decide whether to uphold or overrule such declarations. The objective of this approach is similar to that of the notwithstanding clause procedure - ensuring that Parliament and not the courts have the final say in questions of interpretation. But the two are different in their operation. The Liberty model provides the opportunity for Parliamentary intervention after the courts have passed judgment, rather than prior to the enactment of legislation; and it imposes limits to the scope for such interventions by identifying certain rights (additional to those protected by Article 15) that Parliament should not be entitled to dismiss or modify.

87 Such a procedure raises questions about whether cases should be automatically referred to the Committee, or whether there should there be some filtering device (e.g. referral by a Human Rights Commission or by a minimum number of MPs or Peers), whether the Committee would need to report to one or both Houses of Parliament and whether it would need to operate on an enhanced majority voting system. These issues are considered in more detail in Chapter 4. The attractions of this model are clear insofar as they would ease the objections to incorporation raised by those who fear the erosion of parliamentary sovereignty. Objections have, however, been raised on the grounds that MPs cannot be "sufficiently detached from the political battle between Government and Opposition to be relied upon to act with complete integrity and independence of judgment" (if so, this is a concern that must go far wider that human rights); and because of the poor quality of possible candidates for membership of the Committee, "the likely scenario is that it would be elderly political has-beens who dominated the committee."[52] Perhaps more significantly in the present context, such a complex and innovative model might be considered more appropriate in a climate in which the nature of the rights to be protected are particularly contentious i.e. a newly developed bill of rights rather than the more familiar and far from radical ECHR.

Derogations

88 A further issue requiring resolution is whether the courts would be entitled to review the Government's exercise of the powers of derogation, as the Strasbourg organs are entitled to. Cases involving the UK have been principally concerned with whether conditions in Northern Ireland at certain periods have amounted to a "time of war or other public emergency threatening the life of the nation" and whether these conditions could justify specific actions or decisions taken by the Government.[53] There has not been a case to date in which the European Court of Human Rights has ruled that a derogation properly made by a Member State could not be justified.

89 Following incorporation, a decision to derogate in respect of primary legislation could require parliamentary approval by means of the inclusion or otherwise of a notwithstanding clause (if this were provided for in the incorporating statute) thus limiting the Government's powers. But if the use of notwithstanding clauses were not provided for in the incorporating statute, consideration would need to be given to the adoption of a formal procedure to provide for parliamentary endorsement of derogations, or else to permit review by the domestic courts. SACHR, in its 1977 report, commented:

> *"The difficult question is whether our courts should be in the same position as the Convention organs in being able to decide whether a public emergency threatening the life of the nation could be said to exist at the material time, and whether the measures taken were strictly required by the exigencies of the situation and were not inconsistent with the United Kingdom's other obligations under international law. The Government's Discussion Document has suggested that these are matters which might be better left to Parliament to decide by making a derogation subject to Parliamentary approval. We believe that any existing or future derogation from the Convention should be subject to periodic Parliamentary approval and we so recommend ... these issues should be determined by Parliament rather than by our courts, subject, of course, to any complaint that might be made to the European Commission by the alleged victim of a violation of the Convention. If these issues were to be justiciable in our courts it might well mean that judges would be empowered to sit in camera and in the absence of the complainant when the evidence was*

give, for example, by Special Branch witnesses. The European Commission, by contrast is able and indeed obliged to conduct its investigations in private and is therefore an appropriate body to consider a matter of this kind."

90 By extension of the original rationale for incorporation of the ECHR, adjudication by the domestic courts would be provided for to prevent, or at least reduce, Strasbourg 'interference'. But in practical terms any decision made by the Government in respect of derogation would be unlikely to be ruled against by either the domestic courts or Strasbourg (in accordance with the margin of appreciation doctrine) unless the derogation were so obviously unreasonable that the Government would have anticipated the ruling and been prepared for the consequences. A more effective protection against unwarranted use of the derogation provisions would be to require Parliamentary approval for every proposed derogation.

Conclusion

91 The concept of entrenchment has long been the spectre haunting debates about incorporation of the ECHR. However, it is increasingly recognised that questions of entrenchment do not represent a hurdle to incorporation of the ECHR. Any statute incorporating the ECHR into domestic law could be reversed by a future UK Parliament, so to that extent would not be 'entrenched'. But its relationship with other laws could be different to that of ordinary legislation without undermining the doctrine of parliamentary sovereignty - because the nature of that relationship could subsequently be changed if Parliament so desired.

92 Equally, it is clear that the political and constitutional traditions of the UK must be reflected in the model of enforcement - which means that there must be what David Kinley describes as "an active 'political' role in the protection and furtherance of human rights, to complement the judicial role."[54] Taking both these points, and bearing in mind the lessons from overseas, a model of judicial entrenchment subject to parliamentary override is likely to prove more appropriate than providing the ECHR simply as a tool of interpretation. If a notwithstanding clause approach is adopted, some additional protections might be considered, reflecting the Canadian experience:

- Parliament should only be entitled to use this power of derogation in respect of those provisions from which derogation is permitted by Article 15 of the Convention; although the grounds for its use need not be restricted to those set out in Article 15.
- any notwithstanding clause should be renewed every five years.
- a notwithstanding clause should not normally be inserted into an existing Act specifically to pre-empt a judicial challenge already initiated.

If a notwithstanding clause procedure is not favoured, the Hong Kong model could be adopted.

Introduction

93 The powers given to the courts as a consequence of incorporation along the lines proposed in the previous chapter are likely to necessitate the adoption of some new procedures and practices within the judicial system; and to prompt new consideration to be given to issues that are already raising concern. But they would not require any major upheaval. This chapter examines the possible consequences of incorporation for the judicial system, including: which courts should have jurisdiction; the system of judicial appointments; whether companies should be able to assert their 'human rights' as well as individuals; the remedies available to the courts, and rules about costs.

Jurisdiction of the Courts

Using the ECHR

94 It is worth beginning by considering the circumstances in which the ECHR would be raised in the courts. Many are likely to be 'collateral challenges' in which the ECHR is raised in the context of another matter:

- an individual facing a criminal charge may plead in his defence that the statute under which he is being charged is in contravention of the ECHR, or that actions taken by public authorities in seeking to prove a criminal charge were in contravention of the ECHR.
- a party to civil litigation might plead in support of his case that a particular statutory provision affecting that case is not applicable because it is in contravention of the ECHR.
- a citizen openly refuses to obey the law and deliberately invites prosecution under the law (common, statute or delegated legislation) in order to challenge its conformity with the ECHR.
- if a public authority seeks to enforce legislation, a citizen may refuse to comply and then challenge the conformity of the legislation as a defence to the administrative sanctions that are applied against him.
- any court or tribunal may have recourse to the ECHR in order to interpret an Act of Parliament or delegated legislation.

'Direct challenges' may also arise when the purpose of the challenge is specifically to query compliance with the ECHR. For example, a challenger might seek judicial review of an administrative action on the grounds that it failed to comply with the provisions of the ECHR.

The Forum for the Determination of ECHR Issues

95 Jurisdiction within the court system could be allocated in several different ways. Responsibility might fall to:

1. the ordinary courts of law i.e. the court of first instance that would hear the case if no reference to the ECHR were being made, subject to the same appeal process as any other disputed legal question.
2. a specialised Court within a Division of the High Court. Either:

(a) on reference from other courts.

(b) as a matter of exclusive procedure. (In cases of direct challenges and other judicial review cases, the High Court would be the court of first instance in any case.)

3. a specialist Constitutional Court - the existing Judicial Committee of the Privy Council or Appellate Committee of the House of Lords could be designated a Constitutional Court, or a new court could be established perhaps involving non-judicial experts. Either:
   (a) on reference from other courts.
   (b) as a matter of exclusive procedure.

96 The choice of forum would have to reflect a number of factors, not all of which pull in the same direction. First, the form of incorporation i.e. the extent of judicial authority provided for in the incorporating statute. It could be argued that any authority to strike down legislation should only be exercisable by a 'supreme' court, the appointment of whose members might require the approval of Parliament (as with the Senate confirmation hearings prior to the appointment of Supreme Court judges in the USA), and that it would be dangerous to give all courts power to declare legislation non-compliant. Second, financial considerations would play a part: the Treasury would inevitably have a say in the decision, although it would clearly be desirable to avoid a 'cheapest choice' basis for deciding human rights jurisdiction - efficiency and effectiveness should trump economy. Finally, the need to provide a speedy, efficient and accessible service: for example, a specialist Human Rights jurisdiction might be advantageous in producing coherent and consistent jurisprudence, but might prove more expensive, more cumbersome and slower than allowing all courts to adjudicate on rights issues. The more complex the system, the less accessible it would be. Ideally, the whole problem should be dealt with at once and human rights elements should not be isolated.

97 Those in favour of option (1) cite the fact that the conformity of UK legislation with EC law can be considered in any court of law and, in practice, a final decision on the supremacy of EC law over a particular domestic Act of Parliament would never be taken in the lower courts. Similarly, in New Zealand, Hong Kong and Canada, references to human rights legislation can be raised in any court. Supporters of this approach include the Standing Advisory Commission on Human Rights which, in both its detailed report of 1977 and in subsequent annual reports to the Secretary of State, has recommended that the enforcement of a bill of rights incorporating the ECHR in Northern Ireland should be within the jurisdiction of the ordinary courts. There are obvious advantages to this approach, in terms of ensuring speedy process and avoiding the cost of referrals to a higher court. Either direct application or reference to another court would involve delays and discontinuities. In addition, ECHR matters are likely to arise in the context of ordinary civil and especially criminal proceedings, where the specific human rights issues would not easily be separable from the other facts of the case. It is also worth noting that a decision made by a lower court would be an individual court making an individual decision; it would not establish any sort of precedent for future cases.

98 Others, however, would argue for a separate jurisdiction for all cases raising questions of compliance with the ECHR. In particular, it is argued that this would limit the number of cases that could be brought, avoiding delays, and ensure harmonisation of the jurisprudence on the basis that the nature of Convention means that there should be only a small number of judges responsible for interpretation. An approach similar to that adopted in respect of cases of judicial review might be designed, with ECHR issues heard exclusively by the Divisional Court of the Queen's Bench Division (Option 2b). However, there is already a significant backlog of judicial review cases and it would be necessary to limit the number of ECHR cases brought to avoid overload.

99 Another option would be for the ordinary courts to be entitled to consider ECHR cases, but to have powers to refer cases to a higher court specifically for decisions on whether or not an Act of Parliament should be overridden by the ECHR. Reference might be made to the High Court (Option 2a), to the Court of Session or to a new constitutional court (Option 3a). Such an approach would present a problem of delay, with cases halted whilst the ECHR issue was referred upwards. As the Law Commission has pointed out in the context of judicial review: "a reference procedure would result in a multiplicity of proceedings, increased costs and further delay". But the total number of such instances is unlikely to be significant, and such a procedure would certainly address the objection put forward by the current Government that it would be inappropriate to "give every judge and every magistrate in the country power to decide not to enforce the law of the land if he or she, by their own judgment, formed the view that any person would thereby be deprived of any of the rights and freedoms set out in the Convention."[55] If adopted, a reference procedure might be analogous to the Article 177 reference procedure where questions of EC law arise in the ordinary courts of law. This would be an advisory opinion - binding as an interpretation of the point of law put to the court, but it will remain for the lower court then to reach its own judgment taking that interpretation into account. It would of course be open to the lower courts to decide the matter without a reference, for example if the case were clear-cut, or covered by an existing advisory opinion.

100 The final option (3b) would be for ECHR issues to be considered by a specially designated constitutional court. A constitutional court in the UK could take the form of the present Appellate Committee of the House of Lords or could be a separate court from the final court of appeal on non-constitutional matters (e.g. the Judicial Committee of the Privy Council or a completely new court). However, few advocates of incorporation support a limited constitutional jurisdiction, and the experience of South Africa provides a warning marker: for example, two thirds of civil cases referred by the lower courts have been declared inadmissible; and the scope for direct access has rarely been used. More importantly, the case for creating a constitutional court (which would be a significant step) as a necessary and direct consequence of incorporation of the ECHR is not convincing. So this rules out Options 3a and 3b.

101 A further consideration is the fact that all courts and tribunals would in practice have to be able to have regard to Convention rulings in their work - human rights issues might be relevant where a challenge to a statute was not in question, but the court wished simply to use the ECHR for purposes of interpretation. Moreover, Strasbourg expects the courts of states signatories to abide by the Convention as fully as their legislatures and executives, for example in formulating and applying doctrines of contempt of court. To this extent the choice of judicial structure would in effect be made automatically - every court and every tribunal would need to engage with ECHR issues if they were before them. This rules out Option 2b.

102 So if the ordinary courts cannot be by-passed completely, the next decision is whether the system should involve:

- every court of first instance listening in full to proceedings that raised human rights issues and itself deciding the validity of a claim of breach. Under existing arrangements, where a challenge on a point of law is raised in a magistrates' court and becomes a central feature of the decision, the losing side can appeal to the High Court, whose ruling is regarded as binding on all magistrates' courts. Under such a system, the magistrates' court would have the authority to disapply legislation but could be challenged on appeal and a clear and binding decision reached by the higher court. (Option 1)

- ad hoc referral of issues to a constitutional or specialist court, such as the Divisional Court, similar to Article 177 procedure for EC law. (A variant of Option 1)
- automatic adjournment and referral of human rights issues from a magistrates court. For example, the existing Order 53 procedure for judicial review might be invoked whenever a challenge to administrative decision or to the compatibility of legislation with the Convention was raised. The question then is whether the removal would be to the Divisional Court or direct to the House of Lords. Whichever was chosen it would be important to act speedily and for the referral not to be made too early in the proceedings as the facts of the case might render it irrelevant or unnecessary. (Option 2a)

103 For reasons of principle, practicality and precedent, it can be argued that ECHR issues should be able to be heard in full before all courts of first instance, allowing for - but not requiring - a reference upwards (Option 1):

- principle: human rights are not separable from justice *simpliciter;* it is the duty of the state to supply human rights in all contexts and circumstances. It would be preferable for human rights to permeate the judicial realm rather than be restricted to a special arena of human rights experts.
- practicality: to avoid the need to adjourn proceedings and incur delays pending the ruling on the reference. It would also be very difficult to separate out human rights issues from the other facts of the case in many instances; the lower courts could not simply ignore the human rights dynamic until appeal.
- precedent: many of the same issues arise in the context of EC law, which can be considered by any court; and insofar as the ECHR already has direct application with the UK courts it is through EC law.

104 However, the subsequent development of a more broadly based domestic bill of rights in which the final court of appeal was necessarily UK-based rather than the Strasbourg Court, might prompt calls for further structural changes in the rights jurisdiction, creating a more hierarchical system. One option would be to combine the present little-used system of leapfrog appeals to the House of Lords with the system of referrals now familiar in the context of the European Court of Justice. This would provide the flexibility of allowing the court of first instance to decide an ECHR point if the answer seems clear, or to refer the point upwards if it is problematical. Another option would be to regard the Divisional Court as the 'first and principal port of call' for rights issues, with the existing leave procedure providing an equivalent to the Commission's screening process. The Court of Appeal would provide a final port of call in most cases, and the House of Lords in major cases.

Final Court of Appeal

105 Within the current system in England and Wales, the House of Lords is the ultimate court of appeal for both civil and criminal matters; it also provides a court of final appeal for Scottish civil matters, but not criminal cases. Even if a formal constitutional court is not created in the short term, it remains for consideration whether the House of Lords as currently constituted should be the final court of appeal for ECHR issues. In its judicial capacity the House of Lords comprises the Lord Chancellor and twelve Lords of Appeal in Ordinary who may be supplemented by former Lord Chancellors, retired Lords of Appeal and any other peers who have held high judicial office. By convention, two of the Law Lords are Scottish, but no special recognition is given to judges with Welsh or Northern Irish connections (although there is currently a Law Lord from Northern Ireland).

106 One issue therefore is whether the House of Lords should be the final appeal court for Scottish criminal cases involving ECHR issues. Another issue is whether it would be necessary for a court ruling on matters of fundamental rights to draw members from outside the ranks of the Law Lords. The Labour Party has argued, for example, that "at the appellate level, where points of fundamental or wide-ranging importance may have to be decided, the final court should have added to its judges three further lay members, drawn from a panel of people with knowledge and understanding of society and of human rights in the broadest sense." The sense that 'human rights are for human beings' and not just for lawyers is powerful. But this proposal presents a new set of problems, including the selection and appointment of the lay members and the possibility of creating 'by the back door' a constitutional court. The definition of who would be chosen is extremely vague; nor is there any reference to who would make the appointments and how. One option would be for appointments to be subject to parliamentary hearings, as in the USA in relation to the Supreme Court. But this could cause significant political disputes. And if the final appeal court - i.e. the most senior and experienced judges - cannot be relied upon to offer a view without lay input, it would be difficult to justify lower courts exercising judicial discretion without it. Moreover, if final responsibility for ruling on questions of compliance were given to an alternative court then the position could arise in which an ECHR issue came up in the House of Lords in the course of other proceedings, and the House of Lords would then need to decide whether to reconvene with the additional lay members.

107 Changing the composition of the final appeal court should be left for a later stage in the process, alongside the development of a domestic bill of rights and in the light of parallel developments in reforming the House of Lords and establishing a judicial forum for challenges on devolution issues. This longer term consideration is looked at in detail in paragraphs 273-278 below. In the short term, if Parliament or the Government were unhappy with the decision of the Appellate Committee of the House of Lords in any case, it would be possible to legislate on a 'notwithstanding' basis to overrule the judgment.

Relationship with the Strasbourg Enforcement Bodies

108 Finally, it is necessary to determine the relationship between the domestic courts and the European Court of Human Rights post-incorporation. This point was made by Jaconelli:

> *"... let us assume that a plaintiff, having exhausted his local remedies, then takes his case to Strasbourg. The case finally reaches the Court of Human Rights, which hands down a judgment in his favour. How can that judgement, rather than the earlier (ex hypothesi, adverse) judgement of the English court, be implemented at the level of municipal law? The two courts involved have an independent existence in two distinct legal systems; one is not hierarchically superior or inferior to the other. The European Court has no power to annul or reverse the decision of the national courts. Yet some method must be found for implementing the judgement of the European Court and giving it priority over that of the national court."*[56]

109 The European Court of Human Rights's judgment is essentially declaratory and involves no power to annul or repeal domestic provisions found to be in breach of the ECHR. The incorporating statute would clearly need expressly to provide for UK courts to have regard to judgments of the European Court of Human Rights and decisions of the Commission, so that in future cases, the position would be clear e.g. if a similar case subsequently came before the UK courts, they would be entitled to override the legislation in question following the Court

judgment, if such powers were provided in the incorporating statute (see paragraphs 134-135). In respect of the initial proceedings, the individual would be satisfied by the Strasbourg decision and any wider action to ensure conformity would be a matter for the Government, as at present. Alternatively, it would be possible for the incorporating statute to include a provision based on the European Communities Act 1972 so that the judgments of the Strasbourg Court automatically became part of UK law. On balance, the current arrangements should be preserved.

Judicial Appointments

110 As already noted, one of the key objections to the incorporation of the ECHR or adoption of another bill of rights arises from opposition to increasing the power of judges. The debate has involved three sets of arguments: those who charge that judges are unaccountable and unrepresentative; those who regard judicial encroachment on political territory as inherently inappropriate (including a new right-wing opposition to the role judges have played in extending judicial review and speaking out against Government policy - see for example Boris Johnson in *The Spectator*)[57]; and those who rebut both approaches and point to the adaptability of judges and the possibility of restraining their powers through the manner of incorporation and enforcement (see Ferdinand Mount: "the call for a reformed judiciary is little more than a cheap attempt at public paranoia.")[58]

111 Both the Labour Party and the Liberal Democrats have proposed - in parallel to incorporation, if not as a necessary corollary - changes to judicial appointments. Under existing arrangements, the appointments of High Court judges, Circuit judges, Recorders, Assistant Recorders and stipendiary and lay magistrates are made either by or on the advice of the Lord Chancellor, who also decides whether to renew part-time appointments. Appointments to the Court of Appeal and to the House of Lords, and to the offices of Lord Chief Justice, Master of the Rolls and President of the Family Division are made on the advice of the Prime Minister after consultation with the Lord Chancellor. The scope for partisan appointments is clear not only from the nature of these arrangements but also, seemingly, in practice. For example, media reports of the recent appointments to Master of the Rolls and Lord Chief Justice suggested that there had been lobbying within the Cabinet for and against particular candidates. The tripartite role of the Lord Chancellor, as head of the legal profession, member of the House of Lords and member of the Cabinet (and a political appointee) also gives rise to objections from some quarters as to the impartiality of the process - or at least doubts as to whether the perception of impartiality can be maintained.

112 Impartiality clearly becomes all the more important if the courts are to play an increased role in adjudicating on the legitimacy of Government actions or the law. In a number of new Commonwealth countries, judicial appointments other than Chief Justice are made on the advice of a Judicial Services Commission, presided over by the Chief Justice and composed mainly of judicial members. The Canadian Government rejected the idea of a nominating committee, opting instead for the establishment of provincial committees. These committees were charged with the task of advising whether or not particular candidates were 'qualified'. There is still demand though for a more open process involving greater consideration of candidates' legal accomplishments, social activities and attitudes - a process which allows nominations (rather than mere vetting) by a broadly-based advisory committee.

113 A Judicial Appointments Commission - sometimes with additional responsibilities, or with a different title - has been proposed by the Labour Party, the Liberal Democrats, IPPR, JUSTICE and Liberty. All of these proposals share the objective that judicial selection, practices and procedures should be altered so that decisions may be better informed and more consistent with community expectations; and possibly more representative. But reform of this sort cannot be regarded as a panacea. A key question is the balance between political, legal and lay participation in the appointments process, as Professor Robert Stevens has pointed out:

> *"When Israel was established in 1948, with essentially a British judicial system, the Constitution provided that the judiciary should be chosen by an apolitical Judicial Commission. As the Supreme Court has moved, however, further into the centre of political controversy, taking on such matters as the exiling of political dissidents to Lebanon, the Knesset demanded representation on the Commission. In South Africa, Nelson Mandela had argued that the President should choose the Constitutional Court. The Constitutional Convention rejected that, so that its members are now chosen by the President, but are then subject to review by the Senate...In a court that has already outlawed capital and corporal punishment, such a review system, coupled with hearings, may be singularly appropriate. Certainly the German Constitutional Court provides similar safeguards, with half its members chosen by the Bundestag and half by the Länder."*[59]

114 The Home Affairs Select Committee reported in June 1996 on judicial appointments procedures, and included in its report an evaluation of the case for a Judicial Appointments Commission. It noted that some feared that such a Commission would lead to the politicisation of the process, but that witnesses had sought to soothe these fears by pointing out that "political scrutiny of candidates, whilst appropriate in other nations such as the United States or Israel where judges were required to make political decisions, was less relevant in the United Kingdom **where there was no bill of rights**, and where the theory of Parliamentary sovereignty prevailed"[60] (emphasis added). It must therefore be for consideration whether the incorporation of the ECHR would change this assessment. The Committee recommended against the creation of a Judicial Appointments Commission following a vote on two alternative conclusions which divided on party lines. But its assessment identified three main points that needed to be taken into account:

> *"... firstly, the creation of a Judicial Appointments Commission might answer criticism (whether well-founded or not) that it was constitutionally unhealthy for Ministers to recommend candidates for judicial appointment, but, on the other hand, the Commission might itself be the scene of struggles (whether political or not). Secondly, a Judicial Appointments Commission would dilute the direct responsibility for appointments currently vested in the Lord Chancellor, although the value of this link was questioned. Thirdly, the creation of a Commission might reduce the dependence upon assessments of performance."*

115 Were a Judicial Appointments Commission to be established alongside incorporation of the ECHR, these points would need to be addressed. However, the need for reform of judicial selection and training exists regardless of incorporation; it is clear that the motor of incorporation should not drive and determine the nature of reforms in these areas. It should be only one consideration, and there is no necessary relationship between the two reforms; however, judicial training needs will need to be reviewed. See paragraphs 245-249 below.

Rights Against Whom?

116 The Government bears the international responsibility for compliance with the Convention. It therefore needs to know when an ECHR issue is raised in the courts. It would accordingly be necessary to include provision in the incorporating statute to ensure that in the event of the ECHR being raised in any particular case, the Law Officers of the relevant Government (the Attorney General in England and Wales, the Lord Advocate in Scotland or the Attorney General for Northern Ireland as appropriate) would be informed immediately - unless the Crown is already a party to the proceedings - and would have leave to intervene in the proceedings. The Attorney General already intervenes (as *amicus curiae* or as intervener) where a case raises a question of compliance with international law.

117 The ECHR does not expressly state whether it can be invoked against private individuals and corporations as well as public authorities. At **international** level, it is clear that the ECHR cannot be relied upon to bring a claim against a private person (i.e. an individual or organisation) who has violated rights under the Convention, because the Convention is a treaty that imposes obligations only upon states. Insofar as the Convention touches the conduct of private persons, it does so indirectly through the obligations imposed on a state (i.e. the state may be held to have failed to secure the rights guaranteed by the Convention by not making unlawful the acts of private persons that infringe them - as was held to be the case in the UK in respect of corporal punishment in private schools). What may happen, however, is that in a state in which the Convention is a part of **national** law, the Convention guarantee may be treated (like a national bill of rights) as generating rights vis-à-vis private persons.

118 In its 1977 report, *The Protection of Human Rights by Law in Northern Ireland*, the Standing Advisory Commission on Human Rights recommended that it would be wisest to confine the scope of the Convention, at least initially, to public authorities only. The conclusions of the House of Lords Select Committee on a Bill of Rights were slightly different: "it would appear that there is at least a possibility that the Convention bites on actions by private parties as well as public authorities. That being so, it seems to the Committee that a Bill of Rights ought to leave that possibility open...". Even if the incorporating statute were to be limited in its application to actions by the state, this presents a problem that many public functions are now carried out by private contractors; and what were once regarded as public services are no longer e.g. the regulated utilities. This could give rise to nonsensical situations where state-run prisons were covered, but those run by private contractors were not. IPPR's Bill of Rights proposed the following text, equally applicable to an incorporated ECHR: "The Bill of Rights applies to any act or omission by or on behalf of any person or body (including the Crown) in the performance of any public function." (Parliament is covered by a separate clause). Similarly, Lord Lester's recent Human Rights Bill expressly defined those that would be required to comply with the duties imposed by the Bill.

119 This is by no means a problem unique to the UK. The text of the equivalent provision of the New Zealand Bill of Rights 1990 states:

> *This Bill of Rights applies only to acts done -*
> *(a) By the legislative, executive, or judicial branches of the government of New Zealand; or*
> *(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to the law.*

The unique feature of this text is the statement that acts of the judiciary are covered, so that the

bill of rights could be applied where disputes by private actors are determined in court. A similar provision in a statute incorporating the ECHR would enable the Convention to be applied by the UK courts where a civil case is already before a judge (although it could not be used directly in legal disputes between individuals or private bodies).

The Canadian Charter of Rights and Freedoms 1982 provides for a more restrictive application:

120 *This Charter applies*

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Following this provision, the application of the Canadian Charter has been interpreted as applying to the executive and legislature only, excluding the judiciary, which means that when deciding cases between individuals and private parties, they are not obliged to enforce the Charter. However, the courts have held that it applies to local government, some administrative tribunals and certain other institutions whose boards are Government appointed. A similar provision (but one which deals more effectively with the concern with contractors, but not privatised public utilities) appears in the Hong Kong Bill of Rights Ordinance 1990:

(1) This Ordinance binds only -

(a) the Government and all public authorities; and

(b) any person acting on behalf of the Government or a public authority.

(2) In this section - "person" includes any body or persons, corporate or incorporate.

12 As regards the UK, it is clear that the state should not be able to delegate responsibility to observe human rights through privatisation (Strasbourg has established, for example, that a Government is still ultimately responsible for actions within privatised prisons). The same issue arises in EC law directives, where it is possible to cover private bodies exercising public powers. The more difficult question is how much further the scope of applicability should extend in the direction of private bodies not acting in a Governmental capacity, given that it is currently possible to go to Strasbourg because of the failure of Government to legislate and challenge third parties indirectly through that action. In these circumstances, how should the issue be resolved by the domestic courts - would the right to effective remedy require that individuals must have a right against an individual rather than the State?

12 If it was considered preferable not to go beyond the scope of direct application at the international level, and impose obligations only upon the state, the ECHR's provisions should apply initially only to public authorities, together with an explanatory clause similar to that proposed by IPPR: perhaps appending a list, amendable by statutory instrument, of those bodies which as a result of the nature of their actions should be regarded as falling within the definition of public authorities. There would be no commitment to proceed beyond this point, but the desirability of extension to private bodies could be reviewed in due course - most logically as part of the development of a domestic bill of rights, and in the light of the developing Strasbourg jurisprudence in this area. But this runs the risk that the courts will, through their own interpretation of the existing provisions, provide for a wider applicability than may be intended.

Locus Standi

123 Complaints under the Convention can be brought to the European Commission of Human Rights by "a person, non-governmental organisation or group of individuals claiming to be the victim of a violation" (Article 25). Third parties (including pressure groups and campaigning organisations) cannot however bring cases in their own right. There is extensive case law regarding whom this description has been held to cover - including individuals, organisations and companies. However, it is for consideration as to who should be permitted to raise a challenge in national law under an incorporated ECHR:

- individuals and companies directly affected to their detriment?
- individuals who seek to vindicate the broader public interest in constitutional government?
- pressure groups whose cause is affected?
- representative interests whose interests are collectively disadvantaged?
- political groups whose ideology is contradicted by the Government's actions or legislation?

124 All of these categories would have an opportunity, in respect of legislation, to challenge at the stage of parliamentary scrutiny via their MPs and the standing committee. But this report are concerned here purely with *locus standi* in respect of judicial challenges. The courts have recently adopted a more liberal approach to *locus standi* in judicial review cases, allowing third party public interest cases to be brought by organisations such as Greenpeace and CPAG (albeit with some conflicting exceptions, one for an unincorporated interest group and the other concerning the legal capacity of an incorporated association). The Law Commission has actively paved the way for the judicial creation of the *actio popularis* by recommending that individuals otherwise not meeting the test of standing be permitted to bring applications for judicial review in cases where the court considers it in the public interest for the application to be brought. There have been calls for statutory confirmation of the standing of third parties. It would therefore seem logical that the tests for standing in human rights cases, which a *fortiori* are likely to be in the public interest, should be relatively liberal. One option would be to create a two track process (as recommended by the Law Commission): one approach for those whose rights had been personally affected; another broader approach for those seeking to defend a particular principle.

125 There are, however, likely to be some objections to permitting organisations and companies to bring cases in the domestic courts, on the grounds that "the resources of such organisations are such that their rights will dominate any new system to the exclusion of the individuals that a Bill of Rights is intended to serve."[61] This possibility reflects the experience of Canada where a number of large companies were the first to use the Charter of Rights and Freedoms in the courts, on occasion in ways which some have seen as detrimental to wider civil liberties.[62] However, the Canadian experience also shows how the courts themselves can do a certain amount to develop a more sophisticated concept of *locus standi* and of justiciability to ensure equality of access across the board. Those who advocate limiting rights to human persons as distinct from organisations also point out that most of those cases taken by corporate bodies that are of public importance could be taken by human persons (trades unions would be replaced by individual members of unions; newspapers by the journalist concerned; and so on) and that companies and organisations would retain the right to petition the European Court and Commission direct. However, the view that only individuals should be entitled to bring cases involving breaches of human rights has been rejected by Commonwealth courts in interpreting their own bills of rights. In addition, Article 1 of the First Protocol to the Convention

specifically says that companies, as well as individuals have rights - any restriction imposed domestically would therefore not fully incorporate the Convention. If the objectives are to ensure access to effective remedies through the domestic courts and/or to reduce the number of cases being heard in Strasbourg, limiting the exercise of rights in the domestic courts to individuals would fall short of achieving them. Rather than fetter the rights of some applicants, a more logical means of avoiding the misappropriation of possible legal remedies by the rich would be to ensure adequate mechanisms to enable the poor (and not so poor) to have effective access to the courts.

Filtering Procedures

126 In 1995, only 24 of the 203 decisions made by the Commission in respect of petitions against the UK Government were declarations of admissibility. This pattern is neither a recent phenomenon nor unique to UK cases - of the 25,947 petitions considered by the Commission between 1955 and 1995, only 2,834 (11%) were declared admissible. The reason for such large numbers of cases never reaching the European Court of Human Rights in Strasbourg is that applications must first pass an 'admissibility stage' which is the responsibility of the European Commission of Human Rights, applying the various conditions of admissibility set out in Articles 25-27 of the Convention. (These procedures will change following completion of ratification of the Eleventh Protocol, which authorises the creation of a single full-time court in place of the existing Commission and Court, and also introduces a number of other changes e.g. the right of individual petition will cease to be optional. But the criteria for admissibility will be unchanged, and the principle of using a filtering mechanism also remains.) One of the practical difficulties identified by the current Government in explaining its opposition to incorporation of the ECHR is the potentially adverse effect on the workload of the courts: "We could reasonably expect that, in innumerable challenges to action by public authorities, the Convention would be invoked. Each complainant reaching the courts would have to be tried by reference to the principles of the Convention but without the benefit of the initial screening process carried out by the commission which currently sifts out as unfounded a very large number of cases - in excess of 80 per cent."[63]

127 Filtering procedures similar to these admissibility hurdles have been adopted in respect of domestic rights instruments in some other countries. In Germany, for example, when the applications procedure to the Federal Constitutional Court was first devised, provision was made for regulating it by statute (in particular to require the prior exhaustion of other legal remedies). In recent years, an increasing number of procedural limitations have been devised both to amend the applications procedure for individuals alleging a breach of their fundamental rights and to restrict the criteria of admissibility, although with only limited success.[64] In the UK, there is no *technical* reason why filtering procedures could not be adopted in respect of human rights cases (although in order to define these any filter might be limited to direct challenges, rather than collateral challenges) within the domestic judicial system, if it was thought necessary to limit them in the interests of efficiency. Preliminary filters would also have the advantage of applicants avoiding the possibility of incurring costs if their cases had no prospect of success.

128 But it is important to bear in mind that no other Member State has adopted such a mechanism in relation to domestic enforcement of the ECHR; and the machinery and jargon of international

law is not directly transferable to the domestic context. The judgment as to the need for a filtering process would depend on:

- whether it is considered appropriate to introduce discretionary filters in a rights based system. It can be objected that "if one has a right, one is entitled to a procedure to enforce that right"[65] and access to the courts should not be determined by financial considerations. Human rights cases by their nature involve an attempt to assert a statutory entitlement and should not therefore be filtered out of the system without proper judicial assessment. Procedural hurdles should be introduced only if a problem emerges, not pre-emptively.
- the model of incorporation: if the ECHR were an interpretative tool only, the case for filtering mechanisms would be difficult to sustain; whereas if direct challenges to primary legislation were possible, it might be considered more appropriate to operate some initial filter.
- an assessment of the likely throughput and its implications for management of the judicial system. This is looked at in more detail in Chapter 6. For the current purpose, it is important to note that many of the cases that are filtered out by the Commission every year are cases that would not reach the courts in the UK because the applicants are not legally represented (applications to Strasbourg can and are made simply by writing a letter - no lawyer is required); because of the deterrent effect of the costs rule in the UK (which requires the 'loser' to bear the costs of the successful party); or because there is in fact no basis for proceeding under the ECHR.
- whether existing features of the domestic system are sufficient to limit the caseload. In respect of direct challenges through judicial review, there is already a leave procedure and the fact that the remedies available are purely discretionary also operates as a deterrent to some potential applicants. These features of the current system would continue to apply to judicial review cases that raised ECHR issues. Filtering procedures designed specifically to pre-empt ECHR overload would add to an already burdensome process for the aggrieved individual; equally it must be questioned whether such an approach is justifiable in terms of providing access to justice. A significant number of judicial review cases are dropped even after leave is granted, because of the costs disincentive. Of those that proceed, many are currently legally aided, with the average cost around £5,000-£10,000. However, under the new legal aid proposals, the cost may become a greater deterrent.

129 It should also be noted that - although they are rarely used - procedures already exist that provide for an action (or a defence) to be struck out by the court at an early stage in proceedings if either side successfully contends that there is no substance to the other's case. In sum, the weight of argument is against the introduction of domestic filtering mechanisms specifically designed to limit the number of judicial cases raising ECHR points. This assessment is reinforced by the fact that any new procedures that prevented applications to Strasbourg by making the exhaustion of domestic remedies over-burdensome may be considered a breach of the 'access to justice' provisions in Article 6 of the ECHR (although existing case law in relation to leave requirements in other jurisdictions indicates that most have been judged to be in compliance with the ECHR).

130 If, however, a filtering procedure *were* introduced it should clearly be based on questions of legal merit not judicial resources; and the courts should be required to give reasons for refusing an application. The broad and imprecise 'arguable case' style of test used in judicial review proceedings might have advantages over a shopping list of set criteria, enabling the court to be bold both in discharging a 'tenable but doomed argument' and in allowing an otherwise thin case to proceed where an important point of law may be raised.

Methods of Judicial Interpretation and Rules of Evidence

131 The European Convention on Human Rights must be interpreted according to the international law rules on the interpretation of treaties (in the Vienna Convention on the Law of Treaties 1969). The basic rule is that a treaty 'shall 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.' [66] The European Court of Human Rights has evolved a number of interpretative guidelines - notably those of proportionality, under which any restriction of rights must be proportionate to the legitimate aim pursued; and the margin of appreciation doctrine, which tends in the opposite direction, allowing signatory states a degree of latitude in their implementation of the Convention rights, reflecting the view that national authorities may be better placed to determine the most appropriate action in a given case, subject to a developing body of cross-national minimum standards.

132 The principle of proportionality is well established in the UK courts' application of European Community law, and there is an emerging debate about its applicability to judicial review. Some are opposed to its introduction, including Lord Irvine, the Shadow Lord Chancellor, who suggested in his recent lecture to the Administrative Law Bar Association that there is a "fundamental objection" to the use of the proportionality principle, in that it requires the courts to exercise a judgment that properly belongs to the legislature.[67] However, as Ben Emerson has pointed out, so long as the United Kingdom is a member of the Council of Europe, the proportionality test will continue to be applied to those British cases which reach Strasbourg. And Rolv Ryssdall, President of the Court has commented: "Where, as in many British cases, the applicant has not been able to plead before a domestic court on the same basis as under the Convention, the Strasbourg enforcement bodies are more likely to appear to be sitting as a court of first instance in relation to the Convention grievances...these are assessments which, in the first place, national judges are better placed to make, thereby allowing international judges to confine themselves to the more comfortable role of secondary review."[68] If one of the main purposes of incorporation is to provide effective remedies within the domestic legal system, then UK courts need to be able to apply the same tools of interpretation as the European Court of Human Rights.

133 As regards the margin of appreciation doctrine, some have argued that it would be irrelevant at a national level post-incorporation, as "it rests upon the European Court [of Human Rights]'s peculiar status as an organ of a treaty between states which retain full sovereignty."[69] However, the doctrine is not concerned exclusively with questions of cultural specificity, but also with protecting "the decisions of the member states' democratic legislatures." Even if the doctrine is not be transferred wholesale, it is likely that there will continue to be a role for the judicial self-restraint and deference which are the hallmarks of the margin of appreciation. How far the margin would extend might be left to judicial discretion or, it has been suggested, might be subject to legislative provision or practice direction. For example, the Lord Chancellor has recently suggested that "The extent to which [the] margin of appreciation is used...would have to be decided by our courts on the basis of a generally worded provision if the Convention were incorporated in our law."[70]

134 A further question is whether the UK courts should be bound by Strasbourg rulings - should "take judicial notice" of them - just as when an English judge is interpreting European Community legislation, the decisions and opinions of the European Court of Justice must be

followed. Some regard this as necessary to ensure harmonisation between judgments; whilst others would see in this a diminution of parliamentary sovereignty and a risk of eroding the margin of appreciation, as the evolution of interpretation at Strasbourg will usually be in one direction, towards greater protection of the citizen against the state and towards the more effective protection of rights rather than their diminution. Under the terms of the Convention, Strasbourg rulings are only binding in cases against the UK Government. Rulings in cases against other countries are persuasive but not binding on the UK. Moreover, it may not always be an advantage to take the decisions of the Commission and Court into account. Conforming with the relevant national legal tradition (rather than Strasbourg) may aid the process of establishing the Convention firmly in domestic law - a divergent interpretation would only be dangerous if it conflicted with the 'letter and spirit' of the Convention. [71]

135 However, although Convention rulings in respect of other countries might not technically be binding, to make a decision in the UK courts without reference to the relevant Strasbourg decisions could well result in that decision being overturned later. Therefore in practice, the courts do need to have regard to all Strasbourg rulings. There are, of course, likely to be few cases where all the facts of one case are identical to those of another. The incorporating statute could attempt a compromise: requiring courts to 'have regard to' the published judgments and decisions of the Strasbourg organs, without giving them the force of binding precedent. However, if the object of incorporation is to limit the possible number of adverse decisions at Strasbourg, it would clearly be preferable to make the Strasbourg jurisprudence binding. This would also have the advantage that, when the Strasbourg organs considered the judgments of the domestic courts in reaching their own view on a case, they would know that the decision of the domestic courts had been reached following full consideration of previous Strasbourg rulings.

136 It will also be important to establish other sources of guidance on interpretation. Any court seeking to determine whether legislation or public action contravenes the terms of the ECHR will usually require the party bringing the challenge to justify the claim by providing supporting evidence. This naturally raises the question as to the type and quality of material that will be needed. Courts are increasingly referring to precedents set by courts in other states, and not only in those observing the ECHR, but other countries with domestic bills of rights. The courts are also entitled in some situations to look to Parliament's intended purpose, by reference to Hansard.

137 It may be useful to look to the methods of interpretation employed elsewhere. In the Canadian courts, for example, they are many and various: reference is made to parliamentary records if necessary to assess the purpose behind the legislation in question; counsel are expected to undertake historical research; reference may be made to the wider international context drawing on relevant treaty material and decisions of international tribunals and consideration may be given to relevant legislation from other countries. The courts also insist that the Government in 'demonstrating' that the limits on a protected right are reasonable in a free and democratic society, produce relevant evidence - which might include the testimony of expert witnesses, reports of law reform commissions, and information of a more empirical nature.

138 This concept of the 'Brandeis brief' (a written submission including sociological and economic material to inform the courts of the broader public interests and implications involved in the issue being litigated) originated in the USA, where a brief may contain extensive social science

data in the form of books, articles, reports of committees, testimony before Congressional Committees, reports of state and municipal officers and agencies. The New Zealand experience suggests that the courts are required to make "policy trade offs between efficiency fairness and other individual and community values" and that in so doing, it is important that the courts have access to social and economic material to guide them.[72] There is, of course, an intrinsic concern about the presentation of such material as factual, without the opportunity to rebut or question it (and the presentation of conflicting briefs by both parties could lead to confusion rather than clarification). However, the utility of such material in the UK specifically in the context of the ECHR has been suggested by Lord Justice Henry:

> *"...if the Convention were to be made (or possibly held to be) part of our domestic law, then in the exercise of the primary jurisdiction, the court in, for it, a relatively novel constitutional position, might well ask for more material than the adversarial system normally provides, such as a 'Brandeis brief'. The Court could well appear to be taking too narrow a view if it hypothetically answered a difficult question on limited evidence."*[73]

Remedies

139 If the ordinary courts of law, or a specialist division of the ordinary courts of law, were able to consider questions of compliance as they arose in specific concrete cases they might be empowered to award the whole gamut of remedies currently available to the courts: declaration of the law; damages (including aggravated and exemplary damages); injunctions; specific performance of duties under the bill of rights; orders to quash a decision or act; and prohibiting orders. The incorporating statute could include a provision similar to that in the Canadian Charter of Rights, which provided for the successful litigant "to obtain such remedy as the court considers appropriate and just in the circumstances" or the courts could be prevented from using the full range of remedies by listing those permitted within the incorporating statute. The statute might at the very least protect in domestic law the important interim remedy which is available to those applying to Strasbourg under the existing system - staying the exercise of public power until the determination of proceedings. Technically, however, there is no obligation to include any reference at all to remedies in the incorporation statute - it could simply be left to the courts.

140 Article 5(5) of the Convention, which deals with the right to liberty, specifically requires the provision of "an enforceable right to compensation." Moreover, the European Court of Human Rights may award compensation as "just satisfaction" to an injured victim of a breach of the ECHR (and the European Court of Justice has held that Member States may be liable, under the EC Treaty, to pay compensation for damage resulting from a failure to implement a directive properly). Provision might therefore be made for a new cause of action in damages for breach of constitutional rights - effectively, a constitutional tort for a breach of statutory duty on the part of the public authority. One such tort already exists - for misfeasance in public office (and, in practice, others have been created through the courts giving priority to EC law; although discretion theoretically continues to exist, it is very hard for the courts not to grant leave or remedies).

141 The courts in other common law jurisdictions - including Canada, India, New Zealand, Ireland and the USA - have recently developed compensation as a remedy for such breaches; and the Judicial Committee of the Privy Council has held that the same is true of breaches of the

constitution in Trinidad and Tobago. Such a provision featured in Lord Lester QC's recent Human Rights Bill, but it proved controversial - many of the senior judiciary preferred to restrict remedies to those developed by the courts in judicial review. The Government also opposed the provision on the grounds that it would result in proceedings for compensation being initiated "every time someone disagreed with, say, a decision by an immigration officer or social worker..."[74] and the immediate past Lord Chief Justice argued that it would be preferable for the courts to develop their own discretionary remedies in such cases. The Treasury would also bridle at the prospect of public expenditure increases as a consequence of incorporation. Such concerns could be mitigated by limiting the applicability of such a tort to certain categories of non-compliance - for example, where the instance of non-compliance was deliberate or particularly gross - and through guidance to public officials on the implications of the Convention. There would inevitably be a period of time as case law was developed during which there might be a significant number of test cases.

142 Decisions about the range of permitted remedies will also need to reflect the practicalities of their operation. This is particularly the case in relation to the quashing of legislation (assuming such powers were available to the court under the incorporating statute). The European Court of Human Rights has recently held that the freedom of choice as to the means of fulfilling a State's obligations under Article 53 cannot allow the State concerned to suspend the application of the Convention while waiting for the necessary legislative reforms.[75] In cases of judicial review, the expectation is that the Government will ensure the law is complied with from the day of the decision, even where the Government proposes to legislate to overturn the court's decision, and if this is not done a further judicial review action can be brought to compel compliance. The courts also have a discretion to refuse a remedy if administrative chaos would result.[76] It seems desirable that the same principles should apply in ECHR cases. Indeed, any attempt by an incorporating statute to provide for an 'implementation period' during which the court's decision of breach was to be disregarded would be of dubious legality from the viewpoint of Strasbourg. It is worth bearing in mind that where necessary, Governments can act to change the law to ensure compliance in days or weeks. It is of course easier where the amendments needed are to secondary legislation or regulations, or where the necessary changes can be included in a bill already before Parliament.

Award of Costs

143 If there is an accepted public interest in rights litigation, it is important to look at why so many cases for judicial review fail to proceed because of the cost. In its 1994 report *Administrative Law: Judicial Review and Statutory Appeals,* the Law Commission proposed that the courts should have discretion to award costs out of central funds in public interest cases. Lord Woolf's 1996 report, *Access to Justice,* endorsed this recommendation but suggested that if it were not implemented, the courts should have a discretion not to order an unsuccessful party to pay the other party's costs, on the grounds that the proceedings had been brought in the public interest. No action has yet been taken to implement the Law Commission recommendation, but if it were to be accepted, there would be a strong argument for including at least some categories of cases involving ECHR issues.

144 However, there remains the concern that the uncertainty of the award of costs may reduce the numbers willing to embark on litigation. Possible ways of resolving this include:

- a Human Rights Commission offering financial support for litigation (see paragraphs 204-207 below).
- the courts being empowered to make a protective costs order at the start of a judicial review action so that bodies and individuals could decide to act without fear of being liable to unknown expense.

If these options are not considered and there is no change in the availability of legal aid, the effect of the current costs rules could be to make victims worse off as a result of incorporation, as they would be required to exhaust expensive domestic legal remedies before making an application to the European Commission of Human Rights.

Conclusion

145 Little substantial change in the operation of the legal system would be required as a direct result of incorporation of the ECHR. The ordinary courts and tribunals should be entitled to hear ECHR issues, in the same way as they can consider matters of EC law. No separate procedures or specialist jurisdiction is required. There should be the usual rights of appeal; and establishing the equivalent of the EC Article 177 reference procedure could enable a court to refer a novel point upwards for an advisory opinion. There is no need to establish a constitutional court. The House of Lords should remain the final court of appeal in all but Scottish criminal cases. The case for a Judicial Appointments Commission has been made separately, by the opposition parties and by bodies such as JUSTICE; but it is not a necessary concomitant of incorporation.

146 The incorporating statute should bind the government and all public authorities and private bodies exercising public powers. ECHR rights should be capable of being asserted by companies, pressure groups and interest groups, as well as by individuals. The First Protocol to the ECHR specifically says that companies have rights; and Commonwealth courts have rejected the view that only individuals should be able to bring human rights cases. There is no need for a special filter procedure to weed out unmeritorious cases. Most ECHR issues will be raised by way of collateral challenge in cases already before the courts. 'New' ECHR cases will be mainly by way of judicial review, which is already subject to a leave procedure. That existing filter, plus the disincentive of the cost of legal representation and the risk of paying the other side's costs, will provide sufficient protection.

147 The ECHR grants an enforceable right to compensation in Strasbourg. The incorporating statute could remain silent about the remedies available in the UK; or enable the courts to grant such remedies as they considered just. The Law Commission recommendation that the courts should have discretion to award costs out of central funds in public interest cases should be implemented, and additional means of securing affordable access to the courts should be considered.

Chapter 4

Pre-Legislative Scrutiny for Compliance with Human Rights Standards

"Opposition over many years to reforms designed to identify and remedy breaches of the European Convention on Human Rights may be grounded in a lack of willingness by Governments of all parties to take human rights seriously enough to avoid such conflicts. This requires political, not procedural resolution."

Michael Ryle, 'Pre-Legislative Scrutiny: A Prophylactic Approach to the Protection of Human Rights', *Public Law*, Summer 1994

Introduction

148 The public debate about enforcement of human rights legislation in the UK has focused largely on post-legislative enforcement mechanisms, and in particular on the role of the courts. The formal legal status of rights legislation and the courts' application of its provisions are, however, not the only mechanism for its protection. The enforcement of a bill of rights requires that systems are in place to identify and prevent possible abuses in advance of them occurring and, where they do occur, to provide *post facto* redress. A review of the mechanisms and procedures under our present arrangements is required to assess their adequacy for the task. The executive and Parliament (as well as independent bodies) can all play a role at different stages of the process. Only the active participation of all three branches of government will ensure the effective protection of human rights.

149 In looking for guidance as to the 'optimum enforcement system', there is little evidence as to the comparative merits and demerits of pre- and post-legislative methods of assessing the conformity of new statute law in a state with an enforceable human rights (or other constitutional) instrument. There are pros and cons in both. For example, assessment at the stage of parliamentary consideration of proposed legislation - as opposed to post-enactment judicial assessment - may make it cheaper and easier for aggrieved persons to take up issues of non-conformity through their MPs and with the Ombudsman rather than through the courts. It would also be preferable to resolve issues at the earliest possible stage; and integral review for compliance as part of the ordinary legislative process would also have the advantage of not depending on someone being willing to fund and fight a case. On the other hand, it is clear that a point of challenge may not be identified or raised until an individual feels aggrieved as a result of suffering a personal injustice, and thus the option of judicial assessment must be available at that point. Moreover, circumstances may arise following the enactment of legislation that could not have been envisaged during its parliamentary passage.

150 In the case of delegated legislation, the opportunities for challenge before it comes into force will be fewer than with primary legislation, as it has usually been made before Parliament sees it. It will depend in part on whether, in a particular case, there is a duty to lay before Parliament. In the case of most executive and administrative decisions, there is no requirement of formal parliamentary approval, but there may still be mandatory procedural requirements such as public advertisement, consultation, etc. which would provide an opportunity for challenge on human rights grounds.

151 This chapter considers in detail how other countries have instituted arrangements for enforcing fundamental rights prior to the enactment of legislation and considers the application of these enforcement models to the UK. The next chapter considers post-legislative enforcement mechanisms.

International Practice

152 In considering the effectiveness of pre-legislative mechanisms for enforcement (largely based on scrutiny systems) it is important to recognise that such procedures often stand alongside non-human rights specific procedures for scrutiny. Below, we consider the specific approaches adopted by different states in relation to what Michael Ryle has termed the 'prophylactic scrutiny' of legislation for compliance with human rights instruments. None of these are mutually incompatible.

Ministry of Justice

149 In both Canada and New Zealand scrutiny systems have developed alongside the introduction of human rights instruments. Both rely on a Ministry of Justice, but any finding of *prima facie* infringement of the rights legislation must be conveyed to Parliament. In Canada, the Minister of Justice is required to examine every bill to assess its conformity with "the purposes and provisions" of both the Bill of Rights and the Charter. A similar process is undertaken by the Clerk to the Privy Council in respect of secondary legislation. Where an inconsistency is found, an urgent report must be made to the House of Commons; but this has been extremely unusual in practice.

150 In New Zealand, there is a detailed and well publicised procedure for scrutiny within the executive before the introduction of legislation. The New Zealand Cabinet Office Manual sets down procedures for ensuring that legislation complies with legal principles or obligations, including the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and 'international obligations'. The compliance mechanisms include a requirement that Ministers offer an assessment of compliance both in bidding for the inclusion of a particular Bill in the annual programme of legislation and in subsequently submitting a draft Bill to the Cabinet Committee on Legislation and House Business (LEG). The Manual includes examples of the standard formats for legislative submissions. The texts are reproduced at **Appendix C.**

151 In addition, the Attorney-General is responsible for advising Parliament of any provisions which may be inconsistent with the Bill of Rights once a bill is before Parliament. This process raises a number of issues. First, on two occasions Parliament has decided to legislate in spite of a report by the Attorney General asserting inconsistency with the bill of rights (there have been six reports to date) so the power of deterrence cannot be said to be binding. This is not necessarily a criticism of the system. For example, in 1992 a law was passed relating to drink driving - empowering police officers to use passive breath sensors and breath screening devices. An initial assessment by the Attorney General that the new power was inconsistent with the Bill of Rights prompted others to make submissions disagreeing with this view to the select committee considering the bill. Parliament concluded that the legislation was justified given the likely benefits of the new legislation and the limited extent of the alleged interference in the relevant rights.[77] Second, it is not always clear how the courts should deal with legislation that has been subject to an Attorney General's report when it subsequently comes to be tested, as it cannot be assumed that Parliament **intended** to override the Bill of Rights because no specific vote is required to be taken on the Attorney General's report. Finally, there is an endemic problem in requiring one member of the executive to declare that legislation proposed by the executive is "not demonstrably justified in a free and democratic society."

Parliamentary Scrutiny Committee

152 Parliamentary scrutiny of proposed legislation is, of course, a feature of all democratic systems of government, thus providing an opportunity for considering questions of compliance with both domestic and international human rights instruments. However, in most countries, experience suggests that it is necessary to design the systems of scrutiny specifically to direct attention to such issues if they are not to be lost in a welter of other concerns, and partisan politics.[78]

153 David Kinley's extensive review of scrutiny mechanisms[79] suggests that perhaps the most effective of the overseas models is that in Australia, where the Commonwealth Parliament has established two special Senate Committees for parliamentary scrutiny of legislation - one for primary and one for secondary legislation. The responsibilities of the first include checking for compliance with fundamental rights (although Australia does not at present have a specific domestic rights instrument). The committee's legal adviser reports to the Senate initially immediately after publication of every bill, and the committee seeks an early response from Ministers. Specific adverse comments often result in amendments and preventative action is also taken before publication, as departments grow familiar with what the committee is likely to disapprove. Where the committee remains dissatisfied a further report can be made to the Senate during the main debating stages of a bill's passage. The secondary legislation committee also scrutinises legislation to avoid infringements of rights, but operates slightly differently because scrutiny can usually take place only after the instrument has been made and published. Ministers will sometimes refer draft legislation to the committee to avoid the humiliation of disapproval post-publication. Again the legal adviser plays a crucial role in selecting which instruments are scrutinised. Following publication, there may be correspondence between Ministers and the Committee, and if necessary a formal Notice of Disallowance can be moved in the Senate - a warning which almost invariably prompts the necessary action.

154 Both committees are held in high esteem largely as a result of their bipartisan reports and opinions. The credibility of the legal counsel responsible for advising each Committee is also important, although the fact that both are currently legal generalists rather than human rights specialists is now causing problems as questions of human rights observance have a high profile following signing by Australia of the Optional Protocol in 1991, allowing individual petitioning of the UN Human Rights Committee, and the recent activism in this area of the High Court of Australia. In addition to these two Committees, scrutiny committees for secondary legislation (each with a 'rights and liberties' term of reference) exist in all of Australia's eight other jurisdictions; and scrutiny committees in respect of primary legislation, which to varying degrees scrutinise for human rights compliance, operate in three of these eight jurisdictions.

Independent Legislative Advisory Committee or Commission

155 Independent scrutiny specifically for compliance with human rights standards is undertaken in the Netherlands, where the Council of State vets legislation. Their advice is appended to the bill as it travels through the parliamentary process and is certainly relied upon in the debates. It is, however, difficult to judge to what extent this advice is reflected in amendments made to the legislation.

156 In addition to this human rights specific model of independent pre-legislative scrutiny, there are some more generic systems of independent scrutiny. In New Zealand, for example, the independent but official Legislative Advisory Committee has been influential in promoting guidelines to improve law-making, including the need for legislation to reflect an adherence to principle in both process and content. The Committee plays an increasingly important role in advising Departments at an early stage of preparing legislation. Similarly, the French *Conseil Constitutionnel* was established in 1958 to scrutinise primary and secondary legislation, prior to their promulgation, in order to ensure consistency with the Constitution and its statement of *Droits des L'Hommes* (although it does not in fact ensure compliance specifically with the ECHR). All 'organic' laws are automatically scrutinised. In addition, the *Conseil d'Etat* provides

a rapporteur to scrutinise every draft law in detail; to submit recommendations to the General Assembly; and to return a revised text to the lead Department. However, the *Conseil d'Etat* is not in any sense a judicial body, but part of the executive. When draft laws are submitted to Parliament they are further scrutinised by a Parliamentary Commission and a second rapporteur attached to the Commission. Amendments may be put forward at this stage.

157 An alternative source of independent scrutiny at the pre-legislative stage is a Human Rights Commission, as in Australia and New Zealand - although in both cases, legislative review is not the body's primary function. Both have relatively limited influence in practice. In Australia, the Human Rights and Equal Opportunities Commission has an independent proactive power to review, but scarce resources often effectively prevent it undertaking this role in a way materially different from other quangos and NGOs which may comment on legislative proposals during their parliamentary passage. In New Zealand, the Human Rights Commission reports to the Prime Minister and has only been allowed to publish its advice since 1993, when the prohibition on publication established by the Human Rights Commission Act 1977 was repealed. Accordingly, both have in the past generally been regarded as ineffectual - to the extent that on one occasion the Australian Commission's advice to the Government that certain provisions were likely to infringe the ICCPR was ignored, and the legislation was later ruled to be invalid by the High Court. However, the development of more genuinely independent procedures such as those recently introduced in New Zealand could yet make these processes more effective.

Current UK Practice and Precedents

158 Policy responsibility for human rights issues within Whitehall is currently dispersed between a number of different departments. Each Whitehall department is responsible for policy and action in respect of its own particular areas of human rights; thus the Department of Health leads on the UN Convention on the Rights of the Child; the Department of Employment and Education on CEDAW; and so on. Overarching this, the newly created Constitutional Unit in the Home Office has responsibility for domestic human rights issues; whilst the Human Rights Policy Department of the Foreign and Commonwealth Office maintains overall responsibility for international obligations. There is informal co-ordination between concerned departments, but no Cabinet Sub-Committee or official cross-departmental committee. In addition, devolved departmental responsibilities exist in the Welsh Office, Scottish Office, and Northern Ireland Office. Within each department, the legal advisers have responsibility for the provision of specialist advice to officials and ministers on rights issues, especially in relation to legislation; and across Whitehall, the Foreign and Commonwealth Office is responsible for co-ordinating the Government defence in Strasbourg cases, operating in part as a 'postbox', but also offering a powerful source of advice to other Departments.

159 The first stage of pre-legislative scrutiny is within Whitehall. In the case of bills presented by the Government, and others where the sponsors have been given drafting assistance, the bills' compliance with the ECHR should have been checked by the policy division in the sponsoring department and Government lawyers, including Parliamentary Counsel and, in particular, FCO lawyers. Secondary legislation is prepared inside Departments, without reference to Parliamentary Counsel. These scrutiny arrangements are a necessary part of pre-legislative enforcement.

160 Aside from this process, pre-legislative scrutiny of legislation in the UK is almost exclusively the preserve of Westminster. There is no cross-departmental watchdog within Whitehall at this stage, nor do Parliamentary procedures allow for the taking of external views (except on the rare occasions that special standing committees are used). Even within Parliament, issue-specific scrutiny is rare, although distinct procedures have been devised in relation to certain categories of legislation and specialist committees have been used to consider questions of legislative conformity to specific standards: the Deregulation Committees, Joint Committee on Statutory Instruments, Delegated Powers Scrutiny Committee, etc. The various overseas models of scrutinising legislation for compliance with human rights standards are not mirrored by what currently happens in the UK Parliament.

UK Practice Following Incorporation

Whitehall

161 The current administrative arrangements rightly reflect the current Government's reactive approach to the development of human rights. When an issue arises - say, a case is taken to Strasbourg - it is easy enough to pinpoint the department responsible for policy on the matter at hand. But any Government intending both to incorporate the ECHR and then to develop a domestic bill of rights would need to have in place more rigorous co-ordination arrangements - in the first instance to support the passage of legislation, and thereafter to manage the process of consultation on a domestic bill of rights and to monitor the implementation of the incorporation of the ECHR. The current inclination for Ministers and Whitehall to regard international human rights obligations as distinct from domestic human rights obligations cannot easily be sustained after incorporation of the ECHR into domestic law.

162 In many countries, responsibility for promoting and protecting human rights would fall naturally to a Ministry of Justice. A department along these lines - bringing together parts of the current Lord Chancellor's Department, the Law Officers, Home Office and FCO - has been proposed by the Liberal Democrats, and previously by the Labour Party (although the most recent policy papers appear to have dropped the idea). An alternative would be a Cabinet Sub-Committee, supported by a shadow official-level group responsible for departmental co-ordination, similar to the existing Sub-Committee on Women's Issues. But Committee structures are less effective at driving a programme of reform and ensuring cohesion; they tend not to be initiators. In fact, the key to successful implementation of an incorporated ECHR within Whitehall will be to make it part of the responsibilities of a senior Cabinet Minister - so that ultimate responsibility can be pinned on an individual, rather than dispersing responsibility amongst a Cabinet Sub Committee of junior Ministers.

163 In parallel, the respective roles of the FCO and domestic departments would certainly need clarification following incorporation to eliminate the problems arising from division of responsibility and the creation of a clear motor in one of the central departments, probably the Cabinet Office or FCO, to drive the enforcement culture. This unit might operate in a similar way to the Efficiency Unit, Next Steps Team or Citizen's Charter Unit in the Cabinet Office in promoting a cultural change within Whitehall; it would co-ordinate training and collation of statistics, offer advice to departments and possibly provide clearance for Government

involvement in litigation (currently the responsibility of the FCO). It might also develop proactive policy guidance for the furtherance of the protection of human rights standards, and evaluate the operation of enforcement systems.

164 Over the last decade, pre-legislative scrutiny of bills within Whitehall has become more systematic and has focused particularly on confirming compliance with the ECHR. However, concerns have been repeatedly expressed at the lack of transparency and the frailty of these procedures. Some have seen in the improvement of the system of internal pre-legislative scrutiny the key to reducing the number of judgments against the UK at the Commission and the Court. As the forthcoming IPPR report *Scrutiny and Accountability: Democratic Compliance with Human Rights Standards* suggests:

> *"Whilst it may be that within the administration 'Strasbourg proofing', as it has been called, has been undertaken since 1987 to prevent interferences with human rights, the recent Commission decisions suggest this to be inefficient. Furthermore, there is no real evidence that 'Strasbourg proofing' includes all international human rights instruments ratified by the UK. What can also not be disputed is that this proofing process is opaque, for which there is no justification. Even Parliament is not informed that measures which it may enact could impact on human rights standards and consequently bring the House into disrepute."*

165 The difficulty in ensuring effective 'Strasbourg proofing' is that by the very nature of many human rights instruments (their deliberately broad and unspecific wording; the fact that their interpretation should change over time in response to changing social and political circumstances) it is impossible to give an authoritative ruling on whether a particular proposal would be found, in due course, to breach international agreements. This is no less true of the ECHR; especially given that the European Commission on Human Rights and the European Court of Human Rights may themselves disagree on whether or not a Government has breached the Convention in any given case. The departmental legal advisers will therefore only be able to give an assessment of the likely outcome, based on previous Court and Commission rulings and, to some extent, attempt to anticipate the development of the Strasbourg jurisprudence - but their advice cannot be definitive. Moreover, given that any proposal is only under consideration in the first place because there is some political will behind it and/or public pressure, the judgment about whether to press ahead will be based only in part on the legal assessment. This is certainly not unique to the UK; in Canada, for example, commentators have observed that (even after the introduction of the Charter of Rights and Freedoms) there was a separation between 'policy' and 'legal' matters in the policy making process, with policy considerations dominant.

166 Finally, although the systems for scrutiny are in place, the criteria are not necessarily designed either to protect rights or to avoid litigation. There is effectively a presumption of innocence on the part of the Government. Thus, the question posed within Whitehall is not usually 'can we be absolutely sure that this provision is fully in compliance with all our international obligations?' but rather 'if it gets to court, do we have a reasonably solid argument to put up in support of our claim that this provision is in compliance?' (a more defensive approach).

167 In addition to a possible change in the criteria against which prospective legislation is judged, there may be advantage in an explicit requirement to make an assessment prior to Cabinet consideration of the future legislative programme. The standard forms submitted by Departments to the meetings of the Future Legislation Committee would then be required to give an indication at this early stage of whether questions of compliance will arise, along the lines of

the compliance cost assessment for business that is currently required and used as a factor in determining whether to proceed and the procedure followed in New Zealand (see Appendix C). Of course, such an assessment would not always be feasible as questions of compliance often arise from the detail rather than the central features of a policy.

168 Suggestions have been made that Parliamentary Counsel could be asked to certify that all reasonable steps have been taken to ensure compliance. But this has few attractions. First, Parliamentary Counsel are not the human rights experts in the chain of civil servants involved in preparing legislation - that responsibility lies with the FCO legal advisers. In addition, such 'certification' would have doubtful legal status, might well be regarded as an affront to the professional integrity of the Government lawyers and - not least - smacks of Ministers wriggling out of their personal accountability to Parliament. If certification is desired, the responsibility might more appropriately fall to the Attorney-General. However, it should be recognised that the process of checking for compliance with human rights standards should not start when the legislation is being drafted, but should be an integral part of the earlier stages of determining policy aims and objectives. Moreover, any central scrutiny for compliance should not absolve Government departments of their primary responsibility, and their need to develop internal expertise and understanding.

169 Most important of all in terms of ensuring effective Whitehall scrutiny will be the knowledge that there will be a definite parliamentary check on compliance; as has been seen in respect of European legislation, it is the threat of having to explain oneself to an expert committee induces a significant degree of caution in Ministers and civil servants. The process could also be improved by mechanisms, such as the provision of a 'human rights impact statement' published to accompany each bill, designed to make the process less opaque so that Parliament and NGOs can check that it is operating as it should.

Independent Assessment of Compliance

170 The experience of other countries suggests that much would depend on the attitude of the Government as to whether a formal requirement for independent pre-legislative scrutiny (akin to that undertaken elsewhere by Human Rights Commissions or other bodies) would be effective in practice. Because of its novelty and extra-Parliamentary status, an independent body might not hold the same sway over Government as a parliamentary committee report. A requirement to scrutinise all legislation for compliance would also place an enormous burden on a single Human Rights Commission, and would require significant resources to work effectively. Other priorities might well be identified (see paragraphs 203-208). A more workable alternative might be to increase the number of bills published in draft i.e. prior to their formal introduction to Parliament. This is slowly becoming more common, and the Prime Minister has recently proposed the preparation each year of "not only detailed proposals for the Queen's Speech covering the next Session, but provisional plans for what would be in the Speech after that. This would give Departments the opportunity to bring forward detailed proposals including, in some cases, draft Bills, for consultation in the year before actual legislation was brought before Parliament."[80] The publication of bills in draft would certainly be beneficial in providing an opportunity for parliamentarians and others to raise issues of compliance at a stage when changes to the bill are more likely to be accepted than during the partisan process of parliamentary enactment. A Human Rights Commission could add its weight to press the Government to make changes and the Government could be required to provide a reasoned answer to any major objection on human rights grounds.

Parliament

171 The case for more effective scrutiny of legislation within Parliament is one that has a general application. A range of proposals exists for improving consideration of public bills. [81] But few of these suggestions have yet been taken up, nor do radical changes appear likely in the short term. Moreover, a significant number of bills (especially those dealing with complex issues that might well involve question of human rights) go to Parliament in an incomplete form, which both the Government and the drafter know will require alteration during its passage through Parliament, thus undermining the value of scrutiny. It would certainly be unwise to rely on a general reform of parliamentary or wider legislative procedures to provide the vehicle for enhancing scrutiny of legislation for compliance with the ECHR.

172 However, there is a particular appeal to the Government in propositions for more effective scrutiny to protect against legislation contravening - inadvertently or otherwise - the provisions of the ECHR, as this would ensure that inconsistencies were tackled before they gave rise to court cases. In the context of incorporation of the ECHR, it also provides a legitimate role for Parliament in the enforcement of human rights, alongside the courts.

173 There are several ways in which scrutiny for compliance could be undertaken:

- ensuring that standing committees give special consideration to questions of compliance.
- increasing the use of special standing commissions or other open-access machinery for pre-legislative scrutiny.
- the establishment of a specialist committee or the extension of the powers of an existing committee (specific proposals have included a new Joint Committee of both Houses; or an extension of the role of either the Delegated Powers Scrutiny Committee or the Joint Committee on Statutory Instruments.)
- relying on the Law Commission, or a Human Rights Commission, to offer expert independent advice on compliance.

174 These options are considered in more detail below. Their likely effectiveness and efficiency are assessed against the following criteria: the track record of these bodies; their expertise; the time they have available to undertake scrutiny; the stage at which scrutiny would take place (working from the assumption that the later in the process, the more difficult it is to effect change). It is also worth recording Michael Ryle's view that "Parliamentary reform is usually most successful when it builds on established procedures. Whatever solution is adopted, it should involve minimum constitutional or procedural innovation."[82]

Options for Parliamentary Scrutiny

175 All non-constitutional bills are referred to a standing committee for committee stage in the House of Commons; 'first class constitutional' measures are referred to a Committee of the Whole House; as are all bills in the House of Lords. Were no special procedure device established, these standing committees and committees of the whole House could undertake scrutiny of bills for compliance with the ECHR in the course of their ordinary examination of a bill. However, standing committees have in the past paid little attention to questions of ECHR compliance (even where a bill obviously raises such issues, as with the Criminal Justice and Public Order Act 1994); in part because members of such Committees are not required to be specialists in either the subject of the bill before them or in human rights, and in part because there is neither specialist advice nor external evidence available to such Committees. The

attention of Standing Committees could be focused on compliance through the inclusion in every bill of an equivalent to the existing requirement for a financial memorandum; but for all the reasons above it must be open to question whether standing committees are best equipped or follow the procedures necessary to fulfil such a role. Neither would this provide a mechanism for assessing the compliance of secondary legislation which is not considered by standing committees; separate arrangements would need to be made (probably in extending the terms of reference of the Joint Standing Committee on Statutory Instruments, which already advises on the *vires* of secondary legislation).

176 As noted above, one drawback of using Standing Committees is the lack of opportunity for formal input to the proceedings by outside interests. However, the House of Commons Standing Orders already provide for special standing committees, which are essentially a mixture between a select committee and a standing committee. These committees can take oral and written evidence, holding not more than three morning sittings in public and one in private during the 28 days after the committal of a bill. Once its deliberations are complete the committee reverts to working like any other standing committee. They were formally established in 1986, but had been used occasionally in previous Sessions since their first introduction in 1980. From the, albeit limited, experience of special standing committees they appear to demonstrate the valuable role of consultation and informed scrutiny in improving the quality of legislation, and to engage politicians' interest more effectively than the normal standing committee procedure (which almost invariably splits down party lines where a vote is taken).[83] The real advantage of special standing committees is that through the evidence sessions, they allow for some direct input from affected individuals and organisations to the legislative process.

177 However, to date, there has been very limited use of special standing committees - and this procedure has never been adopted for any controversial measure. Part of the reason for their limited use to date is that they prove more uncomfortable for the Government than the usual standing committee procedures. In addition, they tend to take up more time than ordinary standing committees. Under the present arrangements at least, their use is at the discretion of the Government or the 'usual channels' and cannot therefore be regarded as a reliable scrutiny mechanism. It is conceivable that they might be more regularly used under a different Government, or as a result of a more wide ranging review of parliamentary procedure. A Government could, for example, indicate that it would be prepared to use this procedure (instead of the usual standing committee) where questions of compliance with the ECHR had been highlighted during separate consideration by a human rights-specific scrutiny mechanism. The other main objection to their use as the sole means of scrutinising legislation for compliance is that in most bills issues relating to human rights would represent only a small part of the concerns about the legislation. There can be no guarantee that the evidence taking process would concentrate on human rights issues.

178 An alternative would be a select committee. Either House can commit a bill to a select committee or to a joint committee of both Houses at any time in between the Second and Third Readings. This could be done for part or all of the bill, and would probably go to a specially created committee rather than one of the existing departmental select committees. Referring a bill to such a committee is in effect putting it on hold - but it would be possible for a Government to send only part of a bill to a select committee or joint committee, especially if the bill were drafted in such a way as to facilitate the division of clauses in this way.

179 It would be possible either to build on existing committee structures or to create a new committee which might include members of both Houses. A proposal for the Delegated Powers Scrutiny Committee to take on scrutiny of legislation for compliance with the ECHR (even without incorporation) was put forward by the Lords Simon, Alexander, Irvine and Lester in July 1994. Recognising that resources for committee work are limited, they advocated devising "a structure which builds on existing procedures and committees." They also pointed out that when the Jellicoe Committee first recommended the appointment of the Delegated Powers Scrutiny Committee, it also recommended that the Committee might in due course widen its remit to include questions of compliance with human rights. However, in 1995, the House of Lords Liaison Committee concluded that: "The committee does not recommend that the House should conduct the form of scrutiny proposed at the present time. We will invite the Delegated Powers Scrutiny Committee to reconsider the proposal when the impact of deregulation orders on its workload has become clearer."[84]

180 Despite this effective rejection, the proposal for a committee tasked with scrutinising legislation for compliance with human rights standards has recently been revived by IPPR and continues to attract support amongst peers. The question then is whether such a body should act alone, or should be complemented by an equivalent body in the Commons. A third option would be to establish a new joint committee, as the opinion of a specialist human rights committee may well have more impact if it involves members of the Commons, and this would also guarantee scrutiny of human rights issues at an earlier stage (given that most important bills are introduced in the Commons, not the Lords). A Joint Committee of the Houses might include the members of the Delegated Powers Scrutiny Committee, and links would need to be established with the House of Commons' Select Committees on Home Affairs and Foreign Affairs.

Parliamentary Scrutiny in Practice

181 Whether pre-legislative parliamentary scrutiny for compliance is undertaken by a new joint select committee, or by an existing select committee with expanded terms of reference, there are a number of questions requiring resolution. These are considered in turn below. The analysis assumes that secondary legislation would be considered by the same committee as primary legislation, but as an alternative it would be possible for the terms of reference of the Joint Committee on Statutory Instruments to be extended to include non-compliance with the ECHR as a further ground on which to report in relation to subordinate legislation. It is likely that practice would conform closely to that established for existing non-departmental select committees.

183 What would be the committee's terms of reference? They would need to specify:

- the scope of the committee's remit: to cover both primary and secondary legislation and to specify whether every document in these categories should be examined.
- the nature of the committee's responsibilities: these would clearly include the examination of primary and secondary legislation for compliance with the ECHR (and ideally other human rights instruments by which the UK is bound. It might also include: monitoring of Government responses to international conventions and other human rights commitments and auditing the policy output on discrimination issues currently spread across at least three Whitehall departments. It is also for consideration whether the committee would have a role in adjudicating on questions of legislative override (see paragraphs 86-87 above).
- the extent of the committee's powers: whether the committee had powers to call for 'persons, papers and records'; whether it may require a Government department to submit explanatory memoranda; and conversely whether a department must be allowed an opportunity to submit such a document before the committee reports on it. Also, whether members could be co-opted and sub-committees established.

183 Who would identify legislation as having an impact on human rights issues in order to refer a bill or an order to a select committee ? In respect of 'money bills', it is the Speaker of the House of Commons who has responsibility for certification; and it is conceivable that a similar arrangement could be instituted in respect of 'human rights bills and orders'. It would certainly not be appropriate for the Government to be responsible itself for identification of rights issues. However, it is likely to be more difficult to identify whether a bill or order raised human rights issues than to identify a money bill; the Speaker would certainly need the advice of Speaker's Counsel. The office of the Speaker's Counsel might accordingly need to be expanded by the inclusion of an adviser with a knowledge of ECHR jurisprudence. The closer parallel appears to be with the procedure for the Delegated Powers Scrutiny Committee, which considers each bill as it is going through the House of Lords and draws the attention of the House to provisions which it considers "inappropriately delegate legislative power; or ... subject the exercise of legislative power to an inappropriate degree of Parliamentary scrutiny." The initial sifting need not be undertaken by the specialist committee itself, but could be left to its advisers. For example, the Joint Committee on Statutory Instruments is advised by Speaker's Counsel (of whom there are two, usually former Government lawyers), and Counsel to the Lord Chairman of Committees, who examines all instruments laid before Parliament and draw the committee's attention to those which appear to merit further consideration.

184 With what expert guidance would the selector and the committee operate? Usually, select committees have their own permanent staff and have power to appoint specialist advisers. Some committees have particular requirements - for example, as noted above, the Joint Committee on Statutory Instruments is advised by Speaker's Counsel and the Counsel to the Lord Chairman of Committees; the Select Committee on European Legislation has three full-time specialist staff, in addition to its clerk and other support staff and may also be advised by Speaker's Counsel. A new Joint Select Committee would need a similar complement of advisers. The number of legal and non-specialist staff would depend on the extent of the committee's additional responsibilities e.g. for undertaking inquiries and research. If responsibility for assessing compliance lay with an existing committee or committees, it would be appropriate to provide a specialist human rights lawyer in addition to any existing staff.

185 Would the Committee automatically have a Government majority? The current practice is for non-departmental select committees in the House of Commons to have a majority of Government members, with the official opposition party taking most of the other places. In the Lords, the presence of the crossbenchers makes allocating party representation more difficult. There are a number of parliamentary committees whose chairmen are traditionally members of the official opposition party - the Public Accounts Committee, the European Legislation Committee and the Joint Committee on Statutory Instruments. There would certainly be a case for extending this tradition (perhaps by way of standing orders) to a new joint select committee. The selection of other members of the Committee from the House of Commons would, following the usual practice, be significantly influenced by the views of the respective Party Whips: it would be difficult to avoid this unless a wider reform of the selection procedures were proposed; but the impact would be mitigated by the presence of the traditionally more independent-minded members of the House of Lords.

186 At what stage in the legislative process would the committee give its consideration to a bill? In the 1970s, SACHR dismissed the idea of a parliamentary committee charged with scrutiny because it considered there was no practical scope for a new scrutiny stage "because of the

undue strain which it would impose on a Parliamentary machine which is already under great pressure." However, arguments of parliamentary pressure are not insoluble, especially if the normal parliamentary timetable is disrupted as little as possible. The proposal put forward by Lords Simon, Alexander, Irvine and Lester in 1994 envisaged that the Delegated Powers Scrutiny Committee would report to the House in respect of primary legislation before the beginning of the committee stage in question. The most appropriate time for referral might be after Second Reading and before committee stage in whichever House the bill was first introduced. This would enable concerns to be flagged up for more detailed consideration during committee stage. If this is considered too late in the legislative process to enable real changes to be effected, it would be possible for the committee to scrutinise legislation between the time when a bill is introduced and it has its Second Reading. In respect of delegated legislation, this would be considered at the same time as it is under consideration by the Joint Committee on Statutory Instruments (whether considered by that Committee, the Delegated Powers Scrutiny Committee or by a Joint Committee on Human Rights).

187 By how long would this extend the timetable for the passage of a bill? Any additional legislative scrutiny will need to be matched by measures to ensure that the parliamentary programme is not unduly delayed. In the House of Commons in particular, the time available for legislation imposes a major constraint on the Government. The amount of time any Government has to deal with all of its programme bills (normally between 50 and 60 measures of greatly varying complexity and length) on the floor of the House of Commons is limited to around sixty days in every Session, given that time also has to be set aside for Opposition Days, Estimates Days, Service Debates, and so on. As the Constitution Unit's report, *Delivering Constitutional Reform,* showed, this means that the Government has only around 400 hours on the floor of the House of Commons in any given Session to get all of its legislation through Second Reading, any committee stages taken on the floor of the House, Report and Third Reading and Lords amendments. It would be difficult for an automatic additional stage of scrutiny to be introduced without making changes to the arrangements for timetabling of bills; and there would be merit in considering these changes as part of a wider review of procedure, leading to automatic advance timetabling of all bills; which would ensure that all parts of a bill were looked at and minimise incentives for filibustering. The application of time management procedures to certain categories of bills may prove to be more acceptable than automatic timetabling of all bills. For example, the Procedure Committee report of 1985-86 recommended that bills need only be subject to timetabling procedures where they were expected to take more than 25 hours in committee - and that timetabling for Report and Third Reading would take place only where the Whips could not agree. This sort of fallback scheme has some attractions, in that it allows the 'normal procedures' to be tried in the first instance, and provides for an alternative to a Government imposed guillotine if they fail.

188 What would the committee's output be? The committee might be required to report regularly to Parliament, but the main requirement would be to ensure that reports on bills and draft orders were available to the committee responsible for their more general consideration, and certainly for any debates on the floor of the House. Reports of issue-based inquiries, and specially commissioned research, might also be produced; but there is already very limited time available to debate select committee reports (and sparse attendance by non-committee members at those debates that do happen). The decision as to the balance of priorities would rest with the committee itself and would certainly need adjustment over time.

189 Would the committee's recommendations be binding or advisory? As regards the committee's views on legislation not yet enacted, Michael Ryle has pointed out that "it might be argued that, if the Committee had no formal powers of disallowance or amendment, the dog would have no teeth and could happily be ignored by the Government... [but] this is to underestimate the influence of publicity."[85] The power of publicity in circumstances where the committee is offering a view prior to enactment may well be sufficient to deter the Government from proceeding as originally proposed - although much would depend on the committee's credibility and status. And the question certainly requires further consideration in respect of the role proposed by Liberty for the Committee in advising Parliament on whether legislation **already** enacted (and held to be in conflict by the courts) should override the ECHR.

190 The Liberty model suggests that the committee would, in the first place, require a two-thirds majority in support of its decision to allow it to proceed to the next stage. If two thirds took the view that the provision was, in fact, in compliance, the legislation could be re-enacted with an express declaration protecting it from further judicial repeal if approved by a simple majority of both Houses of Parliament during its passage. If two thirds of the committee took the view that the courts had rightly concluded that a particular provision was non-compliant, the Government could still seek to re-enact it with the inclusion of a notwithstanding clause.86 Any parliamentary committee charged with decisions on the validity of legislation would also need to have regard to the Strasbourg case law, but could not be limited by it. A decision by Parliament to go against the ECHR, taken in full knowledge of existing case law could be challenged at the Strasbourg Court, who could adjudicate on the validity of the action. It must be right that any committee can only have an advisory influence; any other approach would create an unusual precedent in terms of parliamentary procedure and (by severely limiting the number of parliamentarians able to express a view) serve to undermine the very purpose of the committee - providing a democratic voice in the assessment of the compliance of primary legislation.

Conclusion

191 A range of 'prophylactic' measures should be employed within Whitehall and Westminster in order to ensure compliance with the ECHR and to complement the *post facto* judicial enforcement undertaken by the courts. None is a strictly necessary consequence of incorporation of the ECHR, nor is any one an infallible means of avoiding or limiting the number of breaches of the ECHR. But taken together, these measures could help significantly to reduce the risk of reckless and inadvertent breaches of the ECHR in legislating and in policy making. As Geoffrey Palmer (former Minister of Justice and Prime Minister of New Zealand) pointed out, in commending a Bill of Rights to New Zealand in 1985: "In practical terms, the Bill of Rights is a most important set of messages to the machinery of Government itself. It points to the fact that certain sorts of laws should not be passed, that certain actions should not be engaged in by Government. In that way, a Bill of Rights provides a set of navigation lights for the whole process of Government to observe." The proposals made in this chapter are summarised below:

- **before presentation of draft legislation:** the compliance of proposed primary legislation with the ECHR is always checked by the policy division in the sponsoring department and Government lawyers, including Parliamentary Counsel and, in particular, FCO lawyers. Secondary legislation is prepared inside Departments, without reference to Parliamentary Counsel. Effective compliance with these procedures should be actively promoted by a central Whitehall department, building on existing arrangements. In addition, publication of bills in draft should become a regular feature of the legislative process in order to provide an opportunity for parliamentarians and others to raise issues of compliance at a stage when changes to the bill are more likely to be accepted than during the partisan process of Parliamentary scrutiny. External bodies (including a Human Rights Commission if established) should be entitled but not required to offer detailed views on compliance at this stage. Human rights impact statements should be produced by Departments before Cabinet consideration of proposals for legislation and, where appropriate, published to accompany bills.

- **after presentation of draft legislation:** an opportunity should be found for Parliament to scrutinise primary and secondary legislation in relation to compliance with the ECHR, and ideally in relation to other human rights standards. This should be a process separate from the existing standing committee system. It could be the responsibility of the existing Delegated Powers Scrutiny Committee in the House of Lords, or by a new Joint Committee of both Houses of Parliament. Bills should be referred to the committee at an early stage in their parliamentary passage - certainly before committee stage. Any additional legislative scrutiny will need to be matched by wider arrangements for timetabling of bills to ensure that the legislative programme is not unduly delayed.

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Chapter 5

Enforcement of Human Rights Legislation Outside the Courts

"British politicians have no profound belief in natural law...
If we don't like a law, we just change it."

Richard Crossman, *Inside View*, 1972

Introduction

192 This chapter looks at the possible means of promoting compliance with the ECHR following the enactment of legislation - both specifically in relation to the provision of remedies for breaches and more generally in relation to the promotion of a 'culture of compliance'. As in the last chapter, a critical decision is how to balance the powers of the executive, legislature and judiciary in such a way that they are complementary, rather than competing.

International Practice

193 Systematic post-legislative enforcement of human rights standards outside the judicial system is understandably less common than pre-legislative scrutiny procedures. At this stage, enforcement is usually seen as being **primarily** the responsibility of the courts. But in many countries, an independent body also plays an important role in the process of post-legislative enforcement, not only in monitoring and reviewing the operation of legislation, but also in fulfilling a range of other more specialist functions. Canada, Australia, South Africa, New Zealand and most EU countries have established Human Rights Commissions with varying degrees of power and responsibility. In fact, there are few major countries with a bill of rights that do not also have a Commission - one notable exception is Hong Kong, where many commentators have identified the absence of such a body as a significant factor in undermining the impact of the 1991 Bill of Rights Ordinance.[87] Many of the smaller Commonwealth countries also do not have Human Rights Commissions. Some countries have established Human Rights Commissions as an alternative to introducing a domestic bill of rights - as in Australia; and the Standing Advisory Commission on Human Rights in Northern Ireland has attempted to fill the gap left by the absence of a judicially enforceable human rights instrument in this part of the UK.

194 There are many different models for a Human Rights Commission. The Danish Centre for Human Rights, for example, has no statutory function, but 90% of its funding comes from Parliament. It is widely regarded as a centre of excellence which advises Parliament and has the trust of both Parliament and the Government. The Australian Human Rights and Equal Opportunities Commission, on the other hand, is a large and powerful permanent independent statutory body with responsibility for key rights and anti-discrimination legislation. Although its comprehensive remit might suggest it as an optimum model, in practice it has faced a number of problems in prioritising its limited resources. The Constitution Review Group established by the Irish Government in 1995 has reviewed the operation of a range of Human Rights Commissions in other countries and recommended the establishment of a Human Rights Commission in Ireland whose principal role would be "to keep under review the constitutional and legal protection afforded human rights, to assess the adequacy of this protection and to make recommendations to government for amendment of the Constitution and reform of the law, as appropriate." It considered that supporting litigation and conducting research should be secondary functions; and specifically recommended against a role in vetting legislation for conformity with the fundamental rights provisions of the Constitution.[88] The success of any such body tends to depend on the scope of its activities, the extent of its independence from Government and the resources made available. The Philippines, for example, established a Human Rights Commission with few resources, a narrow remit and a lack of Government support which unsurprisingly has meant that its impact has been negligible.

195 Ombudsmen also play an active part in some countries in enforcing human rights. Debate about the role of Ombudsmen in relation to the ECHR in particular has been considered at regular Round Tables, organised by the Council of Europe to bring together European Ombudsmen and the Strasbourg enforcement bodies. Possible roles for the Ombudsmen identified at these meetings include the possibility of Ombudsmen facilitating friendly or amicable settlements in accordance with Article 28 of the Convention; and intervening with Governmental bodies in order to bring laws into conformity with the decisions of the European Court of Human Rights.[89]

Current UK Practice and Precedents

196 The executive will have primary responsibility for evaluating existing law, responding to judgments from the domestic courts and from Strasbourg and developing a positive framework of human rights. However, public pressures on other fronts, procedural and time limitations may force less dramatic 'good housekeeping' measures down the list of priorities: as the example of the Law Commission's work on law reform demonstrates. A Parliamentary Select Committee could in theory undertake inquiries and investigations, but may have limited time or resources to do so. Reviewers of the parliamentary process have frequently commented on the limited amount of parliamentary follow up to legislation - and the pressures on time are unlikely to change.

197 As to the question of a Human Rights Commission, the closest parallels to human rights legislation within the UK's domestic law are the Sex Discrimination Act 1975 and the Race Relations Act 1976, both of which established Commissions with responsibility for enforcement and monitoring; plus, crucially, powers to act on behalf of individuals in cases which raise a matter of principle or where an applicant could not reasonably be expected to take the case unaided. The Fair Employment (Northern Ireland) Acts of 1976 and 1989 also established a powerful Fair Employment Commission. However, it is possible that the precedent set by the current Government in establishing the National Disability Council under the Disability Discrimination Act 1995 without powers to support litigation, and with a deliberately advisory rather than executive role, may have some impact on the debate as to the scope of a Human Rights Commission's remit.

198 The Ombudsman already investigates cases without cost to the individual and many investigations result in improvements to the procedures followed by Government departments and other bodies within his jurisdiction; if the ECHR were incorporated the results would be greater and could have a significant effect within Government. The role of the Ombudsman in relation to questions of maladministration would not of course be able to substitute for the adjudication of specific rights by the courts, but could complement the more expensive and adversarial option of judicial enforcement.

UK Practice Following Incorporation

Human Rights Commission

199 The case for establishing a Human Rights Commission in the UK alongside an incorporated ECHR is sometimes regarded as a 'given'. It is important, however, to determine whether a Human Rights Commission is necessary (or simply desirable) alongside the incorporation of the

ECHR. It might be questioned whether a Human Rights Commission is necessary at this first stage of reform, particularly if some form of parliamentary committee, with a remit to conduct investigations, were established to monitor and review compliance with the ECHR and other rights instruments; and if the courts provided a longstop of judicial enforcement.

200 However, if incorporation takes place without the establishment of a Human Rights Commission, its impact is likely to be diluted. A Human Rights Commission would play a key role in nurturing a 'culture' of human rights and creating the idea of collective enforcement of rights, necessary not only for the effective observance of the human rights standards in the ECHR but also those provided for in other human rights instruments not judicially protected. A Human Rights Commission could also play an important role in giving practical effect to the formal guarantees provided for by the ECHR by promoting effective enforcement of the law and effective access to the courts. If resources are not made available to improve access to justice - and one means of achieving this would be through a Human Rights Commission - incorporation of the Convention could make individual victims worse off (requiring as it would the exhaustion of all domestic remedies before recourse could be had to Strasbourg).

201 Moreover, there would be a range of functions that a parliamentary committee could not carry out, but which might well be regarded as desirable, or essential: for example the provision of public information services - reactive and proactive (posters, information lines, etc.), the funding of research, and the provision of financial or other assistance in taking test cases. IPPR's forthcoming report, *Scrutiny and Accountability: Democratic Compliance with Human Rights Standards,* argues that: "...it is without question a Government responsibility to ensure the adequate recognition of these [human rights] standards, yet it is the Government against whom those standards are set and against whom the instruments are intended to provide a remedy. Therefore in order to achieve an objective review of the implementation of those standards in the UK, it cannot realistically be carried out by the Government and an independent body is needed."

202 A Parliamentary Committee operating without a Human Rights Commission in parallel might also give the impression that human rights were the preserve and responsibility of experts in House of Lords or on the Commons backbenches, rather than belonging to a wider community. Finally, if incorporation of the ECHR is intended as a first step towards a domestic bill of rights, as both the Labour Party and the Liberal Democrats propose, then a Human Rights Commission could also have a critical role to play in providing a focus for the process of public education and consultation in developing that bill of rights.

Functions and Powers

203 It is usually assumed that a Human Rights Commission would have powers and functions parallel to those of the EOC and CRE. SACHR, for example, has recommended "the creation of a Commission for Human Rights, with analogous functions and powers to those of the Equal Opportunities Commission and Commission for Racial Equality, in acting in the public interest to promote the protection of human rights."[90] Both these bodies are specifically empowered to undertake or assist (financially or otherwise) in research and educational activities pursuant to their particular anti-discrimination objectives; to conduct formal investigations "for any purpose connected with the carrying out of [these] duties"; have power to compel production of persons and papers; and can bring cases on behalf of individuals in cases which raise a matter or principle or where an applicant could not reasonably be expected to take the case unaided. They also have power to investigate discriminatory practices on their own initiative and the power to

issue 'non-discrimination notices' to deal with unlawful discrimination (such notices require cessation of the identified practices and are enforceable in the courts by way of injunction). Where appropriate, both bodies have also issued non-statutory codes of practice.

204 However, a far wider range of possible functions for a Human Rights Commission can be identified:

- taking test cases (initiating proceedings in its own name as well as assisting individuals).
- having powers to intervene in human rights cases as an *amicus curiae*.
- providing public education services and resources.
- conducting and commissioning research and issuing codes of practice
- initiating and conducting formal investigations into issues of specific concern.
- carrying out inquiries into current practices.
- having powers, or an obligation, to scrutinise legislation to assess for conformity with the ECHR - in addition to scrutiny undertaken by Parliament and by the Civil Service - possibly as an adviser to a dedicated Parliamentary Committee on human rights or in order to submit evidence to a special standing committee on a particular bill.[91]
- being a source of independent advice to Parliament on human rights matters more generally - for example by offering expert views on actual and potential uses of the right of derogation.
- making recommendations to the Government about changes in existing law or practice which would facilitate the better protection of human rights.
- being involved in the reporting process under UN treaties.

205 It is clear that attempting to cover all of these fronts is both impossible and undesirable. In any case, some of the functions that might be assigned to a Human Rights Commission are already fulfilled - in whole or in part - by other bodies. A Human Rights Commission must complement and not subsume functions already carried out by others (for example, the powers of the Ombudsman to recommend changes in administrative practices to the Government need not be transferred to a Human Rights Commission). Equally, the identification of functions and powers must be realistic within the resources available, a point reinforced by the example of the Australian Human Rights and Equal Opportunities Commission, whose determinative powers have so swamped its resources that it has little left to attend to other more general duties. At a practical level, the early identification of key functions would also determine the support structures necessary for the organisation to operate effectively.

206 In the UK, some commentators regard the provision of financial support for prospective litigants as the principal argument for a Human Rights Commission, and thus its key function. It is argued that, by their nature, human rights instruments require judicial interpretation to give them full effect - unlike the tradition of domestic legislation, which is to specify to the highest degree the exact application of the statutory provisions and to support this with Codes of Practice and other guidance. This argument was recently advanced by Lord Lester: "we will need a well-chosen well-run Human Rights Commission, bringing well-chosen, well-argued test cases before the courts."[92]

207 Others, however, believe that the key function of a Commission should be to facilitate the creation of a proactive 'rights culture' through public education, on the basis that the key objective of incorporation must be for human rights instruments to be understood and enforced by all those bodies exercising public powers; and by those who need to exercise the rights provided. The promotion of human rights standards might include practical schemes such as exchange of staff between the Human Rights Commission and Whitehall departments. Others

argue that its core role should be to conduct strategic investigations and inquiries. Both public education and investigatory functions might be regarded as preferable to litigation as the primary means of promoting human rights. It could be argued, for example, that litigation should not be regarded as a mark of success - it is costly, slow and certainly not user-friendly - and that other more economical means of promoting human rights standards should be pursued. In the short term, public education about both the ECHR and other rights instruments would also be particularly important to ensure an informed public debate around the development of a domestic bill of rights, as proposed by both main opposition parties.

208 Of course, there is no need to define only one core function for a Human Rights Commission. Different functions can complement one another if managed in a strategic way. For example, litigation can play an important role in public education - one high profile case covered by the media can be worth several poster campaigns. Certainly, a number of NGOs active in the human rights field successfully combine a litigating role with a broader public education and campaigning remit. There is also no reason why the primary responsibilities of the Commission should not change over time. In the years immediately following incorporation, and during which a domestic bill of rights may be under development, the most important functions are likely to be public education (in order to ensure public awareness of the ECHR and human rights more generally, in order to ensure an informed debate about the 'next steps') and litigation, in order to highlight and give effect to the rights provided by the ECHR.

Operational Framework

209 A Human Rights Commission must perform a difficult balancing act. It would rightly be judged by the extent to which it 'causes trouble', as it must challenge the status quo if it is to have a purpose at all. Thus the body should certainly not be dependent on Government, but it must have **influence**. This balancing act will inevitably create tensions and the structural and other arrangements must be designed to cope with this. The example of the existing rights agencies shows that this is not always easy. For example, a Human Rights Commission could be used to promote a higher profile for the reporting procedures linked to UN treaties, but both the EOC and CRE have shied away from such actions in their specialist fields for fear it would prove too adversarial to the Government (their funders).

210 A basic issue for a Human Rights Commission would be how much freedom it should have. It would certainly need to be statutorily independent, to maintain a sharp cutting edge. The Northern Ireland SACHR model of a purely advisory and non-executive body cannot be regarded as particularly successful in influencing Government actions, given its long-standing and unheeded call for incorporation of the ECHR. Although it is an official body (acting in an independent capacity), SACHR has no sway over Government, nor even any automatic right to consultation. One means of strengthening the clout of the Commission would be to establish a direct link to a Parliamentary Select Committee. The question of independence is also linked to the question of where accountability should lie (some check on, and answerability for, its activities would be necessary if public funds are allocated and statutory powers are exercised). To ensure the body's independence, direct accountability of a Commission should ideally be to Parliament, rather than to a Government Department.[93] There would also need to be accountability of a different kind to the various constituencies it serves (including the wider public), perhaps through a requirement to produce a public account of its actions.

211 One model for establishing the independence of a UK Human Rights Commission, with accountability to Parliament, would be to emulate the 'partnership' relationship between the National Audit Office and the Public Accounts Committee. The Comptroller and Auditor General is appointed on the recommendation of, and reports to, Parliament. But in practice only the Public Accounts Committee follows up reports (this was formally the case until a couple of years ago, but other select committees are now allowed to consider NAO reports in consultation with the Public Accounts Committee). The NAO's workplan is designed in consultation with the Public Accounts Committee, but the NAO has the last word. Unofficially, the NAO also briefs the Committee with questions for its hearings with Government Departments, and contributes to the drafting of its reports. Another similar model is provided by the relationship between the Parliamentary Ombudsman and the Select Committee on the Parliamentary Commissioner for Administration. Alternatively, a more arm's length model might be preferred in which distinctive but complementary roles for the Commission and a Parliamentary Committee on Human Rights are designated. The political impact of both the Committee and the Human Rights Commission is likely to be more effective with a 'partnership' style relationship, for two reasons. First, the relationship between the official bodies and the Committees which they serve can be mutually supportive; second, a knowledge that office-holders are linked to Parliament formally gives them additional clout.

212 A Human Rights Commission is not likely to represent a significant burden on the Exchequer, if the running costs of the EOC and CRE are any guide. The central government grant-in-aid to the EOC in 1995-96 was £6.43m, including the costs of employing nearly 180 staff. The equivalent figures for the CRE are: £16m grant-in-aid in 1995-96 and an average of 246 staff during the year. However, these are the costs of relatively long-standing organisations, with a wide range of responsibilities. A Human Rights Commission need not operate on such a large scale initially.

213 A further issue is the question of what controls would be imposed on how the money should be spent. If the same arrangements were adopted for a Human Rights Commission as for the existing rights agencies, a grant in aid from Parliament would be paid through the relevant Secretary of State, and the Accounting Officer would be the Permanent Secretary of the Department (although the Commission would itself have an additional Accounting Officer). The responsibility of the parent Department would be to ensure good systems of control and strategic and business planning, but it would be important to guard against departmental officials trying to second guess activities (and expecting to be consulted on business plans) and produce funds accordingly, squeezing out activities that the Department was unenthusiastic about. An alternative would be to adopt the same arrangements as for the NAO, which derives its funds through Parliament, not direct from the Treasury. The same arrangement has recently been proposed for the Ombudsman's Office.

214 A final consideration is whether a Human Rights Commission should fall within the jurisdiction of both the Comptroller and Auditor General and the Ombudsman. The EOC and CRE are within their jurisdiction, and have both been the subject of complaints to the Ombudsman about the way they have conducted formal investigations. It would be possible to limit the jurisdiction of the two officers of the House of Commons to a limited number of specific functions of the Commission, but such a distinction would be both difficult to make work in practice and undesirable in principle.

Relationship with Existing Statutory Rights Agencies

215 A key question of implementation is whether a Human Rights Commission should be a free-standing body or should merge with the CRE, EOC, the National Disability Council, the Fair Employment Commission and other similar bodies, which might conceivably be regarded as having overlapping responsibilities especially in the fields of discrimination. If the Human Rights Commission co-existed with the other bodies, it would need to defer to the specialist bodies in regard to problems within their jurisdiction.

216 For economic reasons, amalgamation may be preferred. This would also have the effect of reducing the number of quangos in existence, rather than adding to the total - which might be a political concern. Amalgamation would also make it easier to deal with issues that involved multiple discrimination and those 'grey' areas of discrimination in respect of which it is currently not clear whether they fall within the remit of the existing bodies e.g. discrimination on the grounds of sexuality as against gender; and religious discrimination. It should avoid the risk of duplication and the difficulties of determining boundaries between agencies.

217 However, some of the communities affected by such an amalgamation might well fear that their interests would be marginalised and specialist knowledge lost, or that a 'hierarchy of discrimination' would be created. Moreover, there is no guarantee that administrative amalgamation would produce any greater coherence of the approach to multiple discrimination. It is also worth noting that discrimination represents only a small part of the ECHR's subject matter (and claims of discrimination under the ECHR may only be invoked on the back of another substantive claim). But perhaps the main objection to such a move would be the disruption this would create; the mature views of the existing bodies would be most needed at a time of change, and any immediate change might damage people's access to justice. The argument can run both ways: either separate bodies reflect the relative importance of specific areas of concern, or the failure to regard a particular set of concerns as falling under the umbrella of human rights marginalises their importance

218 Ultimately, the decision must rest on the fact that the issues which any new Human Rights Commission would tackle are likely to be many and various. The existing agencies already have wide-ranging remits, and face a constant challenge to make choices and to be strategic in their allocation of resources. If a Human Rights Commission in the short to medium term were to be given the responsibilities of the EOC, CRE, FEC and NDC in addition to responsibility for human rights instruments (including but not necessarily limited to the ECHR), it would be a task of huge proportions. There would undoubtedly be great expectations of any new body and politically, there might be advantage in a Human Rights Commission proving its worth with limited terms of reference before any amalgamation is considered.

219 Effective arrangements would need to be put in place for co-ordination and co-operation between the bodies. One answer may be to have the Chairs of the various bodies represented *ex officio* on the Human Rights Commission. This is the approach already adopted in Northern Ireland, where the advisory body of SACHR includes the Chair of the Fair Employment Commission and the Ombudsman *ex officio;* and the Chairs of both the EOC and the Disability Action Group have been appointed as a matter of course, although not ex officio. Day to day co-ordination would obviously rely on the creation of official level working arrangements which would be needed in any case to shadow the group of Chairs. This sort of arrangement may in fact assist in the better operation of existing arrangements by providing a forum for co-ordination that does not currently exist.

220 Over time, however, there may be advantage in considering amalgamation if a significant degree of overlap becomes apparent. However, any possible amalgamation of the rights agencies would need to be the result of a comprehensive review of mechanisms for fulfilling the necessary responsibilities. Such a review would need to involve the existing rights agencies (to lock in the key players on delivery), and take place after the establishment of the Human Rights Commission, possibly as part of a wider review of anti-discrimination and equalities legislation.

221 Equally, the relationship between a Human Rights Commission and the various Ombudsmen would need to be considered, especially in respect of those areas of work where overlap could arise (in particular, dealing with complaints of maladministration that raise human rights issues and the promotion of good practice within government and the public service more generally).

222 A further question is the need for separate Human Rights Commissions for any devolved territories (see also paragraphs 279-287); and the arrangements for co-ordination between them. Whether or not a Human Rights Commission were to be established, it would also be necessary to consider the role post-incorporation of the Northern Ireland Standing Advisory Commission on Human Rights itself, whose responsibilities are: "Advising the Secretary of State on the adequacy and effectiveness of the law for the time being in force in preventing discrimination on the grounds of religious belief or political opinion and in providing redress for persons aggrieved by discrimination on either ground."[94] It would appear incongruous to abolish SACHR at the same time as incorporating the ECHR, but equally inconsistent to allow for the continuation of this body, without establishing sister organisations covering England, Wales and Scotland.

Selection and Appointment of Commissioners

223 This report has so far assumed that a Human Rights Commission would, in terms of its membership, be modelled on the multi-member boards of the EOC, CRE, Boundary Commissions and so on. An alternative that might be considered would be to create a single post of Commissioner, similar to the Ombudsmen and utility regulators. The choice would depend on the range of functions designated to the body. A predominantly administrative and regulatory role could well be fulfilled by a single Commissioner supported by appropriate staff. However, a Human Rights Commission is likely to have a more proactive role and will need to establish public credibility if it is successfully to promote human rights throughout the community. For these reasons, a multi-member Commission, which enables a range of interests to represented among the membership, is likely to be more appropriate.

224 As to size, both the CRE and EOC consist of between 8 and 15 individuals; and it is likely that arrangements for appointment to the Human Rights Commission would follow the same pattern - with the addition, as suggested above, of the Chairs of the parallel rights agencies *ex officio*. The National Disability Council has 17 members, its larger size reflecting the desire to include a range of 'consumer representatives' - disabled people, carers, employers and service providers. Taking this further, Liberty has suggested that a Human Rights Commission should be a larger body - of between 15 and 24 members "drawn in equal numbers from the following categories:- (a) the legal profession, including practising lawyers and other persons knowledgeable in the law; (b) non-governmental organisations concerned with human rights; (c) members of the community, reflecting so far as possible those groups or individuals who have knowledge of or experience of abuses of fundamental rights and freedoms." Bearing in mind that one method of exercising Government control over independent bodies is through the appointments made to their boards; this discretion might usefully be limited by the statute categorising where members

of the Commission should be drawn from, as Liberty suggest. The categories would, however, need to be widely drawn so as not be become redundant with the passage of time and to allow for the evolution of the membership. It might be preferable to impose a statutory duty to consult relevant bodies before making appointments, rather than defining the categories in advance; this might be formalised into an arrangement whereby Ministers made at least some appointments from a slate of candidates provided by outside bodies.

225 Appointments to a Human Rights Commission would almost certainly be by the Crown on the recommendation of the Minister in charge of the department with policy responsibility for domestic human rights issues - currently the Home Office. Responsibility might alternatively fall to the Lord Chancellor. The selection process would be subject to the guidance produced by the Commissioner for Public Appointments, and any other arrangements instituted by the Government of the day - for example, both the Labour Party and the Liberal Democrats have proposed that specialist Select Committees should have a role in the appointment of key members of NDPBs (perhaps, in this case, the Chair and any Vice Chairs). An alternative would be for the Chair of the Human Rights Commission to be appointed by the Crown on the recommendation of Parliament in the same way as the Comptroller and Auditor General (and as proposed by the Select Committee on the PCA for the Ombudsman). This would clearly be dependent on the lines of accountability devised for the body; and it would be cumbersome for all members of the Commission to be appointed in this way.

226 Members might be appointed on a full-time professional basis or on a part-time voluntary basis, as with the EOC and CRE. Alternatively a hybrid model with both executive and non-executive board members might be considered. The *modus operandi* of the organisation would be significantly influenced by the choice between a professional full time board and a voluntary part time board. The decision would necessarily depend on the core functions of the Commission (for example, for a largely advisory body like the NDC, its credibility is dependent on its members' links with outside interests). However, it should not necessarily be assumed that the model provided by the existing rights agencies is necessarily preferable; and it must also be recognised that finding members of voluntary unpaid boards is not always easy. There might well be advantage in appointing a mix of executive and non-executive board members.

Ombudsmen

227 The Parliamentary Commissioner for Administration (Ombudsman) is precluded from investigating a complaint if the complainant has any right of appeal to a court or tribunal, or a remedy by way of legal proceedings, unless the Commissioner is satisfied that in the particular circumstances it is not reasonable to expect the complainant to use that right or remedy. At present, the Ombudsman rules out of consideration the possibility that a person may apply for judicial review of an action when considering whether to investigate it. Theoretically, many of the actions investigated by the Ombudsman could be put to a court for judicial review, but the current Ombudsman takes the view that it is commonsense not to regard that as an obstacle to his own investigation. If, in consequence of incorporation, legal remedies were provided for breaches of the European Convention as such, the Ombudsmen might need to decide, before investigating a complaint, whether it raised any question of a possible breach of the Convention. However, given that the right of individual petition to the European Commission of Human Rights already exists as a possible source of legal remedy, this is unlikely to require any significant change in existing procedures. The difference may be that seeking a remedy through

domestic courts could be considered 'reasonable', whereas the expense and time of Strasbourg proceedings may not. It seems likely that it would be regarded in the same way as potential judicial review; if necessary to establish more formally the Ombudsman's authority to investigate in these circumstances, the incorporating statute could include a provision that maladministration includes non-compliance with the ECHR.

228 Following incorporation, therefore, the Ombudsman should be able to provide the citizen with a cheaper, less formal and less confrontational resolution of his or her complaint than the courts may be able to deliver.[95] However, any extension of the Ombudsman's role should be regarded as an adjunct, not an alternative, to the courts' role in enforcement. It should certainly not fetter or limit the right of access to the courts. There may, for example, be problems arising from the fact that investigations and remedies recommended by national Ombudsmen are not regarded as an effective remedy by the Court and Commission - because they are not legally binding. In order to make an application to Strasbourg, an individual must have exhausted the domestic remedies available; and in the UK a judicial review application must be made within three months of the action that is being challenged. Seeking the Ombudsman's assistance first might mean that the three month limit would have expired before an application for judicial review could be made. In turn this would prevent an application to Strasbourg. However, it would be possible to change the rules governing applications for judicial review to make an exception for applications delayed because of a prior investigation by the Ombudsman.

229 The suggestion was also made at the last Round Table (see paragraph 195) that national Ombudsmen could be empowered to initiate procedures on behalf of aggrieved complainants before the European Court and Commission. This is obviously not something that could be decided at a national level, but Lord Woolf's interim and final Access to Justice reports have already identified an expanded role for public Ombudsmen within the domestic civil justice system: "the discretion of the public Ombudsmen to investigate issues involving maladministration which could be raised before the courts should be put on a formal basis. The Ombudsman should be able to refer points of law (including questions of statutory interpretation) to the courts, and compensation recommended by the Ombudsman should be enforceable through the courts."[96]

230 Finally, a wider enforcement role could be played by the PCA and other Ombudsmen in promoting the ECHR once incorporated. For example, the Parliamentary Commissioner for Administration's link to Parliament, through the Select Committee on the PCA is also an important means of ensuring parliamentary attention to questions of compliance with human rights standards. The Round Table deliberations have also highlighted the scope for national Ombudsmen to influence the political and administrative culture through their educative and preventative role (in making citizens aware of their rights and means of redress; and in improving the training of public servants); and to develop activities that could complement and support those undertaken by the European organs was acknowledged - and, by extension, to complement national Human Rights bodies.

The Role of NGOs

231 The state funding of NGOs is often a feature of countries with a proactive rights culture; in these instances, funding does not imply control and NGOs are free to operate as critics of the Government and take cases against the Government. The UK Government does already fund a number of NGOs broadly involved in human rights - but principally those involved in social

provision (such as NACRO, and community programmes for women, ethnic minority groups and refugees) rather than those engaged in rights litigation; funding is also given to some organisations involved in domestic legal case work such as the Refugee Legal Centre and the Immigration Advisory Service.[97]

232 In essence, the relationship between successive Governments and human rights NGOs has been adversarial, not least because of the different stances taken on the question of incorporation of the ECHR. Following incorporation, it might be invidious for Ministers to have responsibility for determining the direction of such funding, if by withholding funds they could effectively restrict the number of challenges brought against the Government. But it is equally clear that without an active NGO sector, effective enforcement of human rights standards would be made more difficult. One option might be to transfer existing funds for human rights organisations to the Human Rights Commission for distribution. Responsibility for funding women's organisations was transferred to the EOC, but the initial extra cash was rapidly subsumed in the wider budget. A similar arrangement could be made to work in respect of a Human Rights Commission if resources were ringfenced for this purpose and the funding of NGOs was specifically identified as a responsibility of the new body.

233 The funding of NGOs allows the organisations to back individuals cases but also to take cases in their own right. This is important for two key reasons: first - if judicial review cases are any guide - individuals are more likely to settle in advance of trial, whereas NGOs are interested in the clarification of the law *per se*, not just the resolution of a particular case; second, a third party can challenge legislation where it foresees a breach of the Convention, whereas an individual can only bring a case following some particular instance of alleged breach.

234 In many instances, cases which relied on the provisions of the incorporated ECHR would be brought by NGOs or organisations with an interest in the ramifications of a decision beyond the individual case. This already happens with cases taken to the European Court and in respect of the test cases backed by both the CRE and EOC. There may also be cases where third party intervention in the public interest would be appropriate, as a legitimate public interest is raised by the case and the parties to the case do not choose, or are unable, to offer a wider perspective than the facts of their own particular circumstances. The primary question should be whether an issue should be litigated, not whether a particular individual is willing or able to pursue a case.

235 Under the rules of procedure of the European Court on Human Rights, third parties may be invited or granted leave to submit written comments on a case within a time limit and on specified issues. Internationally, the practice of inviting or allowing interventions from those other than the parties to the case is increasingly accepted as part of the judicial process. In the UK, as elsewhere, the case for acknowledging a wider public interest might be regarded as particularly persuasive in relation to cases involving issues of fundamental rights. The case for and against public interest intervention was rehearsed in the report of the joint working party on public interest cases set up by Justice and the Public Law Project.[98] On the one hand, the court will benefit from receiving a diversity of information, views and opinions, which will in turn enhance the legitimacy of the court's decision. Such interventions allow the protection of interests that might otherwise be unrepresented in the litigation and reduce the risk of a multiplicity of actions over the same matter. On the other hand, there are a number of potential disadvantages: an overburdening of the courts unless proper controls are instituted; the possibility of the court developing a legislative, rather than judicial function, where public

interest interventions raise matters of policy. Nevertheless, the cases where the court has heard such submissions appear to have played an important role, and in the interest of assisting in the effective enforcement of human rights there would be merit in extending this opportunity to domestic proceedings, subject to controls along the lines of those suggested by the Justice/Public Law Project report.

236 Of course, the role of NGOs in relation to human rights instruments goes far wider than litigation. Wiseberg has identified a range of possible roles and strategies deployed by NGOs in protecting human rights,[99] and each can be seen to have relevance in the UK: information gathering, evaluation and dissemination (this may be particularly importance in influencing the reports of the international bodies monitoring the implementation of international treaties); advocacy to stop abuses; providing legal aid, forensic and other scientific expertise; humanitarian assistance; lobbying national and international authorities (pressing for the legal incorporation or development of human rights standards); education and empowerment; building solidarity among the oppressed and legitimising local concerns; delivery of services; encouraging political participation and holding Governments to account.

237 The particular priorities will reflect both the political structures and the history of NGO-state relationships. In the UK, it is likely that the functions assumed by NGOs post-incorporation will depend on the extent and nature of their prior involvement in human rights activism. A Human Rights Commission might also facilitate dialogue between NGOs and Government; and both existing rights agencies and a Human Rights Commission might be required to include in their annual reports a section on the steps taken throughout the year to seek - and act on - the views of NGOs. It is also for consideration whether NGOs might wish to propose the creation of a body similar to the Women's National Commission, which includes representatives of 50 NGOs, serviced by Whitehall, but with the status of an independent official advisory body to the Government. Formal arrangements for liaison between human rights NGOs and Government have worked well in other countries, including Australia.

Conclusion

238 The specific proposals made in this chapter are designed to mesh with those in the previous chapter. Post-legislative enforcement is not only a question of providing remedies where breaches occur, but also includes the promotion of a 'culture of compliance'. A Human Rights Commission should be established, accountable to Parliament. It should operate in partnership with the parliamentary committee responsible for pre-legislative scrutiny, with complementary roles. The primary functions of the Commission in the short term should be public education and litigation - bringing proceedings in its own name and assisting individual complainants in cases involving alleged breaches. It should be free-standing and not merge with the existing statutory anti-discrimination agencies. The Ombudsman should be able to assist individual complainants by providing additional remedies in cases of maladministration, but this option should not fetter or limit access to the courts. The role of NGOs in promoting the protection of rights standards should be recognised by the maintenance of Government funding and by encouraging the development of public interest interventions.

Chapter 6

The Process of Incorporation

"Planned and executed? On what occasion? On none. At what place? At none. By whom? By nobody."

Jeremy Bentham, *The Handbook of Political Fallacies*, 1824

Introduction

239 The Northern Ireland Standing Advisory Commission's 1977 report referred to "the modest nature of the process of incorporation", and it is true that the process of incorporating the ECHR will be comparatively simple when set against other constitutional reform measures. It can reasonably be regarded as 'stand alone' and could be achieved fairly swiftly. The question of when to introduce incorporating legislation will, of course, be a matter for political consideration. The Labour Party has not made any timing commitment in respect of ECHR, unlike plans for devolution to Scotland and Wales. The Liberal Democrats, on the other hand, propose framework legislation which would wrap up all the key constitutional measures in one bill introduced early on in a Liberal Democrat Parliament. But like other constitutional measures it is likely to require a considerable number of hours debate in both chambers of Parliament (not least because of the convention that constitutional bills - a category that would certainly include incorporation of the ECHR - have their Committee stage on the floor of the House of Commons). It cannot therefore be seen as a limited or technical measure. Similarly, the question of whether the bill should be introduced in the House of Commons or the House of Lords will depend not on the relative importance attached to the bill, but on the wider demands of the legislative programme. Here, we consider only the detailed arrangements necessary in relation to a bill incorporating the ECHR.

Preparing for Incorporation

Drafting the Bill

240 Since the withdrawal of Lord Wade's Bill of Rights Bill in 1976 to make way for the establishment of the Select Committee on a Bill of Rights, there have been 11 attempts by Private Members to introduce legislation to incorporate the ECHR into domestic law. None has reached the statute book, but the regular opportunities for debate provided by these bills mean that the policy issues underpinning incorporation have been exposed to useful and regular critique; and (unlike in some other areas of constitutional reform) there is significant accumulated expertise within both Houses of Parliament and Whitehall - even if acquired in identifying flaws in the legislation proposed by others. There are also many models in the Commonwealth on which to draw. These factors taken together mean that a Government attempting to draft an incorporating statute will have a considerable amount of useful material to hand, and is likely to have a set of officials (and perhaps Ministers) far more familiar with the issues than in some other areas of policy.

Review of Conformity of Legislation

241 The process of reviewing domestic legislation for compliance with the ECHR (which successive Governments have said has been undertaken at regular intervals) will need to be repeated before incorporation domestically - if only for Ministerial information. Beyond this, the Government will need to decide before incorporation whether to undertake a comprehensive review of domestic legislation to check for consistency, and in cases where inconsistency is found, amend existing laws or introduce new ones, as in New Zealand and Hong Kong (where the exercise was undertaken by the Law Reform Commission and their recommendations for change published

along with a Government response) or whether to wait for the courts to consider compliance as in Canada. The Government may also wish to preclude the possibility of early judicial decisions against them - and/or prove its civil libertarian spurs - by revising legislation which may be regarded as falling into a 'grey area' of compliance.

Provision of Guidance to Public Bodies and Law Enforcement Agencies

242 Although much attention focuses on the implications of incorporation of the ECHR in relation to primary legislation, of equal concern is the operation of statutory agencies following incorporation, especially those involved in law enforcement.

243 The Home Office, in consultation with the Crown Prosecution Service, ACPO, the Police Federation, etc., will need to consider what changes in practice (formal or informal) will be required in order to conform to the ECHR. They are likely to be fewer than in Canada because of the improvement already introduced by the Police and Criminal Evidence Act 1994. Similar reviews will need to be undertaken in respect of the Immigration Service; the Prison Service; local authorities' responsibilities under the Children Act; and others. At a minimum, circulars will need to be issued to the relevant organisations alerting them to the impact of the change; and it may also be necessary to revise some of the statutory rules under which they operate or - more likely - the internal guidance which backs up the statutory framework.

244 Given the Government's reassurances that UK law and practice are already in compliance, it would be expected that there should be no need to make changes in either practice or procedures. But academic commentators and pressure groups have pointed to a number of areas where there is a possible conflict.[100] For example, David Kinley has pointed out that the Prison Rules have formed the central issue of concern in no less than five judgments of the European Court against the United Kingdom (the same matter - prisoners' correspondence - in each case); and that a significant proportion of immigration law is administered through unpublished instructions issued by the Home Secretary directing immigration officers, and many applications to the Commission in Strasbourg have been made challenging aspects of the Immigration Rules (though only one case has to date reached the Court). [101] Changes to formal procedures may also need to be accompanied by a process of training and education: the first case to be found by the European Court of Human Rights against the UK involved a breach of a prisoner's right to correspondence. Yet as recently as last year, the European Commission held admissible a prisoner's correspondence case.

Provision of Legal Guidance and Training

245 At present the judiciary are accustomed to operating within the framework of parliamentary sovereignty, adjudicating in respect of UK law on extremely detailed pieces of legislation - which enables them to interpret the provisions either by focusing on the exact words of the enactment or by looking to Parliament's intended purpose through reference to Hansard in certain circumstances. Some academic commentators have also dismissed the idea that the judiciary currently operates in isolation from the world of politics and the concerns of policy-makers: "Whether in making a rule or standard for the future, or basing a decision on an open-ended standard, the judge has to balance a variety of social interests and come to a decision which, within the limits of the discretion available, he considers to be best....While much of the general outline may be settled by a democratically elected body, important interrelations

between goals and adjustments to changed circumstances may well be made be others, whether in the executive or in the judiciary, in implementing such policies."[102]

246 The courts have demonstrated already their ability to deal with broad, open-textured legislation when applying European Community law and have also had considerable powers to 'override or set aside legislation' since the *Factortame* judgment, although the actual use of this power has been extremely limited. The courts are also entitled to review the legality of all subordinate legislation. In addition to this, the Judicial Committee of the Privy Council has been the final Imperial Court of Appeal since 1833 and has experience of broadly drafted human rights provisions through its consideration of appeals in relation to Commonwealth Bills of Rights. Membership of the Appellate Committee of the House of Lords overlaps with the Privy Council, so the Supreme Court in the British legal system also has experience (although indirect) with interpreting and applying Bills of Rights.

247 But this is not to say that no guidance is needed. Mr. Justice Sedley has taken the view that:

> *"To say that the courts are not fit to absorb and respond acceptably to such a debate is to assume both too much and too little: too much because our judicial culture has historically pretended to be insulated from public debate and so has always had to disguise its social and ethical judgments as value-free adjudications; too little because our capacity for open and intelligent response to the wider human rights issues is largely unexplored: it is a language in which we are not entirely illiterate, but are certainly dyslexic, and in which with remedial help we can probably do a great deal better."*[103]

Following incorporation of the ECHR some additional training provision and guidance for judges may well be desirable (at the very least in induction training) both in terms of the rationale for human rights and the practicalities of their protection, ideally alongside the development of closer links to academic research and teaching facilities. The Children Act Roadshows and the Criminal Justice Act 1991 Seminars organised by the Judicial Studies Board might prove useful models; and it would be useful to draw on the experience gained by the introduction of bills of rights in other countries, including New Zealand and Canada. The universities and law schools would certainly need to introduce new or expanded courses on bills of rights, including comparative aspects. The question of judicial guidance and training in relation to the Convention must, however, be considered against the backdrop of disquiet over the adequacy of existing arrangements for judicial support and development more generally, reflected by Lord Williams of Mostyn QC's recent analysis that "..the system of selection training and monitoring of judges generally is lamentably amateur."[104] The present commitment, for example, is only one week refresher training every 3-4 years for county court judges. The reasons for this limited provision of training are essentially twofold: cost and judicial resistance; and these factors will be no less relevant to the provision of training in relation to the ECHR. This analysis certainly points to the need for courts to have access to ongoing assistance via the use of Brandeis briefs, public interest interventions and so on - see paragraphs 136-138 above - in addition to more formal training.

Public Education

248 Given the complete absence of officially produced public information regarding the ECHR at present (and presuming that any Government committed to incorporation believes that once the rights are available they should be used where appropriate) an education and publicity programme will be needed both in advance of the legislation's introduction, and after

incorporation, to alert members of the public, consumer and interest groups to the implications of incorporation, how they can exercise their rights and the support available to them. The provision of information on an ongoing basis would be as important as initial publicity; this might be achieved through, for example, the provision or funding of information services - perhaps working through existing NGOs such as the Citizens' Advice Bureaux - and the organisation of professional seminars and conference.

249 The extent and focus of public education would inevitably reflect the Government's interest in developing awareness of human rights standards; and the desirability of linking the incorporation of the ECHR to the subsequent development of a domestic bill of rights (for example, public education might not be directed solely at those who might make use of the rights themselves, but at promoting a greater understanding of the nature of human rights using 'below the line' techniques. For example, working with trades unions and employers' organisations, with professional bodies, public bodies, schools and others to develop awareness and understanding of the implications of human rights instruments and specifically the ECHR. Such education could be conducted by the Government (and almost certainly would be prior to incorporation) or by an independent body such as a new Human Rights Commission. The cost of this public education work would inevitably depend on its extent, and it is likely to be more limited in its nature and audience than the broader discrimination based publicity and public education. But as a guide, the CRE's total expenditure - excluding staff costs - on information services and publications in 1995-96 was £584,924; the EOC's equivalent expenditure was £386,289. Of course, additional public education work would also be undertaken by NGOs.

Resource Implications

Funding

250 Under existing arrangements, the annual Appropriation Act makes provision for Government expenditure arising from the award of compensation or costs against the UK by the European Court of Human Rights and friendly settlements under the auspices of the Commission. Private Members' Bills seeking to incorporate the ECHR have generally asserted that such a measure would have no significant resource implications nor any effect on public service manpower. However, this would clearly depend on the institutional framework supporting incorporation (e.g. the establishment of a Human Rights Commission and/or a Judicial Appointments and Training Commission) as much as on the effect of incorporation itself.

251 An assessment of the resource implications of incorporation would need to be undertaken in advance of introducing the legislation for inclusion in the Financial Memorandum to the Bill; and an initial assessment of costs would be made within Whitehall as part of the initial bid for an Incorporation Bill to the Future Legislation Committee. This assessment would consider several different heads: the extent of costs likely to be incurred by public authorities for failure to comply with the Convention i.e. costs over and above those already incurred as a result of decisions of the Strasbourg organs; the costs of establishing and funding the operation of a Human Rights Commission ; the costs of the increase in legal aid and other central funding of litigants; and the manageability of the caseload (and the delays implicit in the referral of Convention issues to a higher court if such a procedure were adopted). In fact, such an

assessment is likely to be made within Whitehall **prior** to decisions about some of the key policy issues, and in order to inform judgments as to: the need for admissibility procedures; the appropriate jurisdiction; and the establishment and remit of a Human Rights Commission. Some form of cost-benefit analysis is inevitable, but will inevitably be speculative.

252 At the core of the costs assessment will be the question of legal aid. The amount presently available for proceedings under the European Convention is widely regarded as grossly inadequate. The expense and time involved in bringing cases before the European Court of Human Rights at present are considerable, far exceeding a comparable action in the British courts. It is one good argument for incorporation. But it does raise a further question of what, if any, arrangements are to be made in relation to extending legal aid in the UK. The first point to make is that **additional** demands on the legal aid budget will come from direct challenges through judicial review proceedings, which are likely to be far fewer in number than collateral challenges (i.e. cases which would have come before the courts in any case, but in which ECHR issues might be raised following incorporation). In respect of these limited additional demands, however, the recent White Paper on legal aid has made clear that legal aid expenditure in future will effectively be capped; and the Treasury is, under any Government, likely to continue to place a ceiling on legal aid costs. It will therefore be important to identify other institutional structures and methods of providing the advice and representation that both aggrieved individuals and the courts will need. These might include reviewing the role of existing agencies - EOC, CRE, Ombudsman - in respect of human rights; and looking at possible new machinery. If additional direct funds are not forthcoming, it would clearly be both possible and advantageous (insofar as the costs might be more limited) to give the Human Rights Commission powers to bring class actions, as the EOC and CRE already have. As already noted, other countries - notably Canada, South Africa, Netherlands - have also provided litigation funds for public interest groups, reflecting the perceived importance of 'engaged rights litigation'.

253 Turning to the other cost factors, it is clear that a 'low cost' model of incorporation could be devised, by limiting the range of new machinery and changes to existing machinery - no public education campaign, no increases in legal aid, no change to Parliamentary scrutiny mechanisms, no Human Rights Commission, no extension to the right to litigate, no new body to supervise the appointment of judges, the adoption of rigorous filtering procedures. But it is impossible to completely remove all cost implications, as by giving the courts a role in protecting human rights, costs will necessarily be incurred by the legal system. Whether a 'low cost' model should be adopted will depend on the objectives of the Government: if incorporation of the ECHR is seen as an end in itself, then clearly it would be unnecessary to provide for other changes in the operating environment. But if the ECHR is to be an effective tool in protecting against human rights abuses, is to play a part in winning public support for the development of a domestic Bill of Rights and is to secure public confidence, then it will need to be resourced appropriately. Access to remedies will need to be efficient and restricted on the grounds of merit, not finance. Careful planning can minimise the cost implications (for example, any increase in legal aid might be reduced by funding a Human Rights Commission to take test cases, rather than funding a larger number of individual cases through legal aid).

Management of the System

254 An accurate assessment of the increased caseload following incorporation is difficult to make, but part of forward planning for incorporation within Whitehall would definitely involve an attempt. (Such an assessment of caseload was, for example, made by the Home Office prior to

the introduction of the Criminal Cases Review Authority in October 1996). However, assessments of this sort are necessarily speculative - prior to the introduction of the Sex Discrimination Act, for example, the Lord Chancellor's Department claimed that there would be 5000 non-employment cases every year in the county courts; in practice, the average number of cases each year is in single figures. The lesson of this is simply that a system of enforcement should not be designed around speculation alone. So what factors should be taken into account in seeking to make an informed estimate? In 1976, the Home Office Green Paper reached the unsurprising conclusion that: "If United Kingdom law allowed proceedings to be brought in our courts (or complaints to be made to some other independent authority) specifically for breaches of the Convention, our provisional assessment is that the total number of complaints made against the United Kingdom Government and its agencies - whether in a domestic forum or by petition to the European Commission of Human Rights - would be greater than the number now made to the Commission." However, that assessment was made at a time when the number of applications to the Commission was far lower than current figures and it cannot be assumed that the same conclusion would be reached today. Moreover, a significant number of applications fall at a preliminary stage in the proceedings. The total number of petitions made against the UK Government to the Commission in 1995 was 1,249 - but only 413 applications were actually registered and 24 ruled admissible in the same year.

255 In fact, in the domestic courts following incorporation of the ECHR, there are likely to be few free standing human rights issues - they are more likely to be 'top-ups' on situations that would provoke a court appearance anyway. After incorporation of ECHR, those cases that are currently disentitled would remain so, and those entitled would arise through other court proceedings. Moreover, the Convention is weak on issues of discrimination and equality and there are only a limited number of rights in the Convention likely to generate a lot of litigation: Article 10 - free speech; Article 8 - privacy; Article 6 - procedural fairness; and possibly Article 2 - right to life. Most disputes could probably be raised in the courts already, and the provisions of the Convention would simply be applied alongside existing statute and common law. But there is a limited range of situations where the Convention could fill a gap in existing law (e.g. privacy) by creating a new right. Additional cases might arise from the reversal of the *Brind* ruling and if a statutory duty were created (see paragraph 140). The evolutionary and dynamic nature of the Convention also means that there is a slow but continual widening of the scope of Convention issues.

256 Another reference point is international experience. Some hold that incorporation would result in the judicial system being blocked with Convention cases, citing the early years of the Canadian Charter in evidence. But others cite Canada's experience in support of the argument that most cases in which the ECHR would be raised would in any case have come before the courts (for example, the Canadian Charter has been mainly used as an extra weapon of the defence counsel in criminal cases - the most comprehensive survey of Charter cases to date indicates that 74% of cases citing the Charter of Rights were criminal defence cases).[105] Similarly, in New Zealand, there was an initial 'flood' of cases - over 200 decisions on Bill of Rights issues in the first year, but again the vast majority concerned the criminal justice system. It is important to acknowledge that whilst some indications can be drawn from international experience, account must be taken of the particular political context. For example, most of the early cases in New Zealand and Canada involved challenges to police procedures which were largely uncodified. In the UK, such challenges may not arise as frequently given that police procedures are regulated by the Police and Criminal Evidence Act 1984 and its Code of Practice.

257 In practice, the manageability of any increased caseload following incorporation of the ECHR will depend on several factors, including: which courts have jurisdiction (more restrictive access to the courts would provide scope for controlling the numbers of cases); the extent and attractiveness of the remedies available; whether reference to a higher court is allowed or required; the availability of public funds to support litigation; the strategies deployed by a Human Rights Commission (for example, the EOC takes a large number of test cases, whereas the CRE takes relatively few); whether any filtering mechanism is adopted; and who is entitled to bring cases - for example, whether rights are available to commercial organisations.

258 Given that no Government is likely to want to incur increased public expenditure, there is clearly a likelihood that initial policy decisions about these matters (*locus standi*, jurisdiction and the availability of public funds, etc.) will be informed by assessments of the likely caseload under different arrangements, with a potential risk of ignoring wider considerations of public interest. It should therefore be borne in mind that both international experience and the history of UK applications to Strasbourg suggest that most cases will be collateral challenges rather than direct challenges. Incorporation of the ECHR is unlikely to give rise to a large number of cases that would otherwise never have been brought in the domestic courts; the number of *additional* cases is likely to be close to the number of cases ruled admissible by the European Commission on Human Rights.

Draft Incorporation Bill

259 Once the policy objectives are clear, drafting the substantive provisions of a bill to incorporate the ECHR will not prove excessively complicated. It would need to cover the following:

- a statement of incorporation, specifying which Sections of, and Protocols to, the Convention are to be incorporated. The text of the relevant provisions would be set out in a schedule.
- a statement establishing the status of the ECHR vis-a-vis other laws.
- a statement giving effect to existing derogations and reservations. The texts would be set out in a second schedule.
- a statement providing delegated powers to the Secretary of State to make an order amending Schedule 1 to give effect to any Protocol to the Convention; and to make an order amending Schedule 2 to give effect to any future derogations or reservations; or to remove or restrict existing ones.
- short title, extent of territorial application and commencement date.

It might also cover the following issues:

- a statement as to the applicability of the provisions in the Convention (i.e. to public authorities, the judiciary, private persons, the Crown, etc.)
- a statement establishing the remedies available to the courts.
- a statement as to the force of decisions of the Court and the Commission.
- a statement establishing a Human Rights Commission.
- a standard interpretation clause, giving the full meaning of terms used.

Preamble

260 Although the use of a preamble is today uncommon, it would be possible to include in the incorporating statute a preamble setting out the rationale for adopting a formal human rights instrument as part of UK law. The preamble could have more than simply declaratory effect: if, for example, it included reference to the protection of status and security of individuals in society, that statement could be used by the courts to develop the common law in private relationships in the direction of third party liability for breaches of the ECHR. However, any preamble would need to be worded to protect against its inadvertent use in the development of domestic ECHR jurisprudence. An alternative to a preamble (which is usually concerned with setting out the state of affairs which the new statute is intended to remedy) would be a 'objects clause', an enacted section at the beginning of the Act which sets out the ends which the Act is intended to bring about. Objects clauses are not common in the UK, but are widely used in Australia.

Amendment to Text

261 Some have suggested that the ECHR might be amended before incorporation to clear up the ambiguities and to fill certain gaps in what is a 46 year old Convention. There are also some concerns about aspects of the Convention which are unclear, either because the drafting is opaque (as with Article 8(2) which gives protection to various aspects of privacy) or because of undeveloped Strasbourg jurisprudence. For example, one untested aspect of the ECHR is how far does the right to life under Article 2 extend to the unborn child? One solution would be to provide that the rights only applied to individuals from the moment of their birth, avoiding the possibility of conflict with the 1967 Abortion Act. Other similar loose ends could be tied up by amending the ECHR before incorporation.

262 However, there are significant problems with incorporating an amended text. For example, the jurisprudence of the ECHR may well be less directly applicable, so that the British judiciary would find it more difficult to refer to the authority of Strasbourg case-law, and to refer to precedents set in other countries which have incorporated the ECHR in its original form. It would also create considerable delay in the process of incorporation and incite the very controversy that incorporation of a ready made bill of rights is intended to avoid. Other countries (such as France and Austria) have avoided this problem by incorporating the original text, but with reservations attached to the application of certain provisions. However, this does not enable the gaps and ambiguities of the text to be amended.

Differentiation Between Provisions

263 It thus seems certain that the form of incorporation proposed by the opposition parties would involve the provisions of the Convention (and Convention Protocols to which the UK is party, along with the UK's derogations and reservations) appearing, unamended, as a Schedule to a Bill which would itself be concerned with giving effect to these rights.

264 However, it would be necessary to consider whether it would be appropriate to incorporate every provision of the Convention or only the substantive rights-conferring provisions. This question was considered in the Home Office Green Paper, which raised doubts about the necessity of incorporating Sections II-V of the Convention, which deal with the constitution and procedure

of the Court and Commission "and other ancillary matters concerned solely with the operation of the Convention on the international level" and those provisions of Section I - articles 5(4), 5(5) and 13 - which cover remedies rather than substantive rights, on the assumption that there would be explicit provision in the incorporating statute for domestic remedies. The Green Paper concluded that: "We realise that any appearance of picking and choosing among the provisions of the Convention may be hard to defend, but nevertheless we think that this question needs to be considered." The 1977 SACHR report, on the other hand, took the view that the Convention should be regarded as a whole, and that domestic courts should be able to consider all its provisions, including the preamble, thus putting them in the same position as the Strasbourg enforcement bodies. The House of Lords Select Committee also considered whether it would suffice for the Bill to incorporate only articles 1-18 of the Convention and those Protocols which deal with substantive rights, and concluded that: "that would not be a satisfactory course. In the first place, there are a number of provisions which would not appear to be self-executing, that is to say, they are not of such a nature as themselves to confer any rights. Precisely which provisions, however, fall into this category is not a question which can be answered definitely, and it would not be satisfactory for the Bill to seek to make a judgment on that matter. In the second place, the Committee think that the Convention must be read as a whole because even provisions which do not confer rights as such may have a bearing on those that do."

265 Despite these views, it has been usual over the last twenty years for Private Members' Bills seeking to incorporate the ECHR to copy out in a Schedule only Section I of the Convention along with the some or all of the articles of the First Protocol - the only one of the Protocols ratified by the UK which confers substantive rather than procedural rights. (Bills have sometimes included Article 5 of the First Protocol so that Articles 1, 2 and 3 would be regarded as additional Articles to the Convention and all relevant provisions applied to them). A further Schedule then details the existing reservations and, in some bills, the derogations. The advantage of such an approach is that it makes clear to the lay reader of the legislation exactly what rights are being conferred; and where the exceptions lie. Reference to the remaining provisions of the Convention might be made in a preamble.

266 To avoid amending the legislation every time the UK decided to ratify a new or existing Protocol, it would be necessary to include provision conferring powers to make an Order in Council to give effect to such ratification. The main text would also need provide for the second Schedule to be amended by Order - subject to parliamentary approval - to remove any derogations or reservations; and to arrange for future derogations and reservations made in accordance with the Convention requirements and any domestic procedure for formal derogation (whether by means of a notwithstanding clause or otherwise) to be notified, and have effect, domestically.

Schedules to the Bill

267 As noted above, the Bill would have at least two schedules: Schedule 1 would include the text of the incorporated sections of the Convention and the appropriate Protocols to the Convention; and Schedule 2 the text of UK reservations and derogations. The SACHR 1977 report suggested that: "Since both the English and French texts are equally authentic, this should be made clear in the incorporating statute, and the relevant provisions of the Convention should be scheduled to the statute in both languages." To include non-English language text in legislation would not be unprecedented (parts of the Warsaw Convention, for example, have been scheduled to a UK

statute in both English and French) but this practice is increasingly rare given the proliferation of 'official languages' within the United Nations and European institutions, and might not find favour politically, although there would be no legal objection.

268 It is also possible to write guidelines into a bill of rights on the method of interpretation, as both Germany and South Africa have done. In Germany, the principle of social justice is to be taken into consideration when applying fundamental rights and freedoms. Legislation, including human rights legislation, can be written to permit greater flexibility in the course of interpretation. The Canadian Charter refers to the general principles of law recognized by the community of nations - which of course changes over time. Other schedules might include a number of issues discussed earlier in the report: the appointment of a Human Rights Commission or Commissioner and its terms of reference; notification of the Law Officers; admissibility procedures; and the establishment of machinery for the development of a domestic bill or bills of rights. Each of these could equally appear in the main text of the bill, depending on the political importance attached to them.

Conclusion

269 Whilst no legislation dealing with human rights could ever be described as straightforward, incorporation of the ECHR should not be equated with other, far more complex, constitutional reforms such as devolution. The key tasks in advance of the introduction to Parliament of incorporating legislation will be consultation with those organisations and professional bodies whose operation will be affected by incorporation, and effective dissemination of information about the proposed reform to the public at large. These measures should help to ensure an informed debate during the bill's parliamentary passage. But however well prepared the draft bill and comprehensive the information campaign, neither can protect a bill seeking to incorporate the ECHR into domestic law from the political ammunition that will inevitably be fired against it. There are, however, ways of reducing the obstacles to securing parliamentary approval for significant constitutional change, without undermining the importance of the democratic process. Simple changes, such as the introduction of timetabling for bills (long advocated by observers of parliamentary procedures both inside and outside Westminster), would limit the opportunities for filibustering and encourage more effective use of the time available.

270 Advance planning will also be necessary to ensure that arrangements for the enforcement and promotion of human rights standards are quickly operational. But decisions about access to rights should not be taken on the basis of speculation that subsequently turns out to be over-estimates of the likely increase in caseload following incorporation of the ECHR. Any assessment of the likely caseload should be based on analysis of international experience (and in particular the experience of Council of Europe member states) coupled with an evaluation of the likely sources of ECHR challenges in the UK, recognising that most occasions on which the ECHR will be raised will be collateral challenges.

Chapter 7

The Wider Implications of Incorporation

"This task of reviving or remaking the old checks and balances must be undertaken, not in a sweeping, blank-sheet fashion, but rather with a careful appreciation of practicalities: what will fit in with our parliamentary system, what MPs and public opinion will find fitting, what is consonant with national tradition and international obligation."

Ferdinand Mount, *The British Constitution Now*, 1992

Introduction

271 The incorporation of the ECHR raises a number of additional issues, especially over the longer term. These include: the need for a constitutional or supreme court; the demand for separate bills of rights in devolved nations and regions; the implications of devolution for compliance with international obligations; the implications for the existing right of individual petition to the European Commission; and the future relationship between the ECHR and EC law - including the prospect of accession by the EU to the ECHR. This chapter considers each of these points in turn.

Links with Other Constitutional Change

272 Although the incorporation of the ECHR need not be identified or implemented as part of a wider constitutional reform package, there are areas of overlap with other constitutional issues - in particular, devolution within the UK.

Constitutional Court

273 Foremost amongst these areas of overlap is the question of the need for a constitutional court to deal with human rights disputes. A constitutional court in the UK could take the form of the present Appellate Committee of the House of Lords or Judicial Committee of the Privy Council, or a separate court from the final court of appeal on non-constitutional matters. As set out in paragraphs 105-107 above, the case for creating a constitutional court simply to resolve matters relating to the ECHR is not convincing. However, it is clear that the range of constitutional reforms advocated by the opposition parties would result in an increase in what might broadly be defined as 'constitutional' litigation.

274 If plans for devolution to Scotland and Wales are pursued and/or a devolved government is established in Northern Ireland, there will need to be a court of final appeal for disputes between Westminster and the devolved assemblies; and for resolving conflicts over the competences of national, regional and local tiers of government in England. However well the legislation is drafted, where legislative and administrative power is divided between two centres it is inevitable that, at some stage, there will be an argument that one or other of the legislatures/administrations has exceeded, or plans to exceed, its powers. Within a federal constitution disputes about the *vires* of legislation would be remitted to the constitutional court empowered to decide questions relating to the constitutional settlement.

275 In addition, the durability of the UK's existing final court of appeal - the Appellate Committee of the House of Lords - is clearly reliant on the House of Lords continuing to include amongst its membership the Law Lords. Any reform of the House of Lords to create an entirely elected chamber would require a decision about whether and how to re-create the Appellate Court outside of the House of Lords. Linked to this would be consideration of the extent of its responsibilities and the possible need to create a constitutional court outside of the ordinary judicial heirarchy.

276 The question then is whether (a) a cumulative case for establishing a constitutional court begins to emerge from the wider constitutional reform context and (b) if so, whether the need for a constitutional court is immediate. The devolution proposals of the opposition parties certainly do not *require* the immediate establishment of a constitutional court, although in the long term the case for such a court in the United Kingdom may become stronger as the constitutional arrangements continue to evolve. One pragmatic short term solution would be for disputes arising out of the application of devolution legislation to be resolved within the existing court system, but in a way that does not prejudice the emergence of a constitutional court in due course. (The Unit's reports on the creation of devolved assemblies in Scotland and Wales concluded that the House of Lords should be the final court of appeal for devolution issues.)

277 The Liberal Democrats, however, have proposed the creation of a Supreme Court as "an essential part of our proposed new constitutional settlement."[106] Modelled on the United States Supreme Court, it is intended to take the place of the Appellate Committee of the House of Lords in the UK legal system. It would consist of a president and at least 10 members, nominated by a Judicial Services Commission, approved by a resolution of a parliamentary committee and appointed by the Head of State (although initially the judges would be the existing Lords of Appeal). The Supreme Court would have the following powers:

- to strike down legislation which is unconstitutional and to curb the abuse of power by the executive.
- to resolve disputes between the Federal Parliament and National Parliaments and Regional Assemblies about their respective powers.
- to protect the rights guaranteed by the bill of rights, while respecting the jurisdiction of the European Court of Justice and European Court of Human Rights.

This model is a 'classic' Supreme Court designed as a partner to a written constitution and a federal state, replicating many of the features of similar courts in other countries. An alternative model, adopted in Germany and South Africa, is to establish a separate Constitutional Court. The South African Constitutional Court has jurisdiction to enforce the rights protected in the Constitution, to test the constitutionality of laws and administrative action, to settle disputes between organs of the state at all levels of government, to certify that any new constitutional text complies with the statement of Constitutional Principles and to advise on the constitutionality of a Bill. The Court is composed of 11 judges, one of whom is the President of the Court; each member has been appointed by the Head of State for a non-renewable period of seven years. The need for a separate Constitutional Court was prompted by "the feeling that a new type of court was needed for the new legal order"[107] in order to gain public confidence.

278 There can be little need to establish a similar distance from the existing judicial system in the UK. However, were the UK to adopt a federal structure over the longer term, or wished to underpin new constitutional arrangements with a clearer practical demonstration of the separation of powers than would be the case by retaining either the House of Lords or the Privy Council as the final court of appeal on constitutional matters, the creation of a new constitutional court may become a more pressing concern in the UK. It is also likely that reform of the House of Lords to create an elected second chamber would require reconsideration of the role of the Law Lords, and the need for a separate judicial body that might readily evolve into a supreme court or constitutional court if required.

A Bill of Rights or Bills of Rights?

279 The development of a domestic bill of rights may be affected in another way by plans for devolution to Scotland and Wales; and by any changes in Northern Ireland. In the 1970s, when devolution proposals were last made by the UK Government, the Government accepted the arguments of the Royal Commission on the Constitution that no bill of rights should be included in the Scotland and Wales Bill, nor in the later separate Scotland Act and Wales Act. Similarly, neither the Labour Party nor Liberal Democrats, both committed to the creation of devolved assemblies, envisage the inclusion of a charter of rights in the legislation establishing devolved assemblies. However, in November 1995, the report of the Scottish Constitutional Convention (whose members include the Scottish Liberal Democrats, Scottish Labour Party, trades unions, churches, local government and others) stated that:

> *"The Convention expects Scotland's Parliament to provide for special protection for fundamental rights and freedoms within Scots law. This is best achieved through adoption of a Charter, advancing clear principles and specifying the rights and freedoms held to be inviolable. The Convention expects the Charter to encompass and improve on prevailing international law and convention (the European Convention of Human Rights, the International Convention (sic) of Civil and Political Rights the European Parliament Declaration of Fundamental Rights and Freedoms), and to be firmly based on Scottish traditions and values."*[108]

280 Incorporation of the ECHR at Westminster would not fulfil this commitment, although it would not in any way undermine or contradict it. The more fundamental question is whether the Westminster Parliament would regard it as imperative to maintain central control over rights issues, to ensure a standardised statement of fundamentals across the UK; or whether it would be content to provide for a minimum 'safety blanket' by way of incorporation of the ECHR and allow a move to develop a national bill of rights in Scotland in parallel to similar moves in England and Wales.

281 It would be difficult to defend the position that the UK Government was fulfilling its human rights obligations under the Convention in one part of the country without incorporation, and in another part by incorporation. This 'lopsidedness' is not an insuperable objection, as some international treaties do apply to parts of the UK and not to others, and under a legislative devolution settlement EC directives could be implemented differently in the devolved territories. (It is also worth noting that under the existing arrangements, there is disparity in the use of the Convention in different parts of the UK as a result of differing judicial dicta in Scotland as compared to England and Wales, and Northern Ireland).[109] More important would be the significant technical difficulties in seeking to confine the effects of incorporation to public authorities and individuals to one devolved area alone; and whether and how to amend UK legislation found to be in breach of the Convention by the courts in (say) Scotland. Either the validity of the legislation would depend upon where the individual lived; or the legislation would be required to change UK-wide and there would be little point in not having incorporated the Convention at Westminster.

282 However, if devolved powers included aspects of the Convention, it might well be necessary for the ECHR to be incorporated separately into the legal order of the devolved nations. This might be justified on the grounds that the rights were standardised across the UK, but the enforcement mechanisms differed as between the countries. For the most part, consistency in case law could be maintained through the right of appeal for courts in devolved areas of the UK to the House of

Lords (the exception would be Scottish criminal appeals) and through reference to Strasbourg rulings. It is also worth acknowledging that, whether the ECHR is incorporated UK-wide or otherwise, given the existence of different legal systems, the interpretation of the Convention may well not be standardised across the UK for some years.

283 The case for the adoption of territorially specific bills of rights as **additional** to UK-wide incorporation of the ECHR is perhaps more persuasive. This could be achieved either by the addition of schedules to the incorporating statute specific to the different devolved areas of the UK; or by the introduction of new legislation. If the devolved Parliaments are to be responsible for enacting such legislation, the latter approach must clearly be adopted. Such a bill of rights could, however, only be concerned with matters within the competence of the devolved authority. A further alternative would be for the Westminster Parliament to enact a UK-wide bill of rights and for the devolved Parliaments to be entitled to amend it in so far as it impacted on matters within its competence.

284 Within the UK, there are precedents for the adoption of sub-national bills of rights, as SACHR has pointed out: "Because there was and is no written constitution containing the paramount law of the nation and defining the rights and liberties of the citizens of the United Kingdom, another characteristic was and remains the absence of uniform minimum standards of human rights applied throughout the United Kingdom as a whole. For example....the existence of a remedy for unfair discrimination has differed as between Northern Ireland and Great Britain."[110] The case for UK-wide incorporation of the ECHR has been made repeatedly by the Standing Advisory Commission on Human Rights,[111] but with the caveat that if this was likely to be delayed, incorporation within Northern Ireland should be advanced alone. They added that, in the event of devolved government returning to Northern Ireland, a Charter of Rights should be agreed, "consonant with those that may accompany devolution in other parts of the United Kingdom...more comprehensive than the European Convention, and...framed in the light of whatever at the time seem to be the special needs of the people of Northern Ireland."

285 Although Governments of all hues have made sympathetic responses to these demands, no action has yet been seen. However, the Government's *Frameworks for the Future* document published in 1995 also offers an apparently positive form of words in relation to the proposed new political institutions: "Protection for specified civil, political, social and cultural rights would be reinforced in respect of a range of matters including those for which the new political institutions would have responsibility, on a basis arrived at in consultation with the parties. The means of such protection would accord with the constitutional arrangements of the United Kingdom, and could build on existing safeguards. The aim will be to ensure that under any political settlement legislation and executive action will operate fairly and impartially so as to ensure the protection of these agreed rights and to inspire the confidence of everyone in Northern Ireland." The document later specifically proposes that a Charter or Covenant be adopted by both jurisdictions in Ireland, which would reflect the particular political, social and religious traditions.

286 Despite this wave of support for a distinctive national bill of rights in the context of Northern Ireland, in the devolution legislation of the 1970s it was assumed that central government would remain responsible for ensuring compliance with the United Kingdom's international obligations, including those imposed by the ECHR.[112] Furthermore, the Home Office Green Paper made this side comment on the implications of devolution, which at the time appeared to be a real political prospect:

"Many of the subjects likely to be dealt with in a Bill of Rights are subjects which it is proposed should be devolved to Scotland and Wales (and might also be within the competence of some future Northern Ireland legislature). Nevertheless, it has been our assumption that it would be appropriate for any Bill of Rights that may be introduced, as a basic constitutional document, to apply equally to all parts of the United Kingdom."

Equally, the House of Lords Select Committee concluded that a bill of rights:

"would constitute a framework of human rights guaranteed throughout the United Kingdom and this would have special value if Scottish and Welsh Assemblies are established with powers devolved from Westminster, to ensure the exercise of such powers (e.g. those respecting local government and education) by the Assemblies with due regard to the United Kingdom's international commitments under the Convention."

287 This view may well prevail amongst Westminster politicians and Whitehall civil servants, and others who regard a statement of fundamental rights as a binding force for the UK. If this were to be the case, procedures would need to be adopted for this purpose in relation to the legislation and executive actions of the devolved administrations. If the Convention were incorporated into UK law, the question would arise whether the courts should have powers (over and above any that might be conferred on them in respect of Acts of Parliament) to test the compatibility of Acts passed by devolved assemblies with the Convention.

Membership of the European Union: Relationship with EC Law

288 Article F of the Maastricht Treaty states that the Union shall: "respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms....and as they result from the constitutional traditions common to the member states, as general principles of Community law." This reflects the trend of recent jurisprudence in the European Court of Justice. However, the agenda for the 1996 IGC takes this trend further in including the question of accession to the ECHR by the European Community i.e. that the Convention should directly bind the Community. Community legislation and executive acts of the Commission and other institutions of the Community would thus be subject to challenge for compatibility with the ECHR. This proposal is supported by both the European Parliament[113] and the Parliamentary Assembly of the Council of Europe.

289 It is not a new idea. The option of accession by the European Economic Community (as it then was) was considered by the House of Lords Select Committee on a Bill of Rights in 1977-78, which concluded that "this is **not** a possible course and can be discounted as a factor in measuring the desirability of a Bill of Rights." However, following a proposal for just this by the EC Commission in 1979, it was looked at in greater detail by the House of Lords Select Committee on the European Communities in 1979-80, whose conclusion was more equivocal, noting that any accession would require an amendment to the EEC Treaties; and "any protocol of accession...would have to deal with two subjects, first, the application of the principles of the Convention to the Community, and secondly, the necessary adaptations of the Convention's institutions and procedures."[114] On balance they concluded that the practical gains from accession were likely to be limited and the benefits to some extent symbolic.

290 The Commission revived its proposal in 1990, on the grounds that (a) accession would meet a gap in the Community's legal system and (b) it was increasingly difficult to separate human rights from Community activities. This prompted the Select Committee on the European Communities to consider the idea again in their 1992 report *Human Rights Re-examined.* The Committee concluded again that, despite changes in the legal and political context (for example, general acceptance of the right of individual petition amongst Member States) accession would be largely symbolic, would present some practical difficulties and would require considerable political resources: "Therefore we do not favour Community accession to the [ECHR]. We believe that at present the Community has more pressing tasks."[115] One of the concerns raised (as in 1979-80) was whether, in the context of the UK's non-incorporation of the ECHR, this would be tantamount to incorporation "by the back-door" as accession by the EU would mean that in Community matters the ECHR would have the force of law in UK courts. The arguments in support of this proposition were broadly dismissed on the grounds that as EC law was already influenced by the Convention (see paragraph 000 above), accession would not make much difference to the position: "In as much as there is a back door, we believe it is already used."

291 The central objection in both House of Lords reports, however, was that the result of accession would be to cause confusion and delay: "If a Community act were challenged in our courts, the case might be the subject of a reference to the European Court [of Justice]. Having perhaps gone through our High Court, Court of Appeal and House of Lords, with a reference en route to the European Court, it might then be the subject of a petition to the Commission of Human Rights and an appeal to the Court of Human Rights, which again might differ from the European Court and, in substance, overrule it."[116] This point was echoed by the UK Government in setting out *The British Approach to the European Inter-Governmental Conference 1996:* "Fundamental human rights are already protected by the ECHR to which all Member States are party, and which the Union too is bound to respect, under articles F and K.2 of the Maastricht Treaty. These rights are enforceable through the Commission and Court established by the ECHR. Duplicating the ECHR in the Treaty would serve no useful purpose and might confuse the jurisdictions of the ECJ and the European Court of Human Rights."[117]

292 Despite the UK Government's lack of enthusiasm for accession and the endorsement of the Select Committee for this stance, the idea remains one that the House of Lords generally[118] and many other Member States find attractive. The IGC's consideration of the issue is likely to be influenced by the Opinion issued by the European Court of Justice on 28 March 1996, which concluded that a treaty amendment **would** be necessary to achieve incorporation in the EU. From the current UK Government perspective (as one of only 2 member states of the Union not having incorporated the ECHR into domestic law), the proposal is also politically unattractive, whatever the legal arguments and reassurances to the contrary from the Commission in Brussels.[119] If accession by the EU were to take place, it might well be seen as strengthening the case for incorporation domestically.

293 It is largely a question of timing. If the ECHR were incorporated into UK domestic law before the question of accession by the EU is resolved, the political objections of the UK objection would disappear. It would also have the advantage of removing the objection expressed by the Home Office representative to the European Communities Select Committee: "A United Kingdom measure might partly fulfil a European Community obligation and partly relate to issues wholly outside European Community competence. It could be hard for the [domestic] court to keep the issues separate and to apply the European Convention directly only insofar as the Community competence was concerned and not that of the United Kingdom."[120]

294 There would, however, continue to be some difficulties presented by accession, so it cannot be assumed that a Government committed to incorporation domestically would necessarily favour accession. First, there is the question of delay, inevitable given that the structures of the Convention were not designed with institutional members in mind, but soluble given better resources to support the ECHR system or by other devices. Second, what exactly to accede to, given the differences between Member States in terms of which Protocols they have ratified, reservations entered and derogations made. The Commission has proposed accession to all the Protocols "within the field of the application of Community law" but detailed consideration has not been undertaken. The House of Lords Select Committee produced a pragmatic response to this problem, suggesting that the Community acceded only in respect of those provisions already accepted by all member states (Protocols 1, 2, 3 and 5 and 8 and the right of individual petition and the compulsory jurisdiction of the European Court of Human Rights - now embodied in the Eleventh Protocol). The problem of divergence between national and potential Community obligations would then not arise. However, others[121] have argued that the Convention should be acceded to along with all its Protocols, on the grounds that it is impossible to say in advance whether or not a fundamental right will be of relevance to Community law or, alternatively that none of those which have not been universally ratified are likely to relate to areas of Community competence. As to the problem of possible conflicts resulting from national reservations to the Convention, the Committee took the view that they had received no evidence to suggest that "any national reservations to the Convention or First Protocol would raise practical difficulties in the event of Community accession." Nor, they said, did they believe that "significant conflicts would arise from national derogations under Article 15....although we accept the possibility of difficulty in regard to the United Kingdom derogation in regard to the situation in Northern Ireland."[122]

The Right of Individual Petition to the European Commission of Human Rights

295 Following incorporation of the ECHR into domestic law, the individual would remain free to have recourse to the European Commission of Human Rights by way of direct application following the exhaustion of domestic remedies. The new Eleventh Protocol will provide a mandatory right of individual petition, so that the fear of non-renewal of the right to individual petition has now receded.

296 There are mixed views as to whether the number of applicants to the Commission in Strasbourg would grow or diminish following incorporation. There is no necessary correlation between the number of cases brought against a state and the status of the Convention in its domestic law. Some charge that because resolution in the domestic courts will be possible, fewer cases will need to go on to Strasbourg; others countercharge that there will be an overall increase in the total number of applicants, and some will not find satisfactory resolution in the UK courts, leading to a larger number of applications to Strasbourg.

297 In practice, the number of cases continuing on to Strasbourg may not decrease significantly. Human rights cases tend to be those where the litigants are passionate about their cause. If the case is not won at an earlier stage it might still be taken to Strasbourg, and there could be cases that would never have reached Strasbourg under existing procedures because they would never have been embarked upon. The actual number would depend in part on the attitude of British

judges when applying the Convention. A narrow view domestically would result in a significant number of applications to Strasbourg. Under these circumstances, not only could there be no reduction in the number of applications to Strasbourg, but the individual litigant might be disadvantaged by the new arrangements. SACHR's 1977 report argued that: "If the UK courts were to be excessively restrictive in their interpretation of the Convention....the individual would be worse placed in important respects as a result of incorporation than in the present situation, for an alleged victim would be required to exhaust expensive, time consuming and fruitless domestic remedies in our courts before applying to the Commission."[123] In addition to proposals for mitigating the costs disadvantage, SACHR went on to recommend that the Government should support moves to amend the Convention so as to empower the Strasbourg Court to give a preliminary ruling on the request of the Commission, or a national court, so that an individual could obtain a reference at an early stage in domestic legal proceedings. But even if this were to happen eventually, it would almost certainly follow a long process of negotiation, and cannot therefore provide an immediate solution.

Conclusion

298 The incorporation of the ECHR cannot be considered in strict isolation from the wider agenda of constitutional reform. The legal and constitutional framework within which incorporation will take effect is changing quickly and may develop in significant new directions under a Government committed to a programme of constitutional change. The package of reform proposals advocated by the main opposition parties will require strategic, long-term planning; and the incorporation of the ECHR and subsequent development of a bill of rights should not be marginalised or excluded from that planning process. Indeed, these changes could be mutually reinforcing if - for example - the creation of devolved Parliaments leads to the development of bills of rights designed to reflect the needs of those devolved nations and regions. The discussion in the next chapter focuses on the development of a single UK-wide domestic bill of rights, although the issues raised would apply equally to the development of bills of rights at sub-national level.

Chapter 8

Development of a British Bill of Rights

"Britain will not have a Bill of Rights ...
unless it turns out, after an intensive period of public debate that ...
the British people do share a constitutional sense of justice."

Ronald Dworkin, *A British Bill of Rights*, 1990

Introduction

299 The Labour Party and the Liberal Democrats are committed to the development of domestic human rights charters that go beyond the terms of the ECHR. Detailed proposals for a British bill of rights have recently been produced both by the Institute for Public Policy Research and by Liberty, drawing on existing international conventions and the example of other countries which have recently developed their own Bills of Rights - Canada, New Zealand and South Africa. This cross-fertilisation of international human rights standards can also be taken one step further, as with the secondment of Judge Strayer of the Canadian Federal Court to the Hong Kong Government to help draft their Bill of Rights Ordinance. Most importantly, it is both unlikely and undesirable that any domestic bill or bills of rights could be formulated without some exercise in public consultation. This chapter looks at the process of policy development, including an examination of international experience in the development of bills of rights and the UK's own history of constitutional reform, before turning to consider how the UK might tackle the task of developing a domestic bill of rights

Terms of Reference and Timetable

300 The Labour Party has proposed "an all-party commission that will be charged with drafting the bill of rights and considering a suitable method of entrenchment";[124] while the Liberal Democrats propose a two stage process: "Our Constitutional Assembly would ... draw up a Bill of Rights which would include the European Convention and the Covenant, and largely follow the IPPR Bill of Rights ... The second stage would be to require the Constituent Assembly to consider any amendments which are needed to the Bill of Rights. The Bill of Rights would then be included in the written constitution and would be entrenched when the referendum approving the constitution was passed..."[125]

301 Whoever is charged with the task, the development of a domestic bill or bill of rights within the UK will require a clear definition of the starting point. This will depend in part on whether (as the Liberal Democrats envisage) the development phase is part of a wider process of negotiation towards a new constitutional settlement - of which a bill of rights forms only a part - and which may therefore require the accommodation of political or partisan views as to the terms of reference. Equally, it will depend on whether there is strong political leadership from the Government of the day. However, as a domestic instrument of fundamental rights could not be framed in terms inconsistent with or in disregard of existing human rights obligations, whether incorporated into UK law or not, two starting points can immediately be suggested:

- the provisions of some or all of the UK's existing international obligations could be combined into one coherent document, which included the 'highest' degree of protection from the range of texts in each area of human rights: essentially a task for experts, not politicians.
- a more fundamental process of inquiry and policy development could be initiated, which would produce a set of rights which were not in contravention of existing obligations, but need not expressly include all their provisions and might add some new provisions that were entirely self-developed or drawn from human rights instruments not ratified by the UK. This is clearly a more complex, and more political, task. The introduction to Liberty's Bill of Rights explains the methodology involved in developing their proposed text, which adopted an approach along these lines (as did IPPR, although all except one of its provisions were drawn from the ICCPR and ECHR):

"its order, relative length, language and broad headings are based on [the ECHR]. However... some rights in the Convention are actually weaker than those currently operating in the UK .... the limitations set out in the Convention can be, and are, interpreted so as to reduce its impact. Consequently, Liberty's Bill also draws upon the relevant articles of the 1966 United Nations International Covenant on Civil and Political Rights wherever it is stronger or less ambiguously drafted. Where both the Convention and Covenant are silent, we have drawn upon the relevant articles from other international, regional or domestic human rights instruments. In the absence of any suitable instrument, we have drawn upon broad principles set out in UK law or even - or rare occasions - Liberty's own policy."[126]

302 What is clear is that any attempt to develop a domestic bill or bills or rights will have to take as its starting point the ECHR - as no part of that should be undermined by a subsequent statement of rights[127] - and the substantive rights contained in the other international treaties by which the UK is bound. However, not everyone will necessarily agree with Liberty as to the 'deficiencies' of the ECHR and some politicians may have their own policy objectives in developing a domestic bill of rights (Jack Straw, the Shadow Home Secretary has, for example, made much of the idea that rights must be balanced with responsibilities, and it may be that a bill of rights could be designed to reflect this proposition). This applies to questions of process as well as content, as it cannot be assumed that the entrenchment and enforcement measures adopted in relation to the incorporated ECHR would be (or should be) transferred to a domestic bill of rights. Developments in the political context (for example, reform of the House of Lords or a movement towards a written constitution)[128] might well prompt new consideration to be given to these issues, and the 'operational' experience of the ECHR will provide lessons of its own.

303 Responsibility for defining the starting point might rest with the Government or might arise from wider deliberations. However, the timetable is likely to be within the control of the Government as a bill of rights will only have a chance of implementation if the relevant legislation is introduced into Parliament by the Government of the day. In 1993, the Labour Party policy document, *A New Agenda for Democracy,* stated that their proposed all-party commission should "report to Parliament within a specified and limited period of time." Jack Straw has since said that "If this project is to have real meaning it is essential that the public feels some sense of ownership of it, and commitment towards it. This will mean that the project will take some time - beyond a single Parliament."[129] The Liberal Democrats see the development of a domestic bill of rights as part of a wider project of creating a written constitution, and so envisage a timetable stretching over two Parliaments.[130] Of course, there is nothing sacrosanct about these timetables: consultation and implementation could be achieved within five years, given sufficient political will. However, for different reasons, both main opposition parties do not regard a domestic bill of rights as a target for the first five year Parliament. This inevitably runs the risk that any process initiated by one Government could be derailed by a new Government and makes it all the more important that the process is cross-party and genuinely popular.

UK Experience

304 There is a strong expectation within the British tradition that constitutional reform should be based on broad public and cross-party consultation. This view is clearly held by both the Labour and Liberal Democrats in relation to the development of domestic bills of rights. However, attempts at resolving constitutional issues through consultation do not have a happy track record within the UK (some attempts, like the Conservative Party's 1979 manifesto pledge of all-party talks on a bill of rights, fail to reach even the starting gates). Protracted consultation is clearly not the most efficient or necessarily productive way of making and implementing policy. If there is the necessary political will and party unity can be assumed, or manufactured, there is every reason to regard the resources of Whitehall as the most efficient way of developing policy. But getting legislation on the statute book is not all. 'Efficiency' also includes making constitutional reforms endure beyond the lifetime of a particular Government: coherence and legitimacy are equally important. Those interested in embarking on constitutional reform in the UK this century have nearly always attempted to engage with other political parties and consult outside of political elites, even if these attempts are subsequently abandoned. This is likely to be particularly important where (as with a bill of rights) it is desirable that the legislation be regarded as, for all intents and purposes, not subject to repeal by a future Government.

305 The absence of any fixed procedure for constitutional amendment means that where a Government does not have definitive plans for reform or chooses to consult on its proposals before implementation, there is a range of vehicles that it might use. In this sense, the UK's unwritten constitution makes a degree of innovation more possible than in those countries where procedures for constitutional amendment are closely defined. In the UK, specific problems can have solutions designed to meet them: one example being the Nolan Committee on Standards in Public Life. This section considers some of the possible models available to a Government intent on developing policy in relation to constitutional issues.

Building Political Consensus

Cross Party Talks

306 During the twentieth century there have been repeated attempts to secure consensus on constitutional measures through cross-party talks. These have been held under various titles and include both private talks at a Privy Councillor level and more public and formal inter-party talks. There are issues on which inter-party talks have been repeatedly attempted, for example reform of the House of Lords. The decision to seek the involvement of all parties in talks usually reflects the fact that the reform in question is either likely to affect the balance of power in Parliament (and especially party political balance) or could not be made to work in practice without the support of other parties. It must be open to question whether the development of a bill of rights is an issue of this sort.

307 The 1977-78 House of Lords Select Committee on a Bill of Rights also provides a precedent for this approach in the human rights field. The Select Committee was appointed following the Second Reading debate on 3 February 1977 on a Bill of Rights introduced by Lord Wade. The House agreed that the Bill should have a Second Reading on condition that it should not proceed further until a Select Committee had considered whether a Bill of Rights was desirable and, if so, what form it should take. The members of the Committee were appointed in May 1977. Over

the course of the 1977-78 and 1978-79 Sessions, the Committee had a total of 17 meetings, 12 of which were in public. The Select Committee had a special adviser and took evidence from a number of academic and other experts, including the authors of the Home Office Green Paper of the previous year. The Committee expressed itself convinced that "to attempt to formulate *de novo* a set of fundamental rights that would command the necessary general assent would be a fruitless exercise" and called in support of this claim the experience of Austria, where "a Commission set up ... in 1966 to draw up a new code of fundamental rights has encountered endless problems and has so far succeeded in producing a text in respect of only two rights, and even then only in the form of alternative drafts."[131] In the event, the House of Lords Select Committee itself was divided on the principle whether or not to recommend a bill of rights for the UK, although they agreed on the form that one should take, in the event of such a Bill proceeding. They finally recommended, by a majority of one, to support incorporation of the ECHR - but when Lord Wade reintroduced his Bill in 1979-80, it was voted out by the Government.

308 The option of inter-party talks will inevitably be raised in the context of future constitutional reform. It is obvious that, given the different constitutional views and political interests of the parties, it is never going to be easy to reach cross-party agreement on constitutional issues. Yet the success of such an approach requires the politics of consensus to prevail. If it does not, the consequential reforms are likely to be either piecemeal - introduced on the basis of whatever agreement was reached, not the comprehensive reforms originally intended - or rejected by the opposition parties. There is significant scope for tactical manoeuvering by opposition parties during the talks, or even for frustrating the very establishment of talks by non-participation. There is also a danger that the party leaders may not be representative of the party at large, and may not be willing or able to whip their backbenchers into line during subsequent parliamentary proceedings.

309 The process of inter-party talks therefore needs to engage backbenchers in the consultation process as far as is possible. Even if formal involvement is not practicable, there is value in keeping backbenchers up to date with the progress of discussions and the reasons for any apparent compromises made. Equally, debate and agreement within the Cabinet on the Government's own stance is a crucial pre-requisite to successful negotiations in any cross-party forum. Where talks break down, any decision to proceed with the measure should recognise that it can no longer expect support across the House and the bill should be framed accordingly. It is also important that those taking part in the negotiations are in a position within their own parties to ensure that the decisions reached are accepted. Otherwise, even where agreements are reached, they may not be sustained through the parliamentary passage of resulting legislation.

310 The keys to success are likely to be ensuring sufficiently high level political engagement whilst avoiding the danger of establishing an inward looking clique, immersed in the detail of the issues and unconcerned with the wider political ramifications (as happened in 1969 with the reform of the House of Lords). The principal advantages are that the concerns and preferences of the parties can be teased out in negotiations which enable suitable solutions to be developed at an early stage - especially if the talks are focused on principles rather than the detail. Moreover, if successful in reaching a conclusion, they should smooth the passage of legislation. This approach does not preclude the commissioning of research to assist in deliberations nor the publication of consultative papers (or the use of other consultative mechanisms e.g. polling) to discover public opinion.

Constituent Assemblies and Constitutional Conventions

311 A constituent assembly is a body comprised of people elected for the purpose of drafting a constitution, although the term 'constitutional convention' has also been used to apply to what are essentially constituent assemblies, as with the United States Constitutional Convention in 1787 and the Northern Ireland Constitutional Convention of 1973. The term constitutional convention is used here to refer to a body made up of a combination of politicians, experts and the wider civic community - as, for example, in the case of the Scottish Constitutional Convention.

312 The Liberal Democrats envisage that their bill of rights would be drafted by a Constituent Assembly. The nearest the UK has come before to a constituent assembly was the Northern Ireland Constitutional Convention established in 1973. The Convention was established to consider "what provision for the government of Northern Ireland is likely to command the most widespread acceptance throughout the community there", and was thus not primarily concerned with a bill of rights. Its 78 members were elected from the 12 parliamentary constituencies of Northern Ireland, and its Chairman appointed by the Queen. Although their report recorded consensus on the need for a bill of rights, it was subsequently suggested that this was "more apparent than real....Examination of the various views expressed by those supporting a bill of rights in fact revealed a variety of different approaches and emphases, particularly in relation to the scope and character of the rights and freedoms to be guaranteed and the means by which a bill of rights should be enforced."[132]

313 The role, functions and timeframe of a constituent assembly are issues that require negotiation rather than imposition. Experience shows that the use of a constituent assembly can be time consuming and does not guarantee the acceptance or durability of any agreement reached. Ultimately, the device of a constituent assembly does not avoid the need to tackle party political differences and to maintain the momentum of reform through negotiation as well as consensus building. It may also prove inadequate to deal with a non-crisis situation, as "the motive power of constituent assemblies will come from acting quickly, in periods of great public euphoria where natural law ideas are dominant - normally following on some great political or social revolution or similar upheaval, when there is little difficulty for the constitution-makers in perceiving the nature of the public mood and in translating it into technical legal form."[133]

314 Although it has no official status, the Scottish Constitutional Convention (SCC) launched in 1989 provides an example of how a constitutional convention could work. It is made up of representatives of the Scottish Labour Party, the Scottish Liberal Democrats and representatives of other parts of Scottish civic society: the trade unions, local government, churches, women's movement, ethnic minority groups and sections of the business and industrial community.[134] The aim of the SCC was to develop a workable and realistic scheme for a Scottish Parliament. The SCC proceeded initially through working groups and prepared a draft scheme in 1990. Issues which were left outstanding, such as proposals on gender balance, electoral system and constitutional implications at a UK level, were referred to a Constitutional Commission which was established in 1993. The Commission was a much smaller body which took expert evidence on these technical issues and reported its findings back to the Convention for decision.

315 The Scottish Constitutional Convention has been successful in attracting support and achieving consensus in its decision making. In bringing together such a wide cross-section of people and

engaging politicians in the process, the SCC has managed to be both educational and consultative and to combine technical advice with building political consensus. It represents a degree of cross party cooperation which is quite alien to national politics (although not so uncommon at local government level). Even so, three important limitations should be noted. First, the Scottish Conservatives and the SNP both refused to participate in the Convention thus limiting the authority of its recommendations. Second, although its recommendations have been endorsed by the leaders of both main opposition parties, the Labour Party's recent announcement that it would not introduce a Scottish Parliament unless approved by a referendum demonstrates the political weakness of a policy position developed by those other than national party leaders. Second, the consensus rule for decision-making meant that where no such consensus could be reached, the Convention has remained silent. Hence its proposals do not deal exhaustively with all the issues that are raised by the prospect of devolution, nor have their proposals yet faced the test of implementation.

Calling in the Experts

Royal Commissions

316 There is some appeal in setting up a small committee of experts to produce a draft bill of rights, not least because most of the legal intricacies and technicalities of drafting would be of little interest to most members of the public; whilst those parties with an interest could easily give evidence. The Human Rights Bill introduced by Graham Allen MP in 1994, for example, proposed the establishment of a Bill of Rights Commission, with the function of preparing a draft bill of rights relating to all civil, political, economic and social rights in the United Kingdom. The members of the Commission were to be appointed by the Lord Chancellor and Lord Advocate after public consultation, but within two months of incorporation of the ECHR. They were to have a 'duty' to report within two years, and the Lord Chancellor was to be obliged to lay copies of the draft bill before both Houses of Parliament not later than one month afterwards.

317 There are no standard criteria for when it is appropriate or helpful to set up an expert commission, nor when it is appropriate for a Commission to be designated Royal. There has been one previous attempt to refer constitutional reform to a Royal Commission. In 1968, the Wilson Government set up the Royal Commission on the Constitution, chaired first by Lord Crowther and then by Lord Kilbrandon, in response to growing demands for decentralisation. The Commission was first decided on in 1968, started work in 1969 and reported in October 1973. Professor Vernon Bogdanor has argued, and the view is widely supported, that the Commission was established as the "expedient of a harassed administration...the demand for immediate concessions to meet the nationalist threat could be contained, and by the time the Kilbrandon Commission reported the SNP and Plaid Cymru might no longer be so credible politically, in which case its findings could be quietly pigeonholed."[135]

318 The expectation that the members of a Royal Commission should be both broadly representative, and expert in the field, presents immediate obstacles to consensus-forming. In the case of the Kilbrandon Commission these inevitable difficulties were compounded by the loss through death of two members (including its first Chairman) and the resignation of three others. Two of the remaining members issued a Memorandum of Dissent - which argued that the Commission's terms of reference permitted a comprehensive review of constitutional arrangements, whereas the main report focused almost exclusively on devolution. On publication, the Commission's

report was debated briefly in the House of Commons, but neither of the two main parties' election manifestos made any commitment to devolution. In the event, the return of a Labour Government to power in the February 1974 election ensured that the Commission's recommendations were further considered, through the publication of a Green Paper for consultation (although only 4 weeks were given for responses) and then a hurriedly produced White Paper which attempted to identify principles on which devolution would proceed, with the details covered in several more subsequent White Papers. At the very least, it can be seen that the work of the Commission assisted little in reducing the decision-making burden of the Government. The history of the Scotland and Wales Bill (which the Government was forced to withdraw) and the subsequent separate Scotland and Wales Acts (which never came into force following their rejection in the 1979 referendums) perhaps provides adequate testimony to the efficacy of the Commission in easing the path of reform.

319 There is nothing intrinsically wrong with Royal Commissions. The principal advantage of a Royal Commission is that it is a public body which is expected to invite evidence from a wide range of bodies and individuals. In doing so a Royal Commission can raise and address new ideas and may also create a climate sympathetic to change. However, it is not overstating the case to say that there are more reasons why a Royal Commission might be inappropriate or ineffectual, particularly in considering the contents of a domestic bill of rights. First, Royal Commissions are famously regarded as an 'excuse for procrastination' and even setting one up would raise questions about a Government's commitment to reform. Second, Royal Commissions may produce findings which are not sufficiently policy oriented or which fail to reflect the realities of the political environment into which their recommendations are delivered. There is always a risk that the Government may not welcome the findings produced. The decision then is whether to accept the recommendations despite the Government's own reservations; or to disagree and face the political consequences. The decision to appoint a Royal Commission may therefore serve two unhelpful ends: keeping a contentious issue alive, and without resolution, for a period of years; whilst adversely affecting the reputation and authority of the Government because of public perceptions about the purposes to which Governments put Royal Commissions and their inherent utility.

320 Finally, and perhaps most critical, is the importance of engaging parliamentarians in negotiating a settlement of a constitutional issue, rather than collecting the views of external experts. The contents of a bill of rights will have to reflect political direction as well as the objective analysis which is ostensibly the input of the Royal Commission (quite apart from the fact that it is extremely difficult to identify a range of sufficiently expert, but non-partisan, Commission members). A Royal Commission might well be able to conduct the sort of exercise that others have done in drawing together international best practice and producing a coherent text that also acknowledged any unique domestic issues identified during the course of consultation. But to the extent that this sort of objective analysis is required to feed policy decisions, it can just as well be carried out by Departmental or commissioned researchers.

321 The single clear advantage offered by a Royal Commission is the relatively transparent nature of its deliberations. Moreover, the example of the Opsahl Report on Northern Ireland also suggests that ways can be found of engaging the public in a more proactive way than has been usual with the work of an expert committee. An unofficial independent commission of inquiry supported by charitable trusts and others, the initiative involved nearly 30 public meetings, a wide range of private meetings, the use of outreach workers and focus groups, and a mailing to every prisoner in Northern Ireland over an eight month period - which led to the receipt of over

500 written submissions and six weeks of oral, and largely public meetings, widely reported in the media (both the Irish Times and the Belfast News Letter covering the oral hearings on a daily basis).[136]

Constitutional Commission

322 The term constitutional commission is used here to describe an independent, expert, standing body, such as the Law Commission. The international precedent would be the Australian Constitutional Commission (see Appendix D), and the lessons of that body's ultimate failure would need to be carefully assessed. It has been suggested by the Editors of the Political Quarterly that a constitutional commission could be established as part of the reform process, providing a new agency which cut across Whitehall boundaries and would be "committed to the enterprise and has the expertise and authority to drive it along"; and by Dr Geoffrey Marshall and Lord Armstrong (the former Cabinet Secretary) that a constitutional committee composed of Privy Councillors could perform "an advisory role and make recommendations on issues referred to it."[137]

323 Were such a Commission in place, it might be a natural home for deliberations on a domestic bill of rights. The advantages of such a constitutional commission would be its potential for ensuring that the reform programme as a whole was coherent and that the interaction of the various elements within it was fully thought through. It would be a means of removing thinking about, if not legislating on, constitutional questions from the political arena; would offer opportunities for ongoing public education in constitutional and citizenship matters (if the Secretariat were appropriately staffed) and could develop as an independent point of reference for ad hoc constitutional questions e.g. the wording of referendum questions. There is no guarantee that the involvement of such an eminent commission would improve the chances of the bill surviving its parliamentary passage. The Nolan Committee on Standards in Public Life, however, provides one example of how such a Commission might successfully operate within the existing constitutional arrangements; although it remains to be seen how effectively its recommendations will be implemented.

Public Consultation

324 There is clearly advantage in ensuring that fundamental rights are not only agreed between politicians, or experts, but also broadly reflect the views of the public at large. This has been the view taken in many other countries, where information exercises, invitations to submit evidence, and so on, have been a central part of the process. However, the classic Green and White Papers are increasingly outmoded, and official dissemination channels are not designed to attract widespread public interest. Public forums, advertising campaigns and more user-friendly and widely available documentation (see, for example, the distribution of the Northern Ireland Frameworks for the Future document) may be used to some effect in improving accessibility and encouraging public participation. The developing tools of electronic democracy may make effective consultation a more manageable and attractive prospect - communications technology may be used to engage citizens through 'electronic summits', on-line provision and exchange of information, and so on, as well as through more traditional 'passive' media such as the televising of the special Committee proceedings in Canada.

325 In respect of a bill of rights, however, there is a particular problem of public education that would need to precede any such debate. There is very limited public understanding of the notions of 'civil and political rights' (perhaps in significant part because they are taken for

granted); and far more enthusiasm for those rights which fall into the categories of social and economic rights, as the chart below illustrates. Politically, therefore, there is a danger of public debate creating expectations that cannot be met because of financial constraints, and of undermining support for existing rights if the debate is mismanaged.

Table 1: What Should Be Included in A Bill of Rights?

	Included	Excluded
Hospital treatment in reasonable time	88	2
Fair trial before a jury	82	1
Privacy in phone and mail	75	2
Know information held about you	74	4
Join or not join a trade union	71	4
Join legal strike without risking job	63	7
Peaceful meetings or demonstrations	59	6
Equal treatment on entering the UK	59	7
Homeless to be rehoused	60	9
Woman to have an abortion	60	10
Press to report public interest	53	13
Defendant to remain silent in court	32	29

Source: 'State of the Nation', MORI/Joseph Rowntree Reform Trust, May 1995

326 In some countries, referendums are required before changes to the constitution can be given effect, and many other countries have chosen to use referendums to settle constitutional issues. There is, however, no example of a referendum being used specifically to approve a bill of rights. In the UK, all three main parties either support, or have not ruled out a referendum on further European integration; and whichever party is in power, some form of referendum is likely to accompany any settlement in Northern Ireland. The Liberal Democrats have promised to extend powers to hold referendums to local and regional government and to introduce advisory citizens' initiative referendums. The Labour Party has promised referendums on electoral reform, the introduction of elected assemblies in the English regions, and on the creation of devolved assemblies for Scotland and Wales. Commenting on this range of planned referendums, Tony Blair has recently said: "I don't believe in governing by referendum as a general principle, but these are all things that arise because of changes to the constitution."[138] To the extent that the development of a domestic bill of rights is a core constitutional issue, it must be for consideration whether a referendum might be an appropriate entrenchment mechanism. The judgment will be a political one and, given the UK's limited and not altogether happy experience of referendums, will inevitably be influenced by the experience of referendums held between now and then.

327 However, it would clearly be difficult to conduct a referendum on a new bill of rights unless it had first been exposed to some more in depth form of public consultation - 'yes' and 'no' options are unlikely to be sufficiently sophisticated to offer guidance on the acceptability of a set of fundamental rights. It would certainly be both difficult and absurd to conduct a pre-legislative referendum on the **principle** of a domestic bill of rights (as Labour proposed in

respect of the devolved assemblies) once the ECHR was already incorporated and therefore the principle had been established. However, a referendum might be used as a practical (although not legally binding) entrenchment mechanism once the substance of a bill of rights had been considered by Parliament in the form of legislation - as with the devolution referendums in the 1970s; or a pre-legislative referendum could be held on the basis of a White Paper, including the text of the Bill proposed by the Government. The questions of how to ensure fairness and efficiency in a referendum will be considered in detail in the report of the Commission on the Conduct of Referendums, to be published by the Constitution Unit later in 1996.

International Experience

328 Elsewhere in the world, national bills of rights, and especially those developed over the last twenty years, have been the product of public consultation and inquiry. Even international human rights agreements, traditionally the preserve of inter-governmental negotiation behind closed doors, have increasingly been influenced by lobbying from non-governmental organisations. The development of tools of mass communication means that there is little excuse for not engaging public interest effectively. Those developing bills of rights have also recognised the importance of avoiding Government dominance of the process (or at least the appearance of such): independent or cross-party bodies have been deployed to assist in the development process; and international experience is often drawn upon. A detailed survey of the processes adopted in a number of different countries is included at **Appendix D.**

329 It is never possible to try to extract any compelling wisdom from the experiences of other countries, not least because the specific political backdrop to any process of policy development and consultation will have significant influence. But some generalisations may be suggested:

- the development of a bill of rights will not come to fruition without (ideally) Government sponsorship at the outset and (certainly) Government support for a specific course of action. Most important is the personal commitment and authoritative leadership of a senior Government figure both during the development process and in 'selling' the outcome to Parliament.
- some sort of consultation process is useful, but must establish public credibility through its *modus operandi.*
- if recommendations are to be made by an independent body, the Government should set clear terms of reference, which offer a framework of principle. For example, the terms of reference could establish that the body is to consider only the possible contents of a bill of rights, not whether one is a good idea or not; and could offer an indication of the Government's own views on existing examples of bills of rights to provide a political steer, which the Commission can choose to adopt or not.
- it is possible to combine expert, public and parliamentary input to the policy development process.

Assessing the Options

330 Any consultation or inquiry process outside Government will benefit from building on an increased awareness of rights following the incorporation of the ECHR. For this reason, there is considerable advantage in a Human Rights Commission being established alongside incorporation of the ECHR, with a clear public education remit, in order to ensure an informed debate in the subsequent stages. The absence of a 'rights culture' in Australia to counter the deeply partisan federal politics and inter-state rivalries, it has been argued, is one of the underlying reasons for that country's failure to adopt a bill of rights despite successive Government attempts: the absence of clear grassroots support for a bill of rights there contrasts strongly with Canada, where "Prime Minister Trudeau was able to tap into strong popular support for the Charter of Rights and Freedoms in his tussle with opposing provincial premiers."[139] However, as the Unit has argued elsewhere (see *Delivering Constitutional Reform*), a Government embarking on such an exercise must be realistic about what can be achieved. Each of the policy development mechanisms discussed in this chapter has merits and disadvantages. More generally, the benefits of these mechanisms can be that they:

- produce more widely acceptable policy and technically accurate legislation.
- allow for compromise before final decisions are made.
- allow for the strength and nature of opposition to be assessed.
- provide a means for building support for a measure.
- educate the public and MPs about the issues involved.
- lend weight and authority to the position the Government takes.

331 One of the key determinants in their success will be political will. It is also crucial that objectives are clearly defined and realistic - Governments have tended to expect too much from consultation, which can only ever serve a limited number of functions. In designing mechanisms for consultation and inquiry, effective planning can minimise the chances of:

- producing compromises which are unworkable in legislation.
- identifying and entrenching opposing views.
- forcing a Government onto the defensive.
- providing a focus for opposition to a measure.
- making the Government look indecisive and directionless.

332 A further reason for the lack of success of policy development mechanisms may be that they are usually entered into as a defensive act, resorted to only when the usual political channels fail. As Professor Rodney Brazier points out: "[Governments] do not look ahead and use departmental committees, Royal Commissions, inter-party talks and the like in a planned way, in order to see how ministerial initiatives on the constitution might be improved. Rather, those mechanisms are resorted to only when events leave them no other choice."[140] The choice will depend in part on the starting point (see paragraph 301): one route would clearly require the input of some sort of expert body, and would require only minimal public and political debate; while the other would necessitate a more wide-ranging and protracted process of consultation. In this case, a Joint Parliamentary Committee committed to public consultation (as in Canada) or the approach adopted by the Scottish Constitutional Convention may well provide the most successful models for the UK development of a bill of rights, especially if they engaged in an outreach programme of sufficient breadth.

Conclusion

333 The process of defining a bill of rights will involve discussion not only of its contents but of the entrenchment and enforcement mechanisms. There are two distinct aspects to the development of a domestic bill of rights - the production of a skeleton bill, drawing on international standards; and the use of a consultative forum that engages the public and expert opinion. A commitment to the second stage should be included in either the legislation incorporating the ECHR or in a White Paper; and the consultation processes and timetable should be declared as soon as possible. A referendum might be used as an entrenchment mechanism for a new domestic bill of rights; alternatively the proposals might form part of a subsequent election platform. But ultimately, the successful adoption of a bill of rights will depend upon it having genuine political backing within the Government and deft political execution of the process of development.

334 In respect of contents as well as entrenchment and enforcement mechanisms, there is considerable international experience to draw on, not only that of Canada. The various international rights instruments will undoubtedly be drawn upon for the substance of the text, but a clear decision will be needed at the outset - influencing the choice of consultative vehicle(s) - as to whether the exercise is to be limited to amalgamation of these texts. The issue of a domestic bill of rights is likely to bring to the fore ideological differences as to what new rights, especially social and economic rights, should be recognised. Such differences of opinion have largely disappeared in relation to the ECHR (e.g. on the question of trade union rights and the private ownership of property) because of the absence of any committed position in the Convention on these issues. As to the domestic enforcement machinery, the framework adopted for the ECHR will provide a starting point, but the extent to which it will prove appropriate for a domestic bill of rights will depend on two factors: the changing constitutional backdrop; and the reactions to the operation of the ECHR in practice. In addition, if social and economic rights are provided for, it will also be important to recognise that they give rise to rather different problems of justiciability and enforcement than civil and political rights. For these reasons, this report does not seek to examine the detailed process of adopting a domestic bill of rights.

335 However, a few concluding observations can be made. The recurring objections to the adoption of a bill of rights in the UK have been its possible impact on parliamentary sovereignty and the perceived risk of 'politicizing' the judiciary. These fears are likely to be greater in relation to a domestic bill of rights, newly created, as compared to the rights set out in a instrument to which the UK has been a signatory for nearly fifty years. They might be lessened if the ECHR had been seen to operate without threat to the constitutional fabric. This argues for considerable care to be given to the planning of this first stage of reform, with one eye to the impact of the initial arrangements on the subsequent debate. A further factor influencing change in the operating machinery would be the potential financial costs of the existing arrangements in relation to the ECHR and the likely implications of any new rights, especially if they went beyond those rights already covered by the UK's international human rights obligations. There are also likely to be fundamental disagreements across the political parties (and in the wider community) as to which rights should be included. There would therefore be every advantage in relying on the international human rights instruments that already bind the UK as the basis of a domestic bill of rights.

Appendix A

UK Cases Before the European Court of Human Rights

This Appendix lists all UK cases heard by the European Court of Human Rights between the granting of the right of individual petition in 1966 and June 1996. The outcome of each case is given.

1 21 February 1975: Golder
Prisoner's access to court
Breach of Articles 6, 8

2 7 December 1976: Handyside
Little Red Book obscene publication
No breach of Articles 10, 14, 18 or Article 1 of Protocol 1

3 18 January 1978: Government of Ireland
Interrogation techniques (Northern Ireland)
Breach of Article 3

4 25 April 1978: Tyrer
Judicial corporal punishment (Isle of Man)
Breach of Article 3

5 26 April 1979: Sunday Times
Freedom of expression; contempt of court
Breach of Article 10

6 13 August 1981: Young, James and Webster
Closed shop
Breach of Article 11

7 22 October 1981: Dudgeon
Homosexuality (Northern Ireland)
Breach of Article 8

8 5 November 1981: X
Mental patient's right to have detention reviewed
Breach of Article 5(4). No breach of Article 5(1)

9 25 February 1982: Campbell and Cosans
Corporal punishment in state schools; respect for parents' philosophical convictions
Breach of Article 2 of Protocol 1. No breach of Article 3

10 25 March 1983: Silver
Prisoner's correspondence
Breach of Articles 6(1), 8 and 13

11 28 May 1985: Ashingdane
Detention of mental patient
No breach of Article 5(1), 5(4) or 6

12 28 June 1984: Campbell and Fell
Prison visitors; conduct of disciplinary proceedings
Breach of Articles 6, 8 and 13. No breach of Article 6

13 2 August 1984: Malone
Telephone tapping
Breach of Article 8

14 28 May 1985: Abdulaziz, Cabales and Balkandali
Immigration: discrimination on grounds of sex
Breach of Articles 13 and 14 in one respect only. No breach of Articles 3 or 8

15 21 February 1986: James
Leasehold reform
No breach of Article 1 of Protocol 1. No breach of Articles 6(1) and 13

16 8 July 1986: Lithgow
Aircraft and shipbuilding nationalisation
No breach of Article 1 of Protocol 1. No breach of articles 6(1), 13 or 14

17 17 October 1986: Rees
Transsexual: reissue of birth certificate; right to marry
No breach of Article 8 or 12

18 26 October 1986: Agosi
Forfeiture by customs
No breach of Article 1 of Protocol 1

19 24 November 1986: Gillow
Interference in right to respect for home
Breach of Article 8. No breach of Article 6 or 14

20 2 March 1987: Weeks
Parole
No breach of Article 5(1). Breach of Article 5(4)

21 2 March 1987: Monnell and Morris
Criminal appeals
No breach of Article 5(1), 6(1), 6(3)(c) or 14

22 8 July 1987: O
Child care procedures
Breach of Article 6(1). No breach of Article 8

23-26 8 July 1987: H, W, B, R
Child care procedures
Breach of Articles 6(1) and 8

of Article 8 in respect of one letter

ogan, Coyle, McFadden and Tracey
revention of Terrorism (Temporary Provisions) Act
rticle 5(3) and 5(5). No breach of Article 5(1) and 5(4)

0 March 1989: Chappell
Search of premises in the execution of a court order in civil proceedings
No breach of Article 8

30 7 July 1989: Gaskin
Access to personal records held by a local authority
Breach of Article 8. No breach of Article 10

31 7 July 1989: Soering
Extradition to USA
Breach of Article 3. No breach of Article 13

32 24 January 1990: Powell and Rayner
Aircraft noise
No breach of Article 13

33 28 March 1990: Granger
Refusal of legal aid to appeal against conviction
Breach of Article 6(1) and 6(3)(c). No breach of Article 5(3)

34 28 August 1990: Cossey
Birth certificate for transsexual
No breach of Article 8 or 12

35 30 August 1990: Fox, Campbell and Hartley
Arrest and detention under emergency powers in Northern Ireland
Breach of Article 5(1)(c) and 5(5)

36 30 August 1990: McCallum
Prisoner's correspondence
Breach of Article 8

37 25 October 1990: Thynne, Wilson and Gunnell
Judicial review for sex offenders
Breach of Article 5(4). For Wilson, also breach of Article 5(5)

38 30 October 1991: Vilvarajah et al
Expulsion of Sri Lankan nationals to Sri Lanka
No breach of Article 3 or 13

39 26 November 1991: Times Newspapers and Neil
Freedom of expression: Spycatcher injunction
Breach of Article 10. No breach of Article 13 and 14

40 26 November 1991: Observer and Guardian
Freedom of expression: Spycatcher injunction
Breach of Article 10 in one respect only. No breach of Article 13 or 14

41 25 March 1992: Campbell
Prisoner's correspondence
Breach of Article 8

42 16 December 1992: Edwards
Fair trial
No breach

43 25 March 1993: Costello-Roberts
Corporal punishment
No breach of Articles 3, 8 and 13

44 20 April 1993: Sibson
Closed shop
No breach of Article 11

45 26 May 1993: Brannigan and McBride
Derogation under Prevention of Terrorism Act
No breach of Articles 5(5) and 13. Derogation satisfied requirements of Article 15

46 28 June 1993: Colman
Doctors' advertising restrictions
Friendly settlement; No breach of Articles 10 and 13

47 28 June 1993: Lamguindaz
Immigration
Friendly settlement; no breach of Article 8

48 26 October 1993: Darnell
Medical discipline; length of proceedings
Breach of Article 6(1)

49 23 February 1994: Stanford
Irregular court proceedings
No breach of Article 6(1)

50 28 February 1994: Boyle
Sexual abuse charge and access to nephew in care
Friendly settlement; Commission opinion of violation of Article 8

51 18 July 1994: Wynne
Inability to have lawfulness of detention reviewed by court
No breach of Article 5(4)

52 21 September 1994: Fayed
Investigation into affairs of private company by state
No breach of Article 6(1)

53 28 October 1994: Murray
Arrest and detention in Northern Ireland
No breach of Article 5(1), 5(2), 5(5), 8 or 13

54 28 October 1994: Boner
Refusal of legal aid for appeal
Breach of Article 6(3)(c)

55 28 October 1994: Maxwell
Refusal of legal aid for appeal (Scotland)
Breach of Article 6(3)(c)

56 9 February 1995: Welch
Confiscation order imposed retrospectively
Breach of Article 7(1)

57 24 February 1995: McMichael
Right of access to custody documents and parental rights
Breach of Articles 6(1) and 8 with respect to Mrs McMichael. Breach of Article 8. No breach of Article 6(1) or 14 with respect to Mr McMichael

58 13 July 1995: Tolstoy Miloslavsky
Freedom of expression
Breach of Article 10. No breach of Article 6(1)

59 5 September 1995: McCann and Others
SAS shooting of suspected IRA terrorists in Gibraltar
Breach of Article 2

60 22 November 1995: S W & C R
Removal of marital immunity from rape
No breach of Article 7(1)

61 22 November 1995: Bryan
Planning appeal procedure
No breach of Article 6(1)

62 8 February 1996: Murray
Access to lawyer
Breach of Article 6(1) in conjunction with 6(3)(c). No breach of Article 6(1) and 6(2)

63 21 February 1996: Hussain and Singh
Right of appeal against life imprisonment
Breach of Article 5(4).

64 27 March 1996: Goodwin
Fine for refusing to disclose source of information
Breach of Article 10

65 10 June 1996: Pullar
Jury composition in trial of applicant
No breach of Article 6(1). No breach of Article 6(1) and 6(3)(d) taken together

66 10 June 1996: Benham
Detention of poll tax defaulter; denial of legal aid
Breach of Article 6(1) and 6(3)(c) taken together. No breach of Article 5(1).

Sources:

International Affairs & Defence Section, House of Commons Library, *UK Cases at the European Court of Human Rights since 1979*, June 1996.

David Kinley, *The European Convention on Human Rights: Compliance without Incorporation*, 1993. Appendix I.

Liberty, *A People's Charter: Liberty's Bill of Rights. A Consultation Document*, 1991. Appendix II, Table 1.

Appendix B

Protocols not Ratified by the UK and Derogations Entered by the UK

Protocols

1 The substantive guarantees in the ECHR have been extended by the addition of further rights in the form of a series of supplementary Protocols which are binding on the states that have ratified them. These Protocols deal both with matters of substantive rights (Protocols 1, 4, 6, 7), and with procedure in the European Court of Human Rights and the European Commission on Human Rights (Protocols 2, 3, 5, 8, 10, 11). Not all Protocols have been ratified by all Member States, and four of the eleven have not been ratified by the UK. These are:

- Fourth Protocol - providing for freedom from imprisonment for breach of contract; and freedom of movement and residence. This has been signed by the UK but not ratified, on the grounds that it presents problems in terms of its compatibility with domestic law, as the Government believes that Article 3(2) of the protocol could give British Dependent Territories Citizens, British Overseas Citizens, British Subjects and British Nationals (Overseas) a right of entry to the UK which they no longer possess under domestic nationality and immigration law.
- Sixth Protocol - abolishing the death penalty. Although the death penalty has for all practical purposes in fact been abolished in the domestic law of the UK, successive Governments have chosen to reserve the possibility of reversing this position in the future by not ratifying Protocol 6. The current Government maintains that the question of the reintroduction of capital punishment should be left to a free vote in Parliament and it would therefore be inappropriate to pre-empt such a vote by ratifying the Protocol.
- Seventh Protocol - providing for the right to appeal following conviction and compensation for those wrongly convicted; the prohibition on double jeopardy in criminal cases; and equality of rights between spouses. This Protocol was designed to fill some of the gaps between the ECHR and the provisions of the ICCPR. The UK has neither signed nor ratified Protocol 7, as the Government maintains that the part which deals with the right of a lawfully resident person originally from overseas to have his case reviewed in the event of expulsion from this country "presents problems...in terms of definitions."
- Ninth Protocol - allowing individuals or groups to take an admissible case before the Court even when the Commission on Human Rights has decided not to. The Government has not ratified Protocol 9 on the grounds that it does not believe that so doing "would significantly enhance the protection of human rights in the UK" and "would add considerably to the workload of and consequent delays in the Court." However, the UK has ratified Protocol 11 which, when it comes into force, will repeal Protocol 9.

Derogations

2 The Convention also permits states when ratifying to make reservations in relation to its provisions, and the UK has entered one reservation to the Convention. This is to Article 2 of the First Protocol, which provides that "In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and training is in conformity with their own religious and philosophical beliefs." The terms of the reservation, made at the time of ratifying the Convention in 1952, are as follows: "... in view of certain provisions of the Education Acts in the United Kingdom, the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only so far as is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure." In accordance with Article 4 of the same Protocol, the UK has also declared a number of restrictions on the extent to which Article 2 applies to the UK's Dependent Territories.

Appendix C

Legislative Compliance: New Zealand Cabinet Office Manual

The New Zealand Cabinet Office Manual (latest edition published August 1996) is the authoritative guide to central government decision-making for those working within government. It is also a primary source of information for those outside government on constitutional and procedural matters. Part of the Manual is concerned with procedures for ensuring that legislation complies with legal principles or obligations, including the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and 'international obligations'. The compliance mechanisms include a requirement that Ministers offer an assessment of compliance both in bidding for the inclusion of a particular Bill in the annual programme of legislation and in subsequently submitting a draft Bill to the Cabinet Committee on Legislation and House Business (LEG). The Manual includes examples of the standard formats for legislative submissions. The texts are reproduced below.

FORMAT FOR A REQUEST FOR A BILL
TO BE INCLUDED IN THE LEGISLATION PROGRAMME

This form indicates the headings to be used. Each heading must appear in the cover sheet. Write "not applicable" if the heading is not relevant to the proposed legislation. Details should be kept brief but should be sufficient to give persons not acquainted with the issues a clear idea of what is involved.

1 Summary information

Please give the following details about the bid for legislation:

a Portfolio of sponsoring Minister.
b Department responsible (include departmental contact name and phone number).
c Title of proposed Bill (or Bill in which these legislative changes to be included).
d Proposed ranking of Bill within the bids from this portfolio.
e Estimated number of clauses in the Bill and whether of low, medium or high complexity.

2 Policy

a Briefly summarise the policy to be implemented by the Bill. (Give references and dates of Cabinet and Cabinet committee decisions already made.)
b Identify any aspects of the Bill which are likely to be contentious.
c Note any policy issues which have not yet been agreed and state the dates by which these are expected to be resolved by Cabinet.

3 Need for Legislation

a Why is legislative action needed to implement the policy? (Please attach or refer to legal advice.)
b Is it essential that legislation be enacted in the period under consideration, or simply desirable? If it is essential, explain why.
c If the proposal is for amending legislation, has the principal Act been amended in the last year or will it be amended in the near future? If so, explain why this amendment is needed now.

4 Compliance

Indicate whether the Bill complies with each of the following, with reasons if the Bill will not comply:

a The principles of the Treaty of Waitangi.
b New Zealand Bill of Rights Act 1990.

c The principles and guidelines set out in the Privacy Act 1993. (If the legislation raises privacy issues, indicate whether the Privacy Commissioner agrees that it complies with all relevant principles.)
d Relevant international standards and obligations.
e Guidelines in the Legislation Advisory Committee report, *Legislative Change: Guidelines on Process and Content* (revised edition, 1991).

5 Consultation

Summarise the consultation on policy issues that has already taken place or will be needed with each of the following groups, as well as the results of any consultation that has already taken place:

a Relevant government departments or other public bodies.
b Relevant private sector organisations and public consultation processes.

If consultation on policy issues has not yet been completed, indicate the date by which it is expected to be completed.

Summarise the consultation with government caucus(es) and other parties represented in Parliament that has already taken place or will be needed.

6 Association Regulations

Are regulations likely to be needed within 12 months of the Bill being enacted to give effect to the provisions in the Bill? If so, briefly summarise the regulations which will be needed, their likely timing (taking into account the 28-day rule), and the likely size of the drafting task involved in developing them.

7 Timeline

Summarise the proposed timing for the legislation, in reverse chronological order, as follows. Please provide Cabinet or committee references where any deadlines have been established by Cabinet or committee decision.

a Requested enactment date.
b Date of report back from select committee. (As a rule of thumb a **minimum** of four months should be allowed for the select committee process. Please give reasons if a period of less than six months is proposed.)
c Requested introduction date. (At least two clear weeks should always be allowed between Cabinet approval for introduction and the date of introduction. This interval may be longer if the Bill becomes available for introduction when the House is dedicated to other business, or is in recess.)
d Dates on which the Bill will be before Cabinet Committee on Legislation and House Business and before Cabinet for approval for introduction.
e Date by which final drafting instructions will be sent to the Parliamentary Counsel Office or other drafter. (The period between submission of instructions and approval for introduction provides for drafting and consultation on the draft Bill. Please relate your estimate for this phase to the expected length and complexity of the Bill.)
f Date by which final policy approvals will be obtained from Cabinet.

8 Recommendations

a This Bill should be introduced no later than [date].
b The Bill should be passed no later than [date].

[Signature of Minister]
Minister of [XX]

FORMAT FOR SUBMISSIONS TO LEG ON DRAFT BILLS READY FOR INTRODUCTION

This form indicates the headings to be used. Each heading must appear in the submission. Write "not applicable" if the heading is not relevant to the Bill.

OFFICE OF THE MINISTER OF [XX]

TITLE [Give the full title of the draft Bill]

1 Proposal

Briefly state what is proposed in the paper.

2 Policy

a Briefly summarise the policy to be implemented in the Bill. (Give references and dates of key Cabinet and Cabinet committee decisions.)
b Indicate any aspects of the Bill which are likely to be contentious.
c Explain why a Bill is required.
d Indicate any outstanding policy issues and explain why these have not yet been resolved.

3 Compliance

Indicate whether the Bill complies with each of the following, with reasons if the Bill does not comply (list each sub-heading):

a The principles of the Treaty of Waitangi.
b New Zealand Bill of Rights Act 1990.
c The principles and guidelines set out in the Privacy Act 1993. (If the Bill raises privacy issues, indicate whether the Privacy Commissioner agrees that it complies with all relevant principles.)
d Relevant international standards and obligations.
e Guidelines in the Legislation Advisory Committee report, Legislative Change: Guidelines on Process and Content (revised edition, 1991).

4 Consultation

Summarise the consultation that has taken place under the following categories, as well as the results of that consultation:

a Relevant government departments or other public bodies.
b Relevant private sector organisations and public consultation processes.
c Government caucus(es) and other parties represented in Parliament.

5 Creating New Agencies or Amending Law Relating to Existing Agencies

a If the legislation will create a new agency, will the Ombudsmen Act 1975 and the Official Information Act 1982 apply? If not, why not? (The Office of the Ombudsman should be consulted on this issue and its views summarised.)
b If the legislation will create a new agency that is legally separate from the Crown, will it be included as a Crown entity in the Fourth Schedule to the Public Finance Act 1989 and, as appropriate, in the Fifth, Sixth and Seventh Schedules? If not, why not? (The Treasury should be consulted on this issue and its views summarised.)
c If the legislation will amend the existing coverage of the Ombudsmen Act 1975, the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987,

explain why. (The Office of the Ombudsman should be consulted on this issue and its views summarised.)

6 Allocation of Decision-Making Powers

a Does the draft legislation involve the allocation of decision-making powers between the executive, the courts and tribunals?

b Have the criteria relating to the qualifications and responsibilities of decision-makers and the procedures they follow (set out in paragraphs 85-84 of Legislation Advisory Committee, *Legislative change: Guidelines on Process and Content* (revised edition, 1991)) been applied?

c If not, state departures from the criteria and reasons for these.

7 Associated regulations

Will regulations be needed to bring the Bill into operation? If so, briefly summarise the regulations which will be needed, their likely timing (taking into account the 28-day rule), and the likely size of the drafting task involved in developing them.

8 Definition of Minister/Department

Does the Bill contain a definition of Minister, department (or equivalent government agency), or chief executive of a department (or equivalent position)? (The Cabinet Office should be consulted on this issue and its views summarised.)

9 Parliamentary stages

a Indicate the date by which the Bill should be introduced and the date by which it should be passed.

b Indicate the select committee to which it is proposed that the Bill be referred.

10 Recommendation

The basic format for recommendations in submissions for approval of the Bill for introduction is as follows:

"I recommend that the Committee:

a note that the [XX] Bill holds priority XX on the legislation programme;

b note that the Bill .... [briefly summarise the main purpose of the Bill];

c approve for introduction the [xx] Bill;

d agree that the Bill be:

(i) introduced on [date];

(ii) referred to the [xx] Committee for consideration;

(iii) enacted by [date]."

[signature of Minister]
[name and title of Minister]

Appendix D

International Experience of Developing Human Rights Legislation

Canada

1 The enactment of the Canadian Charter of Rights and Freedoms in 1982, and its continuing credibility, has been credited to its development in what Professor Roland Penner has described as a 'democratic crucible'.[141] The process was initiated by the governing Liberal Party who (having failed to reach agreement on a package of constitutional reform, including an entrenched Charter of Rights, in a series of meetings with provincial governments in 1980) decided to act unilaterally. In October 1980, the Government tabled a resolution in Parliament, including a draft bill of rights, the text of which was sent to the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada for examination.

2 The Special Joint Committee was made up of 25 members - 10 senators and 15 MPs. The committee obtained resources from the federal Parliament, the Library of Parliament, the Department of Justice, the Office for Federal-Provincial Relations and other Government departments, which enabled them to advertise for written submissions and witnesses in the major daily newspapers. In addition, the committee held televised proceedings. As a result, the committee received nearly 1000 written submissions and heard oral submissions from a total of 97 witnesses. The majority of submissions rejected the Government's proposal on the grounds that it did not go far enough in protecting and extending rights. The Government and official opposition were each allowed to present two expert witnesses and the third opposition party, one witness. The official Opposition party (the Conservatives) opposed the proposal on the basis that they objected to the Government's unilateral action. The third party (New Democratic Party) supported the Government after they won amendments which guaranteed provincial ownership of natural resources. The Committee sat for a total of 267 hours and spent over 90 hours on a 'Clause by Clause' consideration of the Charter. In all, there were 60 days of hearings. At the start of the Committee hearings the Minister of Justice was examined, followed by witnesses representing various groups and then the Minister of Justice returned for a 'Clause by Clause' consideration of the Charter. The Government proposed 58 amendments which were all approved. The Official Opposition put forward 22 amendments, with 7 approved, and the third party 43 amendments, of which 2 were approved. After the Joint Committee hearings, more than 70 substantial changes had been made to the original proposal.

3 However, the text that emerged from this process was subject to further political negotiations between the federal and provincial governments in 1981, resulting in at least one significant amendment - the inclusion of notwithstanding clause provisions - before being passed into law in 1982. In fact, despite the well publicised public participation in the Committee stages, the public debate was probably less influential on the substance of the Charter than the debate between the federal and provincial Governments. Many provinces were opposed to much of the Charter as they feared it would give new powers to federally-appointed judges and reduce provincial authority. They were also concerned with the prospect of expensive and time-consuming redrafting of provincial legislation to comply with the new Charter. Most of all, they were concerned that it would be difficult to amend the Charter to adapt to particular regional problems. This opposition was only resolved during the political discussions that followed the report of the Committee.

4 It is also worth recognising that the Charter was not in its conception a reform requested by the people. The push for the Charter came from interest groups together with the federal Liberal Party. It is doubtful if Charter would have been achieved had it not been for the determination

of the Liberal Government (and in particular Trudeau) to entrench a Charter of Rights and Freedoms into the new constitutional agreement. There was no referendum to enable the public to support or reject the proposed Charter of Rights, and the decision not to have a referendum was largely based on the Liberal Party's determination to entrench the Charter with or without the support of all the provinces or the people.

5 Nevertheless, the Special Joint Committee on the Constitution was a successful mechanism for both debating and publicising the proposed Charter. This was of course time consuming (and took place in the context of much higher public awareness of constitutional and rights based issues than there is in the UK at present) but it was an important factor in securing support for the final version of the Charter, giving the public a sense of ownership and in raising the level of understanding of its provisions and operation. In the view of some, this had knock on consequences for the operation of the Charter: "...in effect the judges gave it real substance because the people took it up. And this may be the most important lesson to learn 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."[142] And if the Special Committee was the primary vehicle for public input into the content of the Charter, there was also another important role played by the public at large in the process of developing the Charter. For the public was an audience which both provincial and federal governments monitored, and the public's reaction to some extent influenced the government's behaviour. In August 1980, for example, immediately before the Liberal Government decided to act unilaterally, opinion poll evidence suggested that 91% of Canadians agreed that the constitution should guarantee basic human rights to all Canadian citizens.[143] (However, following the report of the Special Joint Committee to Parliament and the vote in Parliament on the final amendments to the federal Government's constitutional package in May 1981, a Gallup poll indicated that only 62% of Canadians agreed that a Charter of Rights should be included in the patriation plan; whilst 15% opposed it.[144] It seems likely that this drop in approval ratings was in part a result of public disapproval of the federal Government acting without the support of the provinces to bring the unamended constitution home - in December 1980, one poll suggested that 58% of Canadians disapproved of this action).[145]

New Zealand

6 In the 1984 general election, the Labour Party had included a Bill of Rights as part of the constitutional reform agenda which it presented to the electorate. On gaining office, the new Government set about producing a White Paper, *A Bill of Rights for New Zealand*, which was published in 1985 and offered a draft bill of rights founded on the principle that the bill of rights should have superior status within the law (largely modelled on Canada's Charter of Rights). It included a Foreword by Geoffrey Palmer, then Minister of Justice, which indicated the Government's support for such a measure. The Justice and Law Reform Select Committee was assigned to consider the bill and undertook an extensive process of consultation which included travelling to meet interested parties and members of the public; a total of 431 submissions commenting on the draft were received. The result of the consultation, published by the Committee as an Interim Report in 1987, was a recommendation that a bill of rights should not be enacted as originally proposed, but rather should have the status of ordinary law. This conclusion reflected the views of the majority of respondents to the consultation; and was accepted by the Government, who in redrafting the bill for introduction to Parliament in 1989 dropped the earlier reference to it being 'supreme law.' It was, according to Philip Joseph, a

leading New Zealand constitutional writer, a party political measure "promoted without the support of the national Opposition or indeed of most Government Members, and with no discernible public interest or support."[146] Privy Councillor Sir Ivor Richardson describes the five year consultation process as "extended, if desultory."[147] The fact that the reform was achieved can in many ways be credited to one man - Geoffrey Palmer, initially as Minister of Justice and eventually as Prime Minister.

South Africa

7 The development of South Africa's transitional bill of rights necessarily takes its character from the struggle which produced it. The constitution resulted from four years of negotiations in atmosphere of violence, with the transition to democracy led by a constituent assembly charged with creating a written constitution. When serious negotiations for a new constitution were begun in 1992, all parties appeared to favour an entrenched bill of rights. As part of the 'transparent and inclusive' process of consultation on the constitution, over one million submissions were received and a host of local meetings and forums arranged - nearly 1300 in all; alongside a multi-media multi-lingual campaign.[148] Sydney Kentridge QC has concluded that "the first and most important lesson which in my opinion is to be learnt from the experience of the South African Constitution is that a bill of rights has its best chance of winning public confidence if its terms are hammered out within the country after a full public and parliamentary debate."

8 However, the process of agreeing a bill of rights was not smooth. The ANC had adopted its own Freedom Charter in 1955 - a broadly worded vision statement with no proposed enforcement mechanisms - and conflicts arose between those who wished to see this text reflected in the eventual bill of rights and those of the 'establishment' who were charged with producing a draft text. In particular, the ANC and the Law Commission (which had been tasked with examining the issue of a bill of rights by President de Klerk prior to the end of the apartheid regime and had produced a lengthy report which was broadly supportive of the idea of a bill of rights) disagreed over the appropriate scope - including, for example, whether rights should be available against private persons or only the state. Perhaps more so than other recent bills of rights, South Africa's model reflected genuine passions about rights, which could be seen to have direct relevance to the lives of all the people. Whilst drawing on public international law and human rights instruments, the focus is largely on anti-discrimination measures and is innovative in (for example) extending its provisions to cover sexual orientation; although it does not cover social and economic rights *per se*. Moreover "the emphases and the details of the clauses in which fundamental rights are expressed reflect the deep-felt experience of what went before and a determination to place curbs on the power not only of the executive but of Parliament."[149]

Denmark and Norway

9 In two Nordic countries, a process of consultation and expert deliberation has also been undertaken in the early 1990s in relation to the adoption of human rights instruments, although in neither case was the process designed to develop a new bill of rights. In Denmark, at the request of the Parliament, the Minister for Justice set up an expert committee to examine the advantages and disadvantages of incorporating the ECHR and how this might be achieved. The Committee was appointed in August 1989 and reported in 1991. In February 1992 the Minister

of Justice introduced a bill concerning the ECHR, which was adopted by the Parliament two months later by an overwhelming majority of 107 to 7; the entire parliamentary passage had been marked by a lack of debate. In July 1992, the Convention was 'orated' into Danish law.

10 In Norway, the task of the commission was more complex. The Government made a decision of principle in 1989 that human rights conventions binding on Norway should be made part of Norwegian law and established a Committee "to reflect upon which conventions are to be covered by such a reform...whether the insertion into Norwegian law should take the form of a general reference to such conventions or a reference to a specific convention or to certain rights...[and] whether the reform should be implemented by way of constitutional or legislative amendments."[150] The appointment of committees of this sort - to consider how to give effect to decisions in principle to legislate - is quite common in Norway. The Committee was composed of judges, barristers, academics and members of the Ministry of Justice. Its 1993 report recommended that conventions to be embodied in Norwegian law should be incorporated, dismissing the alternatives of transformation, or 'ascertainment of normative harmony'. It also set out criteria for selecting which international conventions on human rights should be incorporated (factors included the system of international supervision and the nature of the rights); identified which conventions should **immediately** be adopted; and concluded that a constitutional provision dealing with human rights conventions should be adopted to "reflect that human rights are firmly entrenched in modern Norwegian society". The conventions themselves should have not constitutional but statutory rank - although taking precedence over statutory provisions affording weaker protection. The constitutional amendment suggested by the Committee was unusual in that the Norwegian constitution is not often amended, and rarely on the recommendation of a Government-appointed Committee. However, it was subsequently proposed by a member of Parliament and was adopted by Parliament without any debate in July 1994. The Convention itself has not yet been incorporated into Norwegian law, but a bill proposing incorporation will probably be presented to the Parliament before the end of 1996.[151]

Australia

11 Australia offers an example of some of the strengths and weaknesses of both the convention and commission models. Whether Australia should have a Bill of Rights has been the subject of a variety of public inquiries and political debate over the last 35 years; and since 1959 there have been three major constitutional reviews which have addressed the issue. The process has been marked by an evolution in support for an entrenched bill of rights. The 1959 Joint Committee on Constitutional Review dismissed the idea; the Constitutional Convention (1973-1985), made up of delegates from Federal and State parliaments in an attempt to generate non-partisan support necessary for constitutional amendments, failed in its aim, hampered by the continuing hostilities caused by the dismissal of the Whitlam Government in 1975[152] and was split over the question of a bill of rights. In 1985, the Government introduced a Bill of Rights, alongside legislation designed to establish the Australian Human Rights and Equal Opportunities Commission. However, the Bill of Rights legislation effectively lapsed following an exceptionally extenuated Senate debate, which still left more than 40 clauses of the Bill to be debated. In the same year, frustrated with the Convention's lack of progress over constitutional reform, the Hawke Government established a Constitutional Commission in its place. The Constitutional Commission was independent, made up of six members: two lawyers, two academics and two politicians and encompassed broader expertise through working groups which examined specific areas. Its remit was to conduct a fundamental review of the Australian Constitution and to report on its revision; in 1988 it strongly endorsed an entrenched written bill of rights.

12 The strengths of the Commission in comparison with the Convention were that it was not dominated by politicians and it based its findings on systematic and wide consultation. In addition, through public meetings held round the country the Commission played an important role in involving and educating the public in constitutional issues. This process was particularly important as an awareness raising exercise, as any constitutional amendment would first have to be put to the people in a referendum. However, the apparent success of the Commission in coming up with a unanimous decision was undermined by the subsequent referendum of September 1988, which proposed a modest extension of several rights already in the Constitution as a first step to implementing the Commission's more ambitious recommendations including an extensive bill of rights. This proposal emerged, it is argued, because of the political context, which saw the continuation of earlier political opposition on three occasions to Government proposals for a bill of rights, all of which were defeated in Parliament; and because of the "accustomed reluctance of Australians to sanction constitutional innovations that appear to favour central institutions at the expense of the states."[153] There were also wider problems in establishing the non-partisan credentials of the Commission, and therefore its credibility, as the opposition parties were openly hostile to it; quite aside from a lack on enthusiasm from some Government Ministers. Despite the weakening of the proposal, the Rights and Freedoms Amendment in the referendum did not manage to obtain a majority in favour in any State and the overall result was a resounding 'no': 6.5 million voted against, 2.9 million in favour.

Ireland

13 The Irish Government has established an All-Party Committee of the Oireachtas (Parliament) to review the Constitution. A number of experts - including the Attorney General, barristers and academics - were appointed in April 1995 as members of a Constitution Review Group. The review they were tasked with included an assessment of the provisions made for the protection of fundamental rights in the Constitution. The Group considered whether the existing rights provisions should be replaced in their entirety by the ECHR as well as looking at each of the specific rights in order to identify where the text could be improved or extended. Its working methods are worth considering. The Group begun by establishing three working groups and commissioning 'groundwork briefing'; Government Departments and offices were also invited to state, from their experience, what constitutional changes might be desirable or necessary; and advertisements were placed in the press inviting submissions from the public. The Group's final report, published and presented to the Oireachtas Committee in May 1996, advocates that the ECHR should not be incorporated directly into Irish law as it stands, but instead that whichever of its provisions are stronger than the existing Irish constitution should be adopted through amending the constitution. They recommend a list of rights to be considered for express inclusion in the Constitution, including rights that have been identified by the Irish courts "as being amongst the latent or unenumerated rights constitutionally protected by Article 40.3.1°" and ten others, drawn from international human rights instruments.[154] The work of the Review Group certainly demonstrates the speed with which such a task might be achieved; and provides an interesting model of an independent expert committee established under the umbrella of a Parliament-based committee with cross-party representation. It is, however, too early to judge the success of this initiative as the Oireachtas Committee has yet to conclude its work.

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25 [1993] 1 All ER 1011, HL.

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27 In R v Khan [1996] 3 All ER 289 (HL), Lord Nicholls observed that "when considering the common law and statutory discretionary powers under English law, the jurisprudence on Article 6 can have a valuable role to play."

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