The United Kingdom Bill of Rights 1998: The Modernisation of Rights in the Old World

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Into a steadfastly conservative constitutional landscape, the United Kingdom Parliament has now introduced a Bill of Rights, the Human Rights Act of 1998, which takes effect in October 2000. The Act provides for a full catalogue of civil and political rights which are enforceable by the courts. This development raises two questions in evaluating the future of English law. First, does this signify the dawn of a new British radicalism? And second, why has it happened now? In answering these questions in relation to England and Wales, Part I of this Article provides an introduction to the traditional treatment of rights within the English legal system through an examination of the background context provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms, including its impact on U.K. law to date. Part II analyzes the current substance and future role of the Human Rights Act of 1998. This Part explores the desirability of incorporating the European Convention, the content of rights under the Act, the degree of entrenchment of those rights, and the imposition of duties. Part III then explores the role of the judiciary and its procedures and various remedies for vindicating these rights. Finally, the Article concludes by gauging the potential impact of the new Bill of Rights, finding that although the changes to be brought about by the Human Rights Act of 1998 are certainly an important development in English law, they will not be as revolutionary in application as they might first appear.

INTRODUCTION

Change does not come easily or quickly to the “Old World” jurisdictions of the United Kingdom. As is widely known, the United Kingdom still does not have a written constitution and relies upon traditional or uncodified practices as much as laws. An
illustration of this approach lies in England’s treason laws. Despite calls by law reform bodies to revise thoroughly the treason laws, they have remained largely unaltered. Even when the recent Crime and Disorder Act of 1998 amended ancient treason legislation by abolishing the death penalty for peacetime treason, the opportunity was not taken for a more thorough revision. Similarly, the powers of local justices under the Justices of the Peace Act of 1361 to bind over “ne’er do wells” to keep the Queen’s Peace also remains intact, although it has been the subject of two recent decisions by the European Court of Human Rights. Unlike the United States Supreme Court, the European Court of Human Rights, also referred to as the “Strasbourg Court,” refused to con-


3. Crime and Disorder Act, 1998, c. 37, § 36 (Eng.) (“(1) In section I of the Treason Act (Ireland) 1537 (practising any harm etc. to, or slandering, the King, Queen or heirs apparent punishable as high treason), for the words ‘have and suffer such pains of death and’ there shall be substituted the words ‘be liable to imprisonment for life and to such’”).

4. Justices of the Peace Act, 1361, 34 Edw. 3, c. 3 (Eng.). The Act states:

First, that in every County of England shall be assigned for the keeping of the Peace, one Lord, and with him three or four of the most worthy in the County, with some learned in the Law, and they shall have Power to restrain the Offenders, Rioters, and all other Barators and to pursue, arrest, take, and chastise them according to their Trespass or Offence; and to cause them to be imprisoned and duly punished according to the Law and Customs of the Realm, and according to that which to them shall seem best to do by their Discretions and good Advisement; . . . and to take and arrest all those that they may find by Indictment, or by Suspicion, and to put them in Prison; and to take of all them that be [not] of good Fame, where they shall be found, sufficient Surety and Mainprise of their good Behaviour towards the King and his People, and the other duly to punish; to the Intent that the People be not by such Rioters or Rebels troubled nor endangered, nor the Peace blemished, nor Merchants nor other passing by the Highways of the Realm disturbed, nor [put in the Peril which may happen] of such offenders.

Id.


6. See Gooding v. Wilson, 405 U.S. 518, 518–20 (1972) (finding a Georgia statute, which made it an offense to use "opprobrious words or abusive language, tending to cause a breach of the peace" unconstitutionally vague and overbroad).
damn the concept of “breach of the peace” as so intractably vague as to be beyond the concept of due process. The Strasbourg Court, however, did find fault with the alternative basis of behavior “contra bonos mores,” and more generally has expressed concerns about the proportionality of policing actions under this power.

Into this steadfastly conservative constitutional landscape, the United Kingdom Parliament has now introduced a Bill of Rights, the Human Rights Act of 1998, which will take effect in October 2000. The Act provides for a full catalogue of civil and political rights that are enforceable by the courts. This development raises two questions in evaluating the future of English law. First, does this signify the dawn of a new British radicalism? And second, why has it happened now? In answering these questions in relation to England and Wales, Part I of this Article provides an introduction


8. Hashman v. United Kingdom, App. No. 25594/94 (Eur. Ct. H.R. 1999), http://www.echr.coe.int/eng/judgments.htm; see also Hunt Saboteurs, supra note 5 (stating behavior contra bonos mores has been described as conduct that has the property of being “wrong rather than right in the judgment of the majority of contemporary fellow citizens” (quoting Hughes v. Holley, 86 Crim. App. R. 130, 139 (1988))).


11. For a discussion of these questions as they pertain to Northern Ireland and Scotland (and Wales), see generally Human Rights Law and Practice, supra note 10.
to the traditional treatment of rights within the English legal system through an examination of the background context provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms, including its impact on U.K. law to date. Part II analyzes the current substance and future role of the Human Rights Act of 1998. It explores the desirability of incorporating the European Convention, the content of rights under the Act, the degree of entrenchment of those rights, and the imposition of duties. Part III then explores the role of the judiciary and its procedures and various remedies vindicating these rights. Finally, the Article concludes by gauging the potential impact of the new Bill of Rights, finding that although the changes to be brought about by the Human Rights Act of 1998 are certainly an important development in English law, they will not be as revolutionary in application as they might first appear.

I. CONTEXTUALIZATION OF THE REFORMS

The United Kingdom does not share the recent history of countries such as Poland and South Africa that are now emerging


16. Much of the controversy around the building of a new polity has been based around the Truth and Reconciliation Commission. See generally Azanian Peoples Org. and Others v. President of RSA 1996 (8) BCLR 1015 (CC); Ian Liebenberg, The Truth and Recon-
from dark, repressive pasts and are seeking to lift their collective heads up into the shining light of liberal democracy. Of course, there are some commentators who view former Prime Minister Margaret Thatcher as a figure of repression, having destroyed the traditional constitution, and therefore attribute the new Bill of Rights to her misdeeds. In reality, the shift toward a comprehensive bill of rights has been a more gradual and more positive experience than simply a reaction to a bad political trip.

In England and Wales, there has been a long and fairly consistent legal adherence to rights. The statements of these rights are scattered across various statutes and common law rules and have no higher normative status than other laws. In addition, these "rights" have been construed more narrowly than in the United States. Nevertheless, there is a long history of individual rights in the English constitution, just as there is a long and well-trodden history of treason and justices of the peace. This history includes such famous declarations as the Magna Carta, the Petition of Right of 1627, and the Bill of Rights of 1688, all of which have operated as important symbolic gestures. But none has ever delivered a comprehensive statement of enforceable rights similar to the U.S. model, and, as they stand today, they contain relatively little that has been left to speak to the pressures and problems of the contemporary age. By illustration, in regard to the Magna Carta, only two important provisions are left. One is chapter 42 of the 1215 Charter, by which "[i]t shall be lawful in [the] future for..."
anyone to leave our kingdom, and to return safe and sound by land and by water . . . except for a short space in time of war . . . .\(^\text{24}\)

The other is chapter 29 of the 1297 Charter, which provides that "[n]o freeman shall be taken or imprisoned [but] . . . by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right."\(^\text{25}\) There is some doubt as to whether chapter 42 remains in force because it was not repeated in 1297. Chapter 29, however, has been cited in some relatively recent cases.\(^\text{26}\) The Petition of Right has not been cited in any reported case post-1945. The Bill of Rights of 1688, however, remains an important part of the architecture in the relationship between Parliament and the Crown, especially articles 1, 2, and 4, concerning the suspension of legislation and the exclusive parliamentary power to tax,\(^\text{27}\) article 9, concerning free speech in Parliament,\(^\text{28}\) and article 13, concerning frequent meetings of Parliament.\(^\text{29}\) Some parts of the Bill of Rights attend to individual rather than institutional rights. For example, article 3 forbids the improper use of ecclesiastical courts;\(^\text{30}\) article 5 conveys the right to petition the King;\(^\text{31}\) article 7 allows Protestant subjects to carry firearms;\(^\text{32}\) article

\(^{24}\) Magna Carta, 1215, 17 John 1, c. 42 (Eng.), available at http://portico.bl.uk.

\(^{25}\) Magna Carta, supra note 22, at c. 23-33.

\(^{26}\) See, e.g., Regina v. Secretary of State for the Home Dep't ex parte Phansopkar, 1976 Q.B. 606, 626-28 (Eng. C.A.) (listing chapter 29 of the Magna Carta among relevant sources in holding that the wife of a patriarch of the United Kingdom was entitled as of right to enter the United Kingdom upon proof of the marriage).

\(^{27}\) Bill of Rights, 1688, at art. 1, 2, 4. Article 1 states "[t]hat the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without Consent of Parliament is illegall." Id. at art 1. Article 2 states "[t]hat the pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authoritie, as it hath been assumed and exercised of late, is illegall." Id. at art. 2. Article 4 states "[t]hat levying Money for or to the Use of the Crown by p[re]tence of Prerogative, without Grant of Parliament, for longer time, or in other manner then the same is or shall be granted, is Illegal." Id. at art 4. These powers have given rise to occasional litigation. See, e.g., Congreve v. Home Office, 1976 Q.B. 629, 630 (Eng. C.A.) (finding the Home Secretary's discretion to revoke a television receiver licence limited if exercised arbitrarily or improperly).

\(^{28}\) Article 9 states "[t]hat the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." Bill of Rights 1688, at art 9.

\(^{29}\) Article 13 states "that for redress of all grievances, and for the amending, strengthening and preserving of the laws, Parliaments ought to be held frequently." Id. at art 13; see also ROBERT BLACKBURN, THE MEETING OF PARLIAMENT (1990) (discussing the law and practice relating to the frequency and duration of Parliament sessions).

\(^{30}\) Bill of Rights, 1688, at art. 3. Article 3 states "[t]hat the commission for erecting the late Court of Commissioners for Ecclesiastical Causes and all other commissions and courts of like nature, are illegal and pernicious." Id.

\(^{31}\) Article 5 states "[t]hat it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal." Id. at art 5.

\(^{32}\) Article 7 states "[t]hat the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law". Id. at art 7; see also Firearms Act,
8 provides for free elections;\textsuperscript{33} article 10 allows for bail and fines in criminal cases and forbids the use of cruel and unusual punishments;\textsuperscript{34} and article 11 grants the right to a jury trial.\textsuperscript{35} But these resounding declarations, which also achieved some reverberations in the United States, are now viewed in their country of origin as either hopelessly archaic or at best stop-gap measures.\textsuperscript{36}

In the absence of a comprehensive legislated statement of rights, it was therefore left to the judges to fill in the gaps by way of common law principles. They occasionally obliged with ringing phrases about the rejection of claims to state necessity,\textsuperscript{37} the restrictive interpretation of penal statutes,\textsuperscript{38} and the recognition of the values of liberty,\textsuperscript{39} speech,\textsuperscript{40} and property.\textsuperscript{41} However, the English judiciary found it very difficult to impart a clear and comprehensive picture, as is frequently the problem with common law developments. Such "rights" were constructed in negative rather than positive terms.\textsuperscript{42} Furthermore, although there was considerable interest in developing constitutional principles as a partial bill of rights,\textsuperscript{43} the judiciary refused to be
truly radical and entirely rejected, for example, the concepts of a right to privacy. Nor was there any willingness within English law to impose restraints on legislative “Elective Dictatorship.”

A. The European Convention and Its Pre-1998 Act Influence on English Law

In the absence of judicial action, another route to the fastening of liberal values began to emerge after 1950 in the shape of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Convention is the most important instrument of international law to emanate from the Council of Europe—it is the Council’s “jewel in the crown.” The Convention was drafted in 1949, and English civil servants, reflecting English common law perceptions of rights, were highly influential in the process. Since coming into force in 1953, the Convention has experienced phenomenal growth in its stature in at least three respects. First, the substantive rights have been augmented by a number of Protocols to the Convention, especially the First,


44. Malone v. Metropolitan Police Comm’r (No. 2), 1979 Ch. 344, 372-75 (Eng.).
45. But see Oppenheimer v. Cattermole, 1976 A.C. 249 (Eng.).
46. This phrase is taken from LORD HAILSHAM, THE DILEMMA OF DEMOCRACY 9 (1978). It points to the danger that the United Kingdom Parliament is dominated effectively by the government of the day (and even the party machinery from which the government springs), and rights and other constitutional features, therefore, can be altered by legislation motivated by sectional interests.
47. For a full list of treaties, see http://www.coe.fr/cm/site2/ref/dynamic/ftreaties.asp. According to Article 1 of the Statute of the Council of Europe, “[t]he aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which [sic] are their common heritage and facilitating their economic and social progress.” Statute of the Council of Europe, 1949, Europ. T.S. No. 1, at art. 1.
49. See supra note 12. The Convention was finalized in 1950, with the United Kingdom as an original signatory and ratifying state in 1951.
Fourth,\(^{51}\) Sixth,\(^{52}\) and Seventh.\(^{53}\) Second, the number of states adhering to the Convention has grown, especially in recent years with the accession of many Eastern European states, growing from twenty-three in 1989 to forty-one in 1998. Third, the workload, because of the gradual increase in the recognition of and reliance on the exceptional right of individuals to file petitions, has broadened considerably. This right was granted to applicants in the United Kingdom in 1966.\(^{54}\)

The rights contained in the Convention are civil and political rights, though there is a separate European Social Charter.\(^{55}\) The civil and political rights are both substantive and procedural, including liberty, fair trials, privacy, and free expression.\(^{56}\) Some have argued that the Convention bodies have been more sure-footed when dealing with procedure;\(^{57}\) certainly, matters of substantive decision are often avoided by reference to the concept of a "margin of appreciation" by which the Convention adjudicators defer to the greater knowledge and experience of domestic decision makers.\(^{58}\) Thus the prime protectors and overseers of human rights continue to be the national authorities, and the Convention does not act as a vehicle to *de novo* appeal.

The actual and potential impact of the Convention on English law has also been limited by other considerations. One is that the Convention was drafted as a lowest common denominator of rights observance within Western Europe, and so its standards were set at a deliberately modest level to encourage compliance and avoid conflicts with contracting states protective of their sovereignty.\(^{59}\) In
addition, the substantive rights in the Convention are, for the most part, akin to, or even expressly based on, rights recognized implicitly or expressly in English common law.\(^6\)

At the same time, the potential for invocation of the Convention is tremendous, especially as the adjudicative agencies adopt a teleological and dynamic approach in order to realize the fundamental objects and purposes of the Convention in a changing world, namely the protection of individual human rights and the promotion of pluralistic democracy.\(^6\) Approximately one hundred cases concerning the United Kingdom have been referred to the European Court of Human Rights, and adverse judgments have prompted some profound changes in law.\(^6\) For example, Article 2 of the Convention, concerning the right to life\(^6\) and which governed the adverse judgment in *McCann v. United Kingdom*, involving the shooting of I.R.A. suspects by the British Army in Gibraltar, requires greater circumspection in the planning and operation of law enforcement activities which involve the use of deadly force by suspects or law enforcement agents. Several cases centering around Article 3, the right not to be subjected to torture or inhuman or degrading treatment,\(^6\) have also arisen from the conflict in Northern Ireland, including the interstate case of *Ireland v. United Kingdom*.\(^6\) Cases under Article 5,\(^6\) the right to liberty

\(^6\) Id. at 240-44.

\(^6\) See Harris et al., *supra* note 12, at 2, 34, 36.


\(^6\) The right to life provision states:

> everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. (2) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

European Convention, *supra* note 12, at art. 2.


\(^6\) European Convention, *supra* note 12, at art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").


\(^6\) Article 5 of the European Convention states:
and security of person, have involved complaints about the recall of prisoners released on license, the length of detention in police custody, and breach of the peace. Fairness under Article 6, the

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

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

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

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

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

European Convention, supra note 12, at art. 5.


69. Article 6 of the European Convention states:

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society,
right to due process, applies to both pretrial process and trial procedures. Rights to privacy under Article 8 have been fiercely litigated in the fields of correspondence and sexual relations. Cases involving the application of contempt of court

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

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

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

European Convention, supra note 12, at art. 6.


71. Article 8 of the European Convention states:

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

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

European Convention, supra note 12, at art. 8.


73. See, e.g., Dudgeon v. United Kingdom, App. No. 7525/76, 4 Eur. H.R. Rep. 149, 149 (1981) (holding that rights to privacy were infringed by making homosexuality a criminal offence in Northern Ireland); see also Lustig-Prean v. United Kingdom, App. Nos.
restrictions and attempts to impose official secrecy have arisen under Article 10.

As far as English law is concerned, these judgments and decisions are viewed as essentially declaratory of international law; they cannot directly affect the status of domestic laws or decisions under them. However, the United Kingdom, as a contracting state wishing to remain a party to the Convention, invariably has responded to adverse decisions and awards as it is required to do under Article 13 of the Convention, though not always as expected or with alacrity. The result has been several important pieces of legislation favoring rights that create a more direct link between English law and the European Convention.


See, e.g., Sunday Times v. United Kingdom, App. No. 6538/74, 2 Eur. H.R. Rep. 245, 268-82 (1979) (finding that an injunction to prevent the publication of materials that would be in contempt of court was in breach of Article 10).

See, e.g., Observer v. United Kingdom, App. No. 13585/88, 14 Eur. H.R. Rep. 153, 174-83 (1991) (holding that the application of contempt of court to prevent the publication of materials that were the subject of an injunction against another newspaper was a breach of Article 10).

Article 10 of the European Convention, states:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

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

European Convention, supra note 12, at art. 10.

See, e.g., Brogan v. United Kingdom, App. Nos. 11209/84, 11234/84, 11266/84, 11386/85, 11 Eur. H.R. Rep. 117, 128-39 (1989) (reviewing detention by the police without judicial authorisation lasting over four days). This case resulted in the derogation now set out schedule 3 of in the Human Rights Act of 1998. It will be withdrawn when the Terrorism Act 2000 (c. 11) comes into force (which is expected to be in early 2001), since schedule 8 will require judicial authorisation for detention beyond a certain number of days.

See, e.g., Contempt of Court Act, 1981, c. 49 (Eng.), following the case of Evans v. United Kingdom, App. No. 6538/74, 1 Eur. H.R. Rep. 245 (1979) and the Interception of
Furthermore, English courts have, to some extent, used the Convention as an aid to statutory interpretation. This approach has been taken readily where the statute was intended to implement the Convention. In addition, the rule that judges prefer an interpretation that renders English law compliant with the international law represented by the Convention, rather than one that results in an apparent breach of the Convention, further linked English law with the Convention. If, however, English law was clearly at variance with the Convention, the position before 1998 was that the statute simply applied; there was no need to look at the Convention if the English statute was clear. In addition, courts accepted that this approach applied at the level of judicial interpretation. There was no corresponding requirement at a lower level in the administrative hierarchy, however, for officials expressly to consider the Convention when exercising their discretion. The position was even less promising with regard to the common law. No rule of interpretation was asserted clearly about how to achieve compliance, though several judges viewed the Convention as based on principles wholly consistent with, and


81. See Waddington v. Miah, 1 W.L.R. 683, 690–92 (1974) (holding that the Immigration Act of 1971, §§ 24(1)(a) and 26(1)(d), were not retroactive, giving brief consideration to the Convention principles).

82. See Regina v. Staines, 2 Crim. App. R. 426, 440–44 (1997) (allowing the use of evidence coerced under statutory requirement even though such evidence would not be allowed in the European Court of Human Rights); Regina v. Ministry of Defense ex parte Smith, 2 W.L.R. 305, 326–27 (1996) (upholding the dismissal of homosexuals from the armed forces according to domestic policy despite the Convention); Regina v. General Med. Council ex parte Colman, 1 All E.R. 489, 505 (1990) (imposing restrictions on doctors' advertising by the General Medical Council pursuant to authority under an unambiguous act, rejecting that the act was subject to the Convention); Regina v. Secretary of State for the Home Dep't ex parte Brind, 1 All E.R. 469, 477–78, 484 (1990) (interpreting statute banning interviews with representatives of specified political groups in Northern Ireland without considering the Convention to be relevant).

83. See, e.g., Regina v. Home Sec'y ex parte Kirkwood, 2 All E.R. 390, 394–95 (Q.B. 1984) (holding that the English court had no power to grant an injunction against an officer of the Crown and when exercising his powers under the 1870 Extradition Act that the Secretary of State was not obliged to consider the provisions of the Convention); Regina v. Chief Immigration Officer ex parte Salamat Bibi, 1 W.L.R. 979, 984–85 (C.A. 1976) (holding that immigration officers could not be expected to apply the European Convention on Human Rights in the exercise of their powers).
influenced by, the English common law and were therefore prepared to consider Strasbourg jurisprudence in their own development of the common law.\textsuperscript{84} However, the approach was variable and depended on judicial predilections toward rights, with conflicts between courts, as well as between judges in the same court.\textsuperscript{85} Despite all the difficulties, the Convention was cited in a significant number of cases, many of which were high profile.\textsuperscript{86}

The third link between the Convention and English law has been through the operation of European Communities law, which is expressly part of English law according to sections 2 and 3 of the European Communities Act of 1972.\textsuperscript{87} In its 1974 ruling in \textit{Nold v.}\textsuperscript{87*

\textsuperscript{84} See, e.g., Att’y Gen. v. Brit. Broad. Corp., 1981 A.C. 303, 332 (considering the Convention during proceedings for an injunction to restrain defendants from broadcasting a program dealing with matters related to a pending appeal).


\textsuperscript{86} See generally, \textit{Hunt}, supra note 80; R. Singh, \textit{The Future of Human Rights in the United Kingdom} (1997); Beloff & Mountfield, supra note 80.

\textsuperscript{87} European Communities Act, 1972, c. 68 (Eng.). Section 2 states:

\begin{enumerate}
\item 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.
\item Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by regulations, make provision—
\begin{enumerate}
\item for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or
\item for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above; and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the Communities and to any such obligation or rights as aforesaid . . . .
\end{enumerate}
\end{enumerate}

\textit{Id.} § 2.

Section 3 states:

\begin{enumerate}
\item For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of
E.C. Commission,\textsuperscript{88} the European Court of Justice recognized that, as all members of the European Communities had also ratified the Convention, the latter should be considered when interpreting Community law. This rule has been applied on a wide basis, not just in relation to Community law directly but also in relation to indirect impacts upon Community law.\textsuperscript{89} The Convention has also been recognized in the Maastricht Treaty, Article F2, and the Amsterdam Treaty as a fundamental principle that member states must observe on pain of suspension.\textsuperscript{90} In 1996, however, the European Court of Justice concluded that the European Communities are not competent to accede directly to the Convention.\textsuperscript{91}

Despite all these connections, the European Convention did not transmute into a domestic bill of rights and there remained some specific shortcomings in the United Kingdom's stance, resulting in continuing pressures for a domestic bill of rights.\textsuperscript{92} These shortcomings included failings in existing law. For example, judges hesitated to develop rights decisively and were particularly hesitant about the impact of parliamentary sovereignty.\textsuperscript{93} Even law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court).

(2) Judicial notice shall be taken of the Treaties, of the Official Journal of the Communities and of any decision of, or expression of opinion by, the European Court or any court attached thereto on any such question as aforesaid; and the Official Journal shall be admissible as evidence of any instrument or other act thereby communicated of any of the Communities or of any Community institution.

\textit{Id.} § 3.


\textsuperscript{92} See generally MICHAEL ZANDER, \textit{A BILL OF RIGHTS?} (Sweet & Maxwell eds., 4th ed. 1997).

\textsuperscript{93} The old Diceyan mantra still holds sway in internal law, even if it is now eroded in terms of external relations with the European Union. See generally ALBERT V. DICEY, \textit{INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION} (MacMillan & Co., 10th ed. 1959) (1885). See also Regina v. Secretary of State for Transport \textit{ex parte} Factortame Ltd., 3 W.I.R. 818 (E.C.J. 1990) (granting an injunction to stop the application of the Merchant Shipping Act of 1988 against Spanish fishing vessel owners).
the pressures from the European Convention were far from complete or satisfactory. The list of adverse decisions grew, but only by about five adverse judgments per year, which is an extremely modest rate for a supreme constitutional court. It is even modest compared to fellow European states that have domestic constitutional review.

### Table 1

**Impact of the European Court of Human Rights by State to 1997**

<table>
<thead>
<tr>
<th>State</th>
<th>Applications in 1994 to European Commission</th>
<th>References to European Court 1960–1997</th>
<th>Adverse Judgments of European Court</th>
<th>Violation per 100,000 population per annum (worst=1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>78</td>
<td>40</td>
<td>24</td>
<td>0.0050 (9)</td>
</tr>
<tr>
<td>France</td>
<td>439</td>
<td>99</td>
<td>42</td>
<td>0.0036 (13)</td>
</tr>
<tr>
<td>Germany</td>
<td>188</td>
<td>33</td>
<td>14</td>
<td>0.0003 (19)</td>
</tr>
<tr>
<td>Italy</td>
<td>507</td>
<td>251</td>
<td>98</td>
<td>0.0065 (6)</td>
</tr>
<tr>
<td>Spain</td>
<td>138</td>
<td>19</td>
<td>8</td>
<td>0.0013 (16)</td>
</tr>
<tr>
<td>U.K.</td>
<td>236</td>
<td>95</td>
<td>47</td>
<td>0.0021 (15)</td>
</tr>
</tbody>
</table>

At the same time, whenever adverse judgments did arise, there were feelings of dissatisfaction, as they confirmed that English judges had fallen short of international expectations and that English dirty linen had been washed in Strasbourg and not in London. But the process often involved long delays through the requirement to exhaust domestic remedies under Article 35 of the Convention and through the slow-moving bureaucracy in Strasbourg. In addition, there were often complaints of confusion on both sides, as the European Court failed fully to understand English legal practices, and English lawyers and politicians failed to understand Continental versions. As a result, many English lawyers (and politicians) viewed the Convention as an alien institution based more on civil than common law notions.

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94. 564 Parl. Deb., H.L. (5th ser.) (1995) 101. The final column takes account of the different population sizes of member states and also the fact that not all member states allowed individual applications to the adjudicatory system to the same date.

95. These points are all made in Rights Brought Home: The Human Rights Bill, 1997, Cm. 3782, which is discussed infra notes pp. 23–24. The most serious single conflict arose over the Gibraltar Three case, which followed representations made by the Foreign Office and Lord Chancellor's Department. See Francis Gibb, Britain Calls for Reforms to Court of Human Rights, Times (London), Nov. 25, 1996, at 10.
Finally, political changes began to favor a domestic statement of rights. Some of the political factors included the reaction to the greater radicalism, both from the left and the right during the 1970s and 1980s, though much of that radicalism has now long since dissipated. Other political factors included: a fragmentation of political allegiances—smaller parties have increased in power, and some of these, especially the Liberal Party, have long favored a Bill of Rights; the need to find unifying concepts in the face of constitutional changes, including the devolution of powers to Scotland, Wales, and Northern Ireland; the need to find other constitutional checks and balances in the face of other constitutional changes, especially the loss of powers of the House of Lords; and a need to instill a culture of respect in a society that has begun to perceive itself as multi-ethnic and multi-cultural.96 There are also some negative factors at work: in particular, the concern that state interests had expanded into private lives in such areas as welfare assistance and technology.97

B. Alternatives to a Domestic Bill of Rights

For twenty-five years there has been growing interest in improving the protection of rights within English law. Enacting a bill of rights was the leading contender for doing so, but before examining that strategy in detail, some of the other options should be scrutinized especially as some were pursued as alternatives before 1998.98

Several alternatives relate to the alteration of the legislative process to diminish the danger of what Lord Hailsham called "elective dictatorship," which could substantially threaten rights.99 Suggestions from Lord Hailsham himself included strengthening the House of Lords as a counterweight to the partisan House of Commons. Given its lack of democratic credentials, however, the

96. See generally Constitutional Futures (Robert Hazell ed., 1999) (providing a study of the first systematic attempt to foresee the full effects of the new British government's constitutional reform program).


House of Lords’ political trajectory has moved toward marginalization, over the course of the past century. Its record on the protection of rights also is not markedly different from that of the House of Commons.

Another Parliamentary reform that has been suggested is pre-legislation scrutiny by a special human rights select committee that could alert Parliament and the public to any threats. Some concessions have been made in this direction, as shall be described in Part III.D.2. Reforms of the House of Commons would also be apposite, for example, adopting a proportional system of elections, which would be more likely to produce a “balanced” Commons where no party retains overall control. Both major political parties, Conservative and Labour, however, have tended to be wary of this idea, fearing that it would lead to hobbled government and would give undue weight to minor parties who would be courted into forming a coalition. The issue has now been examined by the Jenkins Committee, but no date has been set for the implementation of its suggestions or for a referendum on any proposed change. In conclusion, there seems to be little enthusiasm for substantial change that would give rights greater protection within the parliamentary process.

In addition to institutional reform, there has also been encouragement for Parliament because, within its present constitution, it could be more active in the implementation of rights. From the perspective of the left, decisions about public interest, public policy, and the relationship between state and citizen should remain in the hands of the democratic legislature rather than in those of the unelected judiciary. Accordingly, if problems arise from practices relating to telephone tapping, for example, it would be far better to pass specific legislation rather than to allow the judiciary


101. But see War Crimes Act, 1991, c. 13 (Eng.).


104. See id.


to develop some obscure and erratic legal principle of privacy, with all the politicization that might follow. Specific legislative reforms have certainly occurred over the past twenty-five years, but the reliance upon political activism in favor of rights has also had its limitations. The results are piecemeal, and the strategy assumes that politicians are willing to give high priority to rights issues in the legislative calendar. This cannot have the cultural and educational impact that a comprehensive bill of rights could engender. In any event, it is not inconsistent with the enactment of a bill of rights to have specific legislative reforms.

Outside of parliamentary reform, there has been growing interest in defining and strengthening concepts of citizenship. In part, this trend is encouraged by external factors, such as the perceived encroachment of the European Union, which is depicted as diluting and confusing what it means to be "British." More positively, the trend builds upon the belief that protection and respect for rights are dependent not so much upon a formal documentary bill of rights but upon the prevailing values of elites, particularly politicians and the civil service. This suggests that education, the enunciation of standards, and working protocols will all be very important, and that, in addition to the élites, a culture of rights should be encouraged reciprocally in citizens. The issue was examined in the Report of the (Speaker's) Commission in 1990. The Report rejected a bill of rights in a normative sense, preferring instead a codification of rights and duties in existing laws, but also suggested that a standing Royal Commission on Citizenship examine proposed legislation and warn of incursions into rights. It also made various suggestions as to the teaching of citizenship within the school curriculum and changes to the honors system, some of which have now been implemented.

107. See, e.g., Interception of Communications Act, 1985, c. 56 (Eng.); see also Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 9 (1971).
108. See, e.g., Data Protection Act, 1984–98, c. 29, c. 35 (Eng.); Local Government (Access to Information) Act, 1985, c. 43 (Eng.).
113. See 220 PARL. DeB., H.C. (6th ser.) (1993) 455 (detailing changes to the grant of honors); Department for Education and Employment website, at http://www.dfee.gov.uk/news/99/208.htm (stating that the teaching of "citizenship" becomes part of the "knowledge and understanding about becoming informed citizens" under the National
A more lasting reform has been the Citizen's Charter, issued in the nature of an administrative code rather than legislation.\textsuperscript{114} The Charter is concerned with the citizen not as a political actor but as a passive consumer of state or semi-state services, and it generally encourages standard-setting, performance review, and grievance procedures. The Charter, which has been treated as a rolling program for public services, conforms with British traditions in regard to rights in two respects. First, it builds upon a British tradition of pragmatism and distrust of principle; having a high percentage of trains keeping good time is depicted as more important to the British psyche than vague (and possibly dangerous) rights to free speech. Second, although the Citizens' Charter was the most important public service reform of John Major's Premiership, it complemented the themes of "new public management" associated in the United Kingdom with Prime Minister Thatcher and in the United States with President Reagan.\textsuperscript{115} Thus, where the state cannot be rolled back (through privatization), it should be run along lines more commonly associated with private enterprises in the expectation that the services delivered will be more responsive to the citizen-consumer's demands. In this way, the notion of citizenship is broadened from earlier political conceptions: the "rights" conferred are certainly not in the civil or political spheres, nor are they normally enforceable through the courts, but serve more as precepts for administrators. Given the limitations in all of these reforms and approaches, it is not surprising that the pressures for a "full" bill of rights continued.


The enactment of the Human Rights Act during the time of a strong Labour Government is, at first glance, a surprising development. The idea of having a codified, statutory bill of rights is not traditional Labour Party policy. Indeed, the left wing of the Labour Party has tended to oppose such suggestions, while the right and center saw it as irrelevant or, at best, low priority. Among the reasons were that Western-style rights emphasize civil and political advancement rather than social and economic progress. Additionally, there is suspicion that members of the judiciary, who are seen as being closet or even open Tories, will wreck the social and economic plans of the Labour Party. Yet, it would be wrong to see even the traditional Labour movement as wholly opposed to a Bill of Rights. It was, after all, the government of Attlee, the greatest socialist government in British history, which signed the European Convention in 1950. In reality the Labour Party was always fairly lukewarm towards the Convention and made serious efforts to keep it off center stage. What changed?

The change was cultivated during the short leadership reign of John Smith. After the loss of the 1992 election, there was some feeling of despair that the Tories could never be beaten and that a new style Labour Party would have to emerge, one that would be forced to enter alliances to achieve power. Modernization, therefore, became a buzzword, which evolved into a policy of broad discussions with the Liberal Party to find common ground. The Liberals have long been the main champions of constitutional reform, and a bill of rights has long figured at the top of their political agenda. By late 1993, the Labour Party agenda included a policy to monitor and promote human rights. This informal consensus continued as a distinguishing feature of the new-style "New Labour" politics after the 1997 election, even though Labour did not depend on Liberal votes to continue in office.
The acceptance of a bill of rights was marked by a Labour Party paper issued in 1996, *Bringing Rights Home*, which suggested the incorporation of the European Convention into domestic law. Many of the details were left suspiciously vague. It was clear that even the future Lord Chancellor, Derry Irvine, did not favor the full-blooded American-style version in which judges could set aside legislation, as he warned against "judicial supremacism." Nevertheless, the idea was firmly adopted by the future Home Secretary, Jack Straw, so that when Labour took office, there was strong commitment by the key officers of state to new legislation on rights.

The details of the bill for the incorporation of the European Convention soon emerged after the 1997 General Election with the publication of the Home Department's Paper, *Rights Brought Home: The Human Rights Bill*. Several features emerged as significant. First, the emphasis was indeed on modernization: to avoid the cost and delay of taking cases to Strasbourg and to increase accessibility of remedies. Additionally, the Bill sought to enhance awareness of rights and to instill a rights culture. Next, the Paper envisaged the incorporation of the European Convention, not a wholly new, Anglocentric Bill of Rights. Finally, there would be judicial enforcement, but the judges would not be able to invalidate primary laws. As the Paper explains: "This conclusion arises from the importance which the Government attaches to Parliamentary sovereignty. In this context, Parliamentary sovereignty means that Parliament is competent to make any law on any matter of its choosing and no court may question the validity of any Act that it passes."
As already noted, traditional British constitutional theory stresses the concept of Crown prerogative and parliamentary sovereignty rather than popular sovereignty or rights. Much of the enforcement and observance is therefore to remain at a political level.

Against the background of these observations, Part II surveys the Act itself, starting with the rights to be protected, then continues with the beneficiaries of rights as well as those upon whom duties are imposed, and finally considers procedural matters and the role of the judiciary.

II. Analysis of the Human Rights Act

A. The Catalogue of Rights

The central feature of the Human Rights Act is the incorporation of the European Convention into United Kingdom law. Although this is "a strong form of incorporation," it falls short of direct incorporation.130 As far as English law is concerned, in the words of section 3(1), "[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which [sic] is compatible with the Convention rights."131 In this way, the Convention is not dispositive—it is a shaper not a mover—although the Human Rights Act can be the basis for legal action.132 Another way in which the Act indirectly incorporates the European Convention is that the English Courts are not bound by the decisions of the Commission or even the European Court of Human Rights.133 Consequently, it will be an English interpretation of the Convention that prevails and not simply the Strasbourg interpretation. The political motivation behind this divergence is to allow the English courts to influence Strasbourg reciprocally.134 This imperative follows some

130. 582 PARL. DEB., H.L. (5th ser.) (1997) 1230.
132. See id. § 7(1). By section 7(1)(a), "[a] person who claims that a public authority has acted (or proposes to act) in a way which [sic] is made unlawful by section 6(1) may . . . bring proceedings against the authority under this Act in the appropriate court or tribunal . . . ." Id.
133. Id. § 2(1). By section 2(1): "A court or tribunal determining a question which [sic] has arisen in connection with a Convention right must take into account" the Convention principles and rules. Id.
134. RIGHTS BROUGHT HOME, supra note 124, ¶ 1.18.
considerable dissatisfaction with the quality of the European judgments, for example, as expressed by Lord Mackay in 1996.\textsuperscript{135} It may equally provide some encouragement for English courts to be stricter and more interventionist. Strictly speaking, there can be no domestic version of the doctrine of margin of appreciation,\textsuperscript{136} though ideas such as respect for democratic decisions may have a similar effect depending on the rights affected and whether the courts can claim expertise.

In addition to the limitations on the modes of relation to the Convention, not all of the Convention is incorporated. The levels of decision making are covered comprehensively. Thus, the Act requires in section 2 that:

\begin{enumerate}
\item [a] court or tribunal determining a question which [sic] has arisen in connection with a Convention right must take into account any—
\begin{enumerate}
\item judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
\item opinion of the Commission given in a report adopted under Article 31 of the Convention,
\item decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
\item decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.\textsuperscript{137}
\end{enumerate}
\end{enumerate}

The Human Rights Act, however, does not simply refer to the whole body of Convention norms. Instead, Articles 2 to 12 and 14, Articles 1 to 3 of the First Protocol, and Articles 1 and 2 of the Sixth Protocol are specifically scheduled.\textsuperscript{138} It is understandable that Article 1 of the Convention is left to one side, as it is a statement that makes sense only in international law.\textsuperscript{139} Article 13,

\textsuperscript{135} See Gibb, supra note 95, at 10.
\textsuperscript{137} Human Rights Act § 2.
\textsuperscript{138} Id.
\textsuperscript{139} European Convention, supra note 12, at art. 1. By Article 1: “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention.” Id.
however, is also not included, and this omission may be more significant. Article 13 states that "[e]veryone 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." 140

The exclusion of this provision from the Human Rights Act suggests that the Act is not intended to be used by judges as the basis for major or radical legal surgery; judges are to be confined to specified remedies and should not engage in the invention of wholly new causes of action or legal doctrines. 141 In particular, this omission gives rise to the inference that its purpose is to avoid forcing English judges to develop a new right of privacy at common law. The Lord Chancellor, Lord Irvine, confirmed the government's view that the Act is not necessarily the harbinger of new privacy protections. 142 Nevertheless, the Act possibly requires compatibility with rights to privacy under Article 8 in two ways. 143 One is that the Act itself can be invoked as the basis for an action to protect privacy. 144 Second, is the notion that privacy must be considered relevant and influential in all litigation; there is nothing to forbid judges from developing the concept within common law even if they are under no specific duty to do so.

Some rights outside the original 1950 text of the Convention are also included within schedule 1 of the Human Rights Act. These include Articles 1 to 3 of the First Protocol and Articles 1 and 2 of the Sixth Protocol. 145 Although the First Protocol was signed in 1952 and commitment to it has been long-standing, the enactment process of the Human Rights Act led to a review of the state of ratifications. In particular, pressure arose for the ratification of the Sixth Protocol and thereby the effective abolition of the death penalty (except in war-time). 146 Members of Parliament have also

140. Id. at art. 13.
142. Id. at 785.
144. Human Rights Act § 7. By section 7(1)(a), "[a] person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may ... bring proceedings against the authority under this Act in the appropriate court or tribunal ... ." Id.
145. Id. at sched. 1. The rights in the First Protocol relate to the protection of property, the right to education, and the right to free elections (Articles 1 through 3 respectively). First Protocol, supra note 50. The rights in the Sixth Protocol relate to the abolition of the death penalty, except in time of war (Articles 1 and 2 respectively). Sixth Protocol, supra note 52.
146. See Crime and Disorder Act, 1998, c. 37 (Eng.).
expressed a commitment to ratify the Seventh Protocol\textsuperscript{147} once amending legislation has been passed to provide for equality between spouses in all respects.\textsuperscript{148} The ratification of the Fourth Protocol, which deals with freedom of movement,\textsuperscript{149} is much more problematic; given the colonial history of the United Kingdom, various types of citizenship exist and not all carry full rights of entry.\textsuperscript{150}

In addition to any new rights imported by the Act, section 11 makes clear that existing rights (such as those under common law) are preserved. The Act should not be assumed to be a comprehensive catalogue of rights:

A person’s reliance on a Convention right does not restrict—

(a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom; or

(b) his right to make any claim or bring any proceedings which [sic] he could make or bring apart from sections 7 to 9.\textsuperscript{151}

The common law is not obviously more expansive in terms of the rights granted, but it may be more generous in some respects in terms of level of damages, including the award of aggravated damages.

Conversely, Article 15\textsuperscript{152} is mentioned in schedule 1 of the Human Rights Act. This provision allows a state to “derogate” from its obligations to respect rights in response to a national emergency:

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.\textsuperscript{153}

\begin{enumerate}
\item[147.] Seventh Protocol, \textit{supra} note 53 (relating to the expulsion of aliens, equality between spouses, and compensation for miscarriages of justice).
\item[148.] 597 \textsc{Parl. Deb.}, \textsc{H.L.} (5th ser.) (1999) 201; \textit{Rights Brought Home}, \textit{supra} note 124, \textsc{¶} 4.15.
\item[149.] Fourth Protocol, \textit{supra} note 51 (securing certain rights and freedoms other than those included in the Convention and in the First Protocol).
\item[150.] \textit{See} British Nationality Act, 1981, c. 61 (Eng.).
\item[151.] Human Rights Act \textsc{§} 11.
\item[152.] European Convention, \textit{supra} note 12, at art. 15.
\item[153.] Human Rights Act, sched. 3.
\end{enumerate}
The derogation power is currently in use in Northern Ireland to allow the police to detain terrorist suspects for seven days without any judicial authorisation or review. The practice, which contravenes Article 5(3) of the Convention, is currently authorized by section 14 of the Prevention of Terrorism (Temporary Provisions) Act of 1989, and became the subject of the derogation in 1988 following the adverse decision in *Brogan v. United Kingdom.* This derogation, which was upheld as valid by the European Court in 1993, may continue, as the existing one is recognized specifically under section 14 and schedule 2 of the Human Rights Act for a further five years. There are plans, however, to end reliance upon this particular notice of derogation, which will be withdrawn when the Terrorism Act 2000 comes into force, since schedule 8 will require judicial authorisation for detention beyond four days. Any future derogations are likewise to last for five years. These exceptional restraints on rights are handled poorly by the Human Rights Act. There is no recognition of the need to keep derogations continually under review; the "peace process" in Northern Ireland has resulted in a substantial reduction in actual violence, and challenges to the continuance of the derogation in those changed circumstances are pending already before the European Court in the case of *Marshall v. United Kingdom.* But no form of judicial or legislative review of the necessity for a derogation is provided for in the Human Rights Act. Any renewal of a derogation must be by statutory order, which must be approved in Parliament. This is not a requirement in respect of the *Brogan* derogation, however.

Section 15 and schedule 3 of the Act also preserve the reservation to Article 2 of Protocol 2 (entered into in 1952), which requires education in accordance with parental wishes: "[T]he

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158. Terrorism Act 2000, at c. 11.
159. Human Rights Act § 16.
161. Human Rights Act § 16(3).
principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure.\footnote{162} This reservation also is sustained for a further five years\footnote{163} and arguably is subject to even less scrutiny than the derogation measures in that the Minister must review it and report to Parliament, but any renewal order need not be approved by Parliament nor even laid before it.\footnote{164}

B. The Desirability of the Convention as a Domestic Catalogue of Rights

The use of the European Convention as the basis for a domestic code of rights, by far the most frequently advocated option,\footnote{165} entails both advantages and disadvantages.

The wholesale adoption of the Convention cuts short the potentially interminable debates as to which rights to include and how to define them. As John Waldron points out, the passage of a bill of rights will not settle inherently such arguments; it needs to be based on generally agreed upon norms and cannot specifically define them.\footnote{166} The Convention is both an authoritative and well established text that already commands wide respect both nationally and internationally. Furthermore, it has an established case law, so it is not a wholly unknown quantity that allows judges to start with a blank piece of paper. As well as its normative attractions, the Convention is also politically inviting, because it avoids a drafting and debating process that would otherwise involve a major commitment in terms of parliamentary time and governmental effort. The task is by no means impossible for British civil servants; as already mentioned, these officials were

\footnotesize{\newline
instrumental in the drafting of the Convention itself. In addition, they have produced many statements of rights for the many Commonwealth countries that have gained independence from colonial rule since 1945. Many of these constitutional bills of rights are based on the European Convention.

By comparison, one might consider the U.S. Bill of Rights and the more recent experience of Canada when it decided to "patriate" its constitution. The Canadian Act of 1982 was passed only after many years of negotiations between Federal and Provincial governments. Even now, objections from Quebec have persisted and have resulted in somewhat unprincipled compromises. Much of this kind of interminable wrangling can be avoided by adopting a tried and tested set of rights, which, because it comes as an enduring international package, also rules out any prospect of lobbying for amendments at a purely national level. In this way, reliance upon an international document provides a degree of entrenchment that is not available in legal terms. Some view the entrenchment thus engendered as problematic on the basis that the Convention is said to be tired and old and therefore in need of updating. But this criticism strikingly misreads the transcendental nature of a bill of rights—it is precisely to avoid the fashions of the day and to provide through open-textured language a normative guide that can evolve with society. The fact that the two-century-year-old U.S. Bill of Rights has been applied to such modern day issues as the freedom of the internet amply illustrates this point.

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168. Id.
173. See infra pp. 36-39.
174. See Reno v. ACLU, 521 U.S. 844, 862-64 (1997) (discussing challenges to the Communications Decency Act of 1996); Free Speech Coalition v. Reno, 198 F.3d 1083, 1090-97 (9th Cir. 1999) (discussing challenges to the Child Pornography Prevention Act of
The adoption of the European Convention could also avoid conflicts between domestic and international rights and should reduce costly and delayed litigation under international procedures.\textsuperscript{175} The Act, however, may not fully achieve these goals.\textsuperscript{176} The relationship between domestic and international rights is meant to be reflexive; that is, domestic and international rights influence each other. Part of the conception of the Human Rights Act is that English judges are not bound by European jurisprudence; they may depart from it in the hope that their innovations eventually will produce shifts in thinking in Strasbourg.\textsuperscript{177} Divergences can arise deliberately, as well as from lack of understanding or knowledge or from a difference in timing, such as when an issue comes first before English courts and only later is the subject of a decision in Strasbourg. One solution to these difficulties might be to provide for advisory opinions from the European Court of Human Rights, in the same way referrals can be made to the European Court of Justice under section 3 of the European Communities Act of 1972.\textsuperscript{178} This facility could not be achieved unilaterally under the Human Rights Act, however, because such referrals currently are forbidden by the Convention rule that requires the exhaustion of domestic remedies.\textsuperscript{179} It seems unlikely that the Council of Europe would agree to a change just to suit the United Kingdom. While the procedures of the Court recently have been changed by Protocol 11 of the Convention,\textsuperscript{180} the primary goal

\textsuperscript{175} See supra p. 17.
\textsuperscript{176} See supra p. 23.
\textsuperscript{178} European Communities Act, 1972, c. 68, § 3 (Eng.). Section 3 enforces article 177 of the Treaty of Rome, stating “[f]or the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court).” Id.; see Regina v. Plymouth Justices \textit{ex parte} Rogers, 2 All E.R. 175 (Q.B. 1982); C.I.L.F.I.T. v. Minister of Health, [1Y83] 1 C.M.L.R. 472 (1983).
\textsuperscript{179} Eleventh Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, Europ. T.S. No. 155 [hereinafter Eleventh Protocol]. By Article 35 of the Convention, “[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.” European Convention, supra note 12, at art. 35; see A.A. Cancado Trindade, The Application of the Rule of Exhaustion of Local Remedies in International Law 60 (1983).
of this simplification of procedures is to allow the Court to better cope with the growing flood of applications from western European countries and the new stream of cases from eastern European members.\textsuperscript{181}

Nevertheless, there are alleged disadvantages in simply adopting the Convention. First, it could be argued that the vague and loosely drafted provisions of the Convention are alien to British law and will cause problems for English judges trained in the more precise and pragmatic traditions of common law. This argument is not very convincing, however. The European Court of Human Rights always has included a British judge whose judgments are not noted for being wayward. In addition, a rights discourse has to some extent infiltrated English law,\textsuperscript{182} and English judges increasingly have become inured to handling the issues of broad principle. It is, of course, inevitable that constitutional rights are drafted in vague language relative to road traffic regulations or the common law intricacies of offer and acceptance in contract. A bill of rights must be drafted so as to provide flexibility for changes in attitudes over time and in different circumstances. There is no evidence that English judges cannot learn to appreciate this mode of reasoning.

Next, the European Convention is said to be inappropriate as a domestic bill of rights since it was not drafted solely with the United Kingdom in mind. As a result, there may be significant omissions that fail to take account of the quirks of English legal life,\textsuperscript{183} especially in regard to its adversarial criminal process that differs from the inquisitorial models in most of Europe.\textsuperscript{184} For example, there is no express privilege against self-incrimination. It may be argued, however, that these issues can be addressed through the adaptation of the broad statements of principle in the Convention. The European Court itself has managed to take due account of adversarial process and the role of the “right to silence”

\textsuperscript{181} For a list of ratifications, see Council of Europe, \textit{European Court of Human Rights Judgments and Decisions}, http://www.echr.coe.int/eng/decisions.htm (on file with the University of Michigan Journal of Law Reform).

\textsuperscript{182} See sources cited supra notes 19, 37–41.


within it in cases such as *Saunders v. United Kingdom* and *Murray v. United Kingdom*. Indeed, in both cases, it afforded more protection for the detainee than thought proper by the United Kingdom Parliament. In the same way, it is hard to see why the English judiciary should not follow suit and make sensible provisions for rights in an adversarial system.

A related argument is that the European Convention, as a broad statement of international law, cannot readily take account of subtle regional concerns of Scotland and Northern Ireland. A response to this claim is that the broad statements of principle in the Convention are inherently adaptable, and judges assigned to those jurisdictions are well-placed to make the necessary adaptations. One would expect the main differences to be procedural rather than substantive, but it should be noted that one of the tasks of the Northern Ireland Human Rights Commission, established under the Northern Ireland Act of 1998 and the Belfast ("Good Friday") Agreement, is to consider whether Northern Ireland would benefit from a distinctive bill of rights supplementary to the European Convention measures. In Scotland, the Human Rights Act of 1998 entered into force by virtue of the operation of the Scotland Act of 1998, and the Scottish judiciary has already found several breaches.

Perhaps the most serious objection to the adoption of the Convention is that its use in this way fundamentally misreads its

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186. App. No. 18731/91, 22 Eur. H.R. Rep. 29 (1996) (finding that the use of silence as adverse evidence in circumstances where access to a lawyer had been denied was not a violation of Article 6(1)).
192. Scotland Act, 1998, c. 46, §§ 29(2)(d), 57(2) (Eng.).
purpose. The Convention was drafted to secure a minimum level of rights protection; it demands merely the lowest common denominator in western European liberal democracies. Therefore, the signatories produced a relatively weak statement about rights in order to secure the agreement of widely divergent states to this new concept of common rights, while at the same time overcoming doubts about potential loss of national sovereignty. These limitations in the Convention are illustrated below.

One limitation is that there are numerous restrictions on the substantive rights built into the drafting of the Convention. For example, Article 10, which guarantees freedom of expression, amounts to a compromise far removed from the absolutist statement in the first provision of the U.S. Bill of Rights. Some of these restrictions have come to be seen as too severe, such as the pre-licensing of broadcasting within Article 10, which acts as a form of enforcement of the state monopolization of broadcasting. The idea that any restriction of rights has to be justified by reference to other rights rather than social interests, though, is not the European way. Nevertheless, the inculcation of a purposive approach to interpretation of the Convention should be able to overcome these concerns, at least if the judges turn their backs on the doctrine of “margin of appreciation,” which applies to international relations only and assumes that Strasbourg judges have insufficient knowledge and understanding.

Second, the Convention largely ignores social and economic rights. Although they are stated in the European Social Charter of 1961, that code does not carry the same prominence or enforcement mechanisms as the Convention's civil and political protections. It has been left to the European Union to address

194. European Convention, supra note 12, at art. 10.
195. U.S. Const. amend. I. The First Amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”
199. European Social Charter, Oct. 18, 1961, Europ. T.S. No. 35. Enforcement of the Charter is by way of reports from member states. The reports are commented on by a committee of experts, the Governmental Committee of the Social Charter (with one
these issues at a legal level. Accordingly, the rights in European law have concentrated upon employment related rights, though the Social Charter of the Maastricht Agreement provides for a much wider agenda, including not only workers but also pensioners, students, and others. Some commentators have argued for a further Convention protocol that would link with the Social Charter, or some other, perhaps broader statement about minimal levels of welfare, were such rights to be justiciable. The collective nature of such protocols makes them generally less suitable as subjects for juridification, however.

A third problem has been the derogations under Article 15, which have been the common resort of the United Kingdom with regard to Northern Ireland. This exception clause again reflects respect for national sovereignty by the international community. Indeed, the European Court of Human Rights has been very deferential to claims of emergency, especially in relation to terrorism. There is concern, though, in the United Kingdom that the Human Rights Act simply perpetuates this position, and, at a domestic legal level where national sovereignty is not being challenged, should have imposed more checks on the exercise of the Crown’s role as protector of its citizens. Whether this would be accomplished through a form of judicial review or through legislative mechanisms is a matter for debate.

representative for each state) and the Council of Europe’s Assembly and Committee of Ministers. The European Court of Human Rights has no jurisdiction and individuals have no rights to make complaints. DAVID HARRIS, THE EUROPEAN SOCIAL CHARTER 192-99, 235-45 (1984).


201. Compare Keith D. Ewing, Social Rights and Constitutional Law, 1999 Pub. L. 104, 104 (pursuing the thesis that “there is a strong and compelling democratic case in favour of the sovereignty of Parliament and against the entrenchment of rights, at least so far as this gives to the courts the power to override legislation”) with Constitution of Ireland 1937, art. 45, at 542 (stating that, “[t]he principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any court under any provisions of this Constitution.”). See also Murtagh Properties, Ltd. v. Cleary, [1972] I.R. 330, 335-36 (Ire.).


203. See Walker, supra note 202, at 1.

204. See William J. Brennan, The American Experience: Free Speech and National Security, in FREE SPEECH AND NATIONAL SECURITY 10 (Shimon Shetreet ed., 1991); see also George J.
C. Entrenchment of Rights

An issue that sparked much debate about a bill of rights during the two and a half decades before the enactment of the Human Rights Act was whether rights could be entrenched against later repeal or amendment by Parliament. This issue took center stage in the debates of the House of Lords' Select Committee Report of 1978. The short answer is that direct entrenchment as in the United States was never possible, given how broadly parliamentary sovereignty is construed in English law. It would be feasible to achieve a lesser degree of legal entrenchment by including an interpretation clause to the effect that later Acts do not impinge upon rights, unless they state so expressly. This device would follow the model of section 2 of the European Communities Act of 1972, effective at least to prevent implied repeal by a later Act. In addition, such a clause could eventually lead to a reassessment of the nature of sovereignty itself.

Since there is no direct incorporation under the Human Rights Act, Convention jurisprudence need not always prevail—Convention rights do not become part of English law of equal standing to prior legislation. In this way, the Act does not even imply the repeal of past legislation, and the Convention can only be used as a vehicle for interpretation. In this respect, the Human


Rights Act has lower status than all other legislation. Despite this limited impact, an emphasis on legal entrenchment in large part would miss the point. It is far more important to secure political entrenchment to ensure that the prevailing political atmosphere is one that will give rise to the treatment of rights as sacrosanct and to make it politically difficult to curtail them. So what is important is to ensure full debate, time for reflection, and information. Entrenchment relies ultimately on a frame of mind, not a legal technicality.

In this respect, the Human Rights Act wisely adopts a subtle approach. It requires that the courts interpret legislation "[s]o far as it is possible to do so . . . in a way which [sic] is compatible with the Convention rights" and makes it "unlawful for a public authority to act in a way that is incompatible with a Convention right." In addition to these duties, the underlying principle that the catalogue of rights are taken from international law and cannot easily be disregarded without international disapprobation creates such a frame of mind.

More disappointing is the absence of any firm commitment to change parliamentary process. The Home Department's Paper advanced the idea of a Parliamentary Select Committee. This proposal also was raised during the parliamentary debate of the Bill and resulted in the intention to establish a joint parliamentary committee on human rights. There is no mention of it, though, in the 1998 Act, nor is there currently any clear commitment as to its details. Moreover, there has been no discussion about other procedural safeguards, such as the possibility of gathering expert evidence and delays in the parliamentary processing of a bill, so that reflection can be focused on the potential damage to human rights. The need for such mechanisms is illustrated by the passage of the Criminal Justice (Terrorism and Conspiracy) Act of 1998. The Act was devised in response to the bombing on August 15, 1998, in the town of Omagh by the Real Irish Republican Army, a Republican splinter-group, which


211. Id. § 6(1).
216. Criminal Justice (Terrorism and Conspiracy) Act, 1998, c. 40 (Eng.).
killed 28 people and injured at least 220 others.217 British Minis-
ter Tony Blair announced in a speech in Omagh on August 25,
1998, that Parliament would be recalled to consider new anti-
terrorism legislation. The draft Criminal Justice (Terrorism and
Conspiracy) Bill was published by the Home Office on the even-
ing of September 1. By September 4, it had received Royal
Assent, ironically just as the Human Rights Bill of 1997–1998218
was due to reach its final stages in Parliament.219 Despite protesta-
tions to the contrary by Government ministers, it is arguable that
some provisions in sections 1 to 4 are incompatible with Article 6
of the European Convention concerning fair trials and the pre-
sumption of innocence. Inferences from silence, as opposed to
the direct criminalization of silence during investigation, are not
per se a breach of the Convention220 or wider common law immu-
nities.221 Nevertheless, the fairness of drawing adverse inferences
depends on the circumstances, including effective access to legal
advice, disclosure of the police’s evidence, and the availability of
explanations in judgments, none of which is assured in the appli-
cation of the 1998 Criminal Justice Act.222 That such a measure
could be passed so easily in the shadow of the Human Rights Act,
when the Home Secretary gave every assurance there was no
breach, does not bode well for the current levels of institutional
entrenchment.

D. Applicability of Rights

1. Public Authorities—The Human Rights Act applies to “public
authorities”; under section 6(1): “[i]t is unlawful for a public
authority to act in a way which is incompatible with a Convention
right.”223 This raises two issues: What is meant by “public authority”
and what actions would be “incompatible” with the new statutory

For a history of the group, see Peter Taylor, The Secret Power Struggle that Spawned Omagh,
(1999).
31 (1997).
(1996).
223. Human Rights Act, 1998, c. 42, § 6 (Eng.).
duty? The Act includes a broad definition of “public authority” in section 6:

(3) In this section “public authority” includes—
    (a) a court or tribunal, and
    (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In subsection (3) “Parliament” does not include the House of Lords in its judicial capacity.224

The phrase in section 6(3)(b) certainly includes local and central government. Other authorities exercising public functions could include utilities companies and prisons operated by corrections corporations. The definition expressly includes the courts,225 as well as the House of Lords in its judicial capacity. Parliament, except the (judicial) Appellate Committee of the House of Lords, is expressly not part of the definition of “public authority.” Reflecting the constitutional settlement inherent in the Human Rights Act, Parliament can choose to override or disregard rights. Parliament may also decide not to introduce amending legislation to provide effective rights, and is so excused by section 6 of the Human Rights Act. That portion of section 6 provides:

(6): “An act” includes a failure to act but does not include a failure to—
    (a) introduce in, or lay before, Parliament a proposal for legislation; or
    (b) make any primary legislation or remedial order.226

Along the same lines, a public authority is excused from its normal duties if it could not act in any other way because of clear primary legislation:

(2): Subsection (1) does not apply to an act if—
    (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

224. Id. § 6(3)–(4).
225. Id.
226. Id. § 6(6).
(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.227

The limitation of the duty to public authorities naturally reflects the impact of the European Convention, which delineates relationships between an individual and a state. While many of the Articles under the Convention are worded sufficiently broadly to apply to private infringements of rights, the system only accepts as admissible complaints against a High Contracting Party under Article 34, that is, complaints alleging some kind of state involvement or responsibility.228 The state is responsible for actions by state agents within their discretion and for actions by third parties in so far as those parties operate under laws enacted by the state229 or where the state has failed to take action against independent violations of rights by those third parties.230 Attacks on rights may not always come from governments but may arise, for example, from the infringement of privacy by the media or discrimination by a private employer or provider of goods and services. The Human Rights Act seems to impose liability on a wide, arguably sophisticated basis; it seeks to impose state responsibility on a functional rather than hierarchical basis. With the prevalence of new public management, this approach is prudent. Likewise, Andrew Clapham suggests that the rights instrument ensures a remedy for harm arising from a breach of rights, whatever the role of the state in causing the breach.231

This expansive view as to who possesses duties under the Human Rights Act only is partially reflected elsewhere. For example, in Canada, the courts have refused to entertain claims against third

227. Id. § 6(2).
228. Eleventh Protocol, supra note 179, at art. 34. Article 34 states: "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right." Id.
230. This form of liability especially arises in connection with privacy rights under Article 8. See ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 134 (1993); HARRIS ET AL., supra note 12, at 19-22.
231. CLAPHAM, supra note 230.
parties such as estate trustees,\textsuperscript{232} closed shop agreements,\textsuperscript{233} and secondary picketing,\textsuperscript{234} however, a hockey association receiving state grants was subjected to Charter requirements,\textsuperscript{235} as was a private university with a supervisory body appointed by the government.\textsuperscript{236} In the United States, problems have arisen with company towns where all open and public spaces are owned by a private company that has prohibited meetings and demonstrations. In \textit{Marsh v. Alabama},\textsuperscript{237} the Supreme Court held First Amendment rights can apply in those circumstances. Access will be denied, however, if speech activity is incompatible with a private purpose such as picketing in a shopping center.\textsuperscript{238} Similarly, the European Commission has asserted in \textit{Anderson v. United Kingdom}\textsuperscript{239} that there is no right to gather for social purposes in a commercial shopping center.

More difficult cases involve public universities; they have traditionally claimed independence from the state, but in their dealings at least with students whose degree programs are approved and funded under legal terms, they are considered public authorities. There was also much debate in Parliament about the position of the British Broadcasting Corporation (BBC) and the Press Complaints Commission. The BBC will likely be treated as a public authority in many of its activities; it acts as a public service broadcaster under its Royal Charter,\textsuperscript{240} as implemented by a License and Agreement from the Home Secretary,\textsuperscript{241} and is largely funded by a license fee levied on all owners of television sets.\textsuperscript{242} While most

\begin{itemize}
  \item \textsuperscript{232} See \textit{Re Peg-Win Real Estate Ltd.}, [1986] 27 D.L.R. 767, 768 (Can.), \textit{dismissing appeal from} [1985] 19 D.L.R. 438 (Can.).
  \item \textsuperscript{233} See \textit{Re Bhindi}, [1986] 29 D.L.R. (4th) 47, 56 (Can.).
  \item \textsuperscript{234} See Retail, Wholesale & Dep't Store Union, Local 580 v. Dolphin Delivery Ltd., [1987] 33 D.L.R. 174, 191-99 (Can.).
  \item \textsuperscript{235} See \textit{Re Blainey}, [1985] 26 D.L.R. 728, 748 (Can.).
  \item \textsuperscript{236} See \textit{Re Lavigne}, [1986] 29 D.L.R. 321, 383-93 (Can.).
  \item \textsuperscript{237} 326 U.S. 501 (1946).
  \item \textsuperscript{238} See, \textit{e.g.}, Hudgens v. NLRB, 424 U.S. 507, 521 (1976); \textit{But cf.} Lee v. Int'l Soc'y for Krishna Consciousness, 505 U.S. 830 (1992) (holding that a ban on distribution of literature in Port Authority airports was invalid under the First Amendment).
  \item \textsuperscript{241} License and Agreement, 1981, Cmnd. 8233.
  \item \textsuperscript{242} See \textit{Wireless Telegraphy Act}, 1949, c. 54 (Eng.); Committee on Financing the BBC, \textit{Report}, 1986, Cm. 9824; Home Department, Broadcasting in the '90s, 1988, Cm.
privately owned media, whether press or broadcast, are probably not public authorities, there is concern about the Press Complaints Commission, which was established in 1991 as a private body financed by the press to deal with complaints from the public about unfair treatment or invasions of privacy.\textsuperscript{243} Especially as the Press Complaints Commission also purports to act in the public interest, and both the Commission itself and the government see part of its role as creating standards that would otherwise be imposed by legislation, the Commission is best classified as a public authority. This categorization requires the Commission to consider factors such as rights to privacy and freedom of expression.\textsuperscript{244} This balancing is part of its everyday functions and so should not cause problems.\textsuperscript{245} The Commission’s Chairman, Lord Wakeham, feared, however, that the effect of the Human Rights Act would be to upset the nature of self-regulation because the courts could become involved, and dissatisfied customers would be tempted to go to the courts directly as they can award injunctions and damages that a self-regulatory body is unable to offer.\textsuperscript{246} In order to avoid these problems, various special protections are given by section 12, though confined to civil proceedings:

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied-

(a) that the applicant has taken all practicable steps to notify the respondent; or


\textsuperscript{244} See Human Rights Act, 1998, c. 42, sched. 1, arts. 8, 10 (Eng.).

\textsuperscript{245} See 583 Parl. Deb., H.L. (5th ser.) (1997) 784.

\textsuperscript{246} Id. at 771.
(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

(a) the extent to which—

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.\(^{247}\)

It is far from clear what the "particular . . . importance" of freedom of expression under subsection (4) is meant to be, as the issues related in (a) are largely culled from existing Strasbourg case law.\(^{248}\) In addition, reliance to any degree upon the code of practice issued by the Commission, a code without legislative backing by a body which has no standing in law, seems undemocratic and a potential hostage to fortune.\(^{249}\) On the other hand, the prohibition on the issuance of interim injunctions in the absence of press advocates and the shifting of the burden of proof from prima facie case to proof of likely success at trial are useful reforms.

The passage of the Human Rights Act also excited the attention of various churches that lobbied for protection for the continuance of religious practices. Some representations arose out of fears that for example, the Catholic Church or the Church of England, both of which operate schools funded by the state and thereby act as public authorities, would have to accommodate persons from

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249. Cf. Human Rights Law and Practice, supra note 10, at 45–50 (arguing that the rights conferred by the Human Rights Act operate only as supplements to existing rights and remedies and in no way function as a substitute for such rights).
other religions in their schools in order to avoid charges of discrimination under Article 14.250 Similar problems were feared in regard to the selective ordination of priests (women being disbarred in the Catholic church) and the officiation at marriages (where homosexual couples are not allowed).251 These concerns are almost certainly excessive, for Article 9 of the Convention expressly protects freedom of conscience and religion.252 Nevertheless, a general reassurance is given by section 13 of the Human Rights Act: "If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right."253

Again, the meaning of "particular ... importance" is most obscure, and section 13 is best viewed as a political contrivance; but as far as the law is concerned, it "serves no sensible purpose."254

2. Duties Under the Act—The Human Rights Act takes an expansive view of those "public authorities" who possess duties, perhaps even more expansive than the Convention. The courts' duty as a public authority is an appropriate illustration of this point, as the courts are pivotal institutions in the application of the Act.

As already indicated, the courts must take account of the Convention in their interpretation and application of statutory materials under section 3.255 More generally, the courts are expressly "public authorities" under section 6(3) of the Act. This means that, even when not dealing with statutory materials governed by section 3, the courts must still avoid acting in any way incompatible with the Convention. This instruction applies both to procedures under which court work is constructed and also to the substantive determination of the law, in so far as it does not fall within the rules under section 3. The result would seem to be that the courts cannot ignore the Convention even in litigation involving common law and litigation that does not directly involve the

250. European Convention, supra note 12, at art. 14. By Article 14: "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Id.


252. European Convention, supra note 12, at art. 9; see also David Pannick, Churches Granted Unwise Safeguard, TIMES (London), June 2, 1998, at 35.


254. HUMAN RIGHTS LAW AND PRACTICE, supra note 10, at 50-51.

255. See supra note 131.
state as a party. Consequently, one expects the Convention to have a substantial indirect influence on private litigation, what is referred to as a "horizontal effect." Lord Chancellor Irvine supports this interpretation arguing that: "It is right as a matter of principle for the courts to have the duty of ruling compatibility with the Convention not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals."

For example, the impact of the Human Rights Act may be felt in the development of the laws of libel with regard to such issues as the level of damages and the extent of the qualified privilege defense arising from political commentaries on political issues. Internet service providers may also find new avenues of regulation of their contracts with customers. In this way, the Human Rights Act becomes a pervasive influence in not only vertical relationships with the state but also in horizontal relationships between citizens.

3. Right Holders—The discussion turns now from who has a duty to protect rights under the Act to who has the power to enforce rights. A rights claim can only be raised by a "victim." This seems an unduly narrow rule of standing. The concept comes from the European Convention and is understood within a complex system of international law, but not within domestic law, especially within a jurisdiction where forms of public funding for civil

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261. Eleventh Protocol, supra note 179, at art. 34. Article 34 states:

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Id.
litigants are already diminished considerably. The rule of standing is notably more restrictive than that applying to judicial review in English administrative law, which allows applications by a person with "sufficient interest," but is one that is intended to rule out most forms of *actio popularis*. It is also probably narrower than the American concept of some "personal stake in the outcome of the controversy," though it is arguable that large numbers of citizens equally could be victimized by some breaches of rights.

A related issue is the extent to which class actions will be allowed. Class action suits are important in rights claims in order to maximize the evidential docket while at the same time spreading costs. The concept is of course well established in United States jurisdictions but is not common in English or Convention law. Furthermore, a special problem relates to claims of breaches of rights affecting children. Many of the child-related actions under the Convention have been brought by parents, and it remains to be seen whether the English courts will be so relaxed in assuming that the parents always represent the best interests of the child.

Beginning in the early 1980's the European Court of Human Rights moderated the impact of some of its restrictive rules about standing by allowing *amicus curiae* submissions on an increasingly generous scale. For example, the Trades Union Congress made oral and written submissions in *Young v. United Kingdom* concern-
ing closed shop agreements. In *Malone v. United Kingdom*, the Court allowed an intervention by the Post Office Engineers' Union. Submissions have been allowed many times since; it seems a desirable mechanism within the context of constitutional litigation to allow third parties to draw attention to the wider implications of the case. Once more, it remains to be seen whether the English courts will follow suit, as *amicus curiae* briefs have not been encouraged previously, especially as they seem to undermine the impetus toward the management of litigation and defining issues as narrowly as possible. However, English judges have wide discretion in managing their courts, and *amicus curiae* briefs have been admitted from time to time. One notable example concerns the extradition hearings in relation to General Pinochet of Chile, where the court accepted submissions from Amnesty International.

Though the concept of "victim" is narrow in some senses, it is quite broad in others. In particular, it can allow companies and associations to bring claims where rights are not confined to human individuals. The extent to which this is the case depends on the wording of each right. Some Convention rights expressly refer to legal "persons," especially the property rights in Article 1 of the First Protocol, and so many of the applications under this provision have been from corporate interests. Some rights are said to be for "everyone;" this phrase is used by articles 10 and 11 of the Human Rights Act. Thus, campaign groups and large media conglomerates can avail themselves of rights to freedom of expression, while freedom of association can apply to protest

272. See, e.g., Muller v. Oregon, 208 U.S. 412, 421 (limits on the working hours of women; brief by Louis B. Brandeis) (1908); *In re Canadian Labour Congress & Bhindi* [1985] 17 D.L.R. 193, 197 (challenge to closed shop agreement; intervention by the Canadian Labour Congress) (Can.).
275. First Protocol, supra note 50, at art. 1. Article 1 states that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." *Id.*
organizations.\textsuperscript{279} Other rights clearly are confined to "men and women," such as the right to marry under article 12.\textsuperscript{280} Although United States companies can generally claim constitutional rights,\textsuperscript{281} other jurisdictions have been more circumspect in allowing this for fear that corporate power will be used contrary to the interests of individuals.\textsuperscript{282}

III. THE ROLE OF THE JUDICIARY AND THE CREATION OF REMEDIES

The basic duty of the judiciary (including all tribunals) is not to act in any way incompatible with a Convention right.\textsuperscript{283} In addition, the interpretation of statutory materials must explicitly take the Convention into account.\textsuperscript{284} Convention rights include not only those listed in schedule 1 but also, according to section 2(1), any:

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
(d) decision of the Committee of Ministers taken under Article 46 of the Convention . . . \textsuperscript{285}

In this way, the English courts can no longer simply say that the law is clear and that reference to the Convention is therefore not necessary. As far as public authorities such as the courts are concerned, they always have a duty to refer to the Convention, so it becomes a relevant consideration in almost any conceivable litigation, even in litigation between purely private parties who are themselves under no duty to act compatibly with the Convention.

\textsuperscript{280} Human Rights Act, 1998, c. 42, sched. 1, art. 12 (Eng.).
\textsuperscript{283} Human Rights Act, 1998, c. 42, § 6 (Eng.).
\textsuperscript{284} Id. § 3.
\textsuperscript{285} Id. § 2(1).
The courts must interpret the laws in a manner that is consistent with their interpretations of the requirements of the Convention. In practical terms, this will extend the indirect impact of the Convention into English law by ensuring it can come into play in all cases, including those cases where a statute is clear within its own terms or where common law is settled. Due to its vague nature, however, the Convention rarely would serve as a basis for per se violations. Additionally, arguments based upon the Convention are more likely to be raised in English courts in order to ensure the exhaustion of domestic remedies, so as to permit a subsequent application to the Strasbourg court.

A. Interpretative Principles

Under the Human Rights Act, we can expect English judges to apply the commonly used principles and interpretative devices used by the Strasbourg court. These include a teleological approach to the meaning of the Convention, which is to be treated as a living and developing document and a generous approach to the scope of rights. Due regard should be given to the importance of the right in question: some are treated as absolute, some as fundamental, and some more provisional. Restrictions on rights should be subjected to established tests such as "proportionality," being "prescribed by
Some concepts, however, such as the "margin of appreciation," make sense only in an international context and should not be replicated.

Overall, we must expect to see a teleological, dynamic, purposeful approach based on achieving values, rather than a literal and historical approach as illustrated in English common law.

B. Interpretative Processes

The interplay of sections 2, 3 and 6 in the Human Rights Act is both subtle and complex. Their first implication is arguably a presumption in favor of compatibility: that English law as it stands at present generally complies with the requirements of the Convention. This might be argued from section 6(1), worded as a duty not to act incompatibly rather than a duty to strive for compatibility. For the future, compatibility can be assured in almost all cases by the processes of interpretation that are required by the Human Rights Act. It is suggested, by reference to section 3(1), that the first step in the interpretative process is to examine English law in light of settled Convention jurisprudence. Thus, the interpretation of the Convention is left to English courts at this stage, and interpretations that are compatible should be preferred to interpretations that are incompatible. The question arises as to how far the judiciary will be prepared to strain the natural meaning.
of words. This problem has been faced in regard to European Community law, and some suggest that the adopted meaning of words can be strained and far from obvious, but not to an undue extent. The process of achieving compatibility can next be aided by the legal requirement under section 2 (1) only to “take into account” the established jurisprudence of the Convention. This means that settled Strasbourg interpretations are not strictly binding in English law, so English courts may decide to shape the interpretation of the Convention in a way that can then relate back to the preferred interpretation of English law. In reality, it is likely that the two steps will be mixed together, but it probably would be best to avoid too much inventiveness in regard to Convention jurisprudence, as there remains the possibility that English law will later be declared in Strasbourg to be incompatible with the Convention.

C. Procedures

Convention rights can be raised as an argument in any court, from the highest to the lowest, or official tribunal in two ways under section 7:

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.

In most cases, the rights claim will be part of an argument about interpretation, asking for one meaning to be adopted rather than

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298. The breadth of judicial discretion is thus greater than it might first appear. See generally Ewing, supra note 10.

another by relying upon the Convention but not by basing the litigation specifically upon it.\textsuperscript{300} Probably the most common example of this scenario will be arguments in criminal prosecutions.\textsuperscript{301} The prosecution is, of course, not founded on the Human Rights Act but is based on a breach of criminal laws. The defendant, however, may seek to raise rights arguments at various stages—for example, by suggesting that a failure to disclose,\textsuperscript{302} the use of entrapment,\textsuperscript{303} or undue media attention\textsuperscript{304} should result in the courts declaring an abuse of process. At trial, the defendant may use rights arguments, such as the denial of access to a lawyer, as the basis for excluding prosecutorial evidence.\textsuperscript{305}

In a small number of cases, where there might be a direct challenge to the compatibility of the English statute (or a prerogative order)\textsuperscript{306} with the Convention right, the litigation is brought under the authority of the Human Rights Act, section 7(1)(a).\textsuperscript{307} In this scenario, the Convention right is the sole or principal argument, and the challenge is that any conceivable meaning of the law is incompatible with the Convention. Such a challenge can only be made in a higher court, not a first instance criminal court or a local civil court.\textsuperscript{308} The process has a similar status to judicial review in administrative proceedings.\textsuperscript{309} So if such a challenge arises in combination with proceedings at such a court, the magistrate or relevant judge would adjourn the case pending such a challenge.

\textsuperscript{300} Id. § 7(1)(b).
\textsuperscript{307} Human Rights Act, 1998, c. 42, § 7(1)(a) (Eng.).
\textsuperscript{308} Id. § 7(2).
\textsuperscript{309} See Supreme Court Act, 1981, c. 54, § 31 (Eng.); Supreme Court Rules, (1977) SI 1955/1776.
and its resolution in the upper court. If any case does arise, notice must be given to the Crown under section 5 of the Human Rights Act: "Where a court is considering whether to make a declaration of incompatibility, the Crown is entitled to notice in accordance with rules of court."\footnote{310} The Crown may always intervene in the case and is given rights of appeal against a declaration of incompatibility. If the higher court\footnote{311} accepts the argument of incompatibility, then it can issue a formal declaration of incompatibility.\footnote{312} In the case of a statute under challenge, the declaration does not invalidate the law, since courts are not given the power to invalidate (or even disapply) legislation out of respect to parliamentary sovereignty and its democratic mandate.\footnote{313} There is also a savings clause in section 3:

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.\footnote{314}

The position in regard to the specific parties in the case is also preserved by section 4(6)(a), which states that the declaration "does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given."\footnote{315} It is also "not binding on the parties to the proceedings in which it is made,"\footnote{316} so that the litigation can still be determined on the basis of legislation

\footnote{310}{Human Rights Act, 1998, c. 42, § 5 (Eng.).}
\footnote{311}{Id. § 4(5).}
\footnote{312}{Id. § 4(2).}
\footnote{314}{Human Rights Act, 1998, c. 42, § 3(2) (Eng.).}
\footnote{315}{Id. § 4(6)(a).}
\footnote{316}{Id. § 4(6)(b).}
which has been declared incompatible with human rights. The incompatibility is for the judges to discern, but it is for Parliament to consider whether to remedy under a rule of "imperfect obligation." Though Parliament is not duty-bound to respond to a declaration of incompatibility, the government has promised that a change in the law "almost certainly" will follow. One can even imagine the development of a conventional duty to consider such declarations and to produce a statement in Parliament within a given time, but this hardly renders ministers into "little more than judges' runners."

Secondary legislative instruments can, by contrast, be declared invalid to the extent of their incompatibility. This condemnation is not seen as an assault on parliamentary sovereignty, but it is depicted as enforcing the will of Parliament as primarily expressed through Acts of Parliament (such as the Human Rights Act). English courts have long exercised administrative law powers to strike down delegated legislation. Section 3 (2) (c), however, preserves the validity of any incompatible subordinate legislation if it essentially arises from the incompatibility of primary legislation for two reasons. First, the primary legislation expressly allows incompatible secondary legislation. Second, and more likely, the whole statutory scheme is held to be incompatible and the secondary legislation is in furtherance of the scheme.

The expositions in sections 3 and 4 are exclusively targeted in terms of the treatment of statutory materials. Consequently, the position is less straightforward in relation to incompatible common law principles or rules. While total incompatibility is less likely because of the greater flexibility and adaptability of common law, it is possible. The common law has been found at fault in the case of Malone v. United Kingdom in relation to the lack of a right to privacy, and there are also several examples of challenges to the common law relating to rape and

319. Ewing, supra note 10, at 88–89.
321. See Human Rights Act, 1998, c. 42, § 3(2) (c) (Eng.).
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libel. Given the omission of Article 13, it is doubtful whether the Act requires that judges now do any more than, in the words of sections 2 and 6, have regard at all times to Convention rights as relevant considerations, even the alien value of privacy. The expectation seems to be that no fundamental incompatibility will arise, since the common law allows for sufficient regard to be taken.

In summary, the courts are not to be given a "strong" form of judicial review. They may interpret legislation in a way that seeks to achieve compliance with, or minimal detriment to, rights, but they will not be able to invalidate inconsistent legislation and certainly must accept without question later inconsistent legislation that expressly states that it is to prevail notwithstanding the Bill of Rights. This result may have disappointed some human rights champions. Judges themselves, however, have expressed some hesitation about stepping into these higher profile roles, which will inevitably expose them to greater political scrutiny of their backgrounds and their performance. Furthermore, the records of English judges who have been asked to look at rights issues are not always inspiring. This applies especially to the Judicial Committee of the Privy Council, which hears various Commonwealth constitutional appeals. For example, in *Riley v. Attorney General of Jamaica*, Lords Scarman and Bridge condemned the "austere legalism" of their colleagues, even though the court has become more activist in recent years. Limited powers of review also reflect a traditional Labour Party distrust of the higher judiciary, as well as a more positive belief in the supremacy of Parliament and the distinctness of judicial and political functions. It follows that there has been little enthusiasm for widening the range of judicial experiences by more "political" appointments or by a special constitutional court. Nor, as mentioned previously, has the government embraced the idea of an expert and independent

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325. See, e.g., Malone v. M.P.C. (No. 2), 1979 Ch. 344 (recognizing privacy rights under Convention but finding them inapplicable in case where there was no English law against wire tapping).


327. 2 W.L.R. 305 (1982).

Human Rights Commission. This idea is both widely supported and widely utilized in other, comparable jurisdictions. Such Commissions have several advantages, such as the possibility of proactive intervention and the gathering of expertise. Perhaps they lack the authority of judges, and so can be more easily ignored than legal judgments. This was certainly in part the experience of the Standing Advisory Commission on Human Rights established in 1973 in Northern Ireland, which was replaced by a Human Rights Commission under the Northern Ireland Act of 1998. This device would again take direction away from the politicians, as well as perhaps complicating the work of existing bodies such as the Commission for Racial Equality and the Equal Opportunities Commission. The only exception is Northern Ireland, where special circumstances apply and distance from local politics is currently seen as desirable.

D. Remedies

1. Judicial Remedies—Section 8 of the Human Rights Act allows the courts to award any existing remedy and compensation for a breach of Convention rights, whether the challenge arises from interpretation or incompatibility: "In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate."
Thus, the remedy must be one that the court can normally give, consequently, awards of damages, and the grant of administrative orders such as declarations or injunctions are thereby ruled beyond the criminal courts. One unfortunate result may be multiple proceedings, whereby a criminal defendant raises rights issues by way of a defense to the charge, the continuance of the proceeding, or the production of evidence, while at the same time pursuing claims in the local civil county court for damages and the High Court for a declaration of incompatibility.

The power to grant appropriate remedies is further circumscribed in order to curtail the powers of the judiciary. First, certain types of conceivable remedies are ruled out entirely. No criminal offence is created by the Act, and one can safely assume that the judges will not think it proper to create one in common law. There is no mention of a new constitutional tort, though it is possible that it will be judicially developed. Nor, presumably, can there be an injunction against the enforcement of an incompatible law, as that would run contrary to section 4. Second, it is not possible to award damages in response to the good faith failure of a court to recognize or enforce rights other "than to compensate a

337. Id. § 8(2). Section 8 states that "damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings."


341. See, e.g., Shaw v. Dir. of Pub. Prosecutions, 1962 A.C. 220, 233-36 (acknowledging that the court cannot create a criminal offense for moral indecency at common law, referring to a long line of cases showing that conspiracy of the same is a criminal offense); Knuller v. Dir. of Pub. Prosecutions, 1973 A.C. 435, 442 (upholding Shaw but stating that it is not necessary in the twentieth century for courts to create offenses).

342. See, e.g., Hayes v. Ireland, [1987] 7 I.L.R.M. 651, 652 (awarding damages as a result of the unlawful interference by teachers with a constitutional right); Kennedy v. Ireland, 1987 I.R. 587, 594-95 (awarding damages to plaintiffs whose constitutional rights were violated); Kearney v. Minister for Justice, 1986 I.R. 116, 122 (stating that the state may be liable for acts of a servant of the state which amount to an infringement of a constitutionally protected right); Carey v. Piphus, 435 U.S. 247, 254-58 (1978) (stating that while sometimes appropriate, damages for constitutional torts should be permitted only for compensable damages and not for every constitutional violation); Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 888, 889 (1971) (ruling that violation of the Fourth Amendment by a federal agent acting under color of authority gives rise to a cause of action for damages). The Human Rights Act can be said to create a "public law remedy." Sir Robert Carnwath, ECHR Remedies from a Common Law Perspective, 49 INT’L & COMP. L.Q. 517 (2000).

person to the extent required by Article 5(5) of the Convention." \(^{344}\)

Claims, which will be paid by the Crown rather than the judge personally, can only be brought by way of appeal or judicial review. \(^{345}\)

Third, the courts must apply such remedies as remain available in ways that are "just and appropriate." \(^{346}\) Presumably, common remedies in the civil courts will be damages or equitable relief such as declarations and injunctions. As for the criminal courts, the possibility of exclusion of evidence will probably arise most commonly. Here, the Human Rights Act will interact with sections 76 and 78 of the Police and Criminal Evidence Act of 1984, \(^{347}\) which deals with the admissibility of evidence arising from the exercise of police powers, \(^{348}\) for there is no express guidance in the Act itself. \(^{349}\)

Fourth, there are further limits on the award of damages. \(^{350}\) The court must be satisfied under section 8(3) that

> taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act, . . .

the award is necessary to afford just satisfaction to the person in whose favour it is made. \(^{351}\)

The court must also take account of principles developed by the European Court of Human Rights under Article 41 of the Convention in awarding compensation in determining "(a) whether to

\(^{344}\) Human Rights Act, 1998, c. 42, § 9(3) (Eng.).

\(^{345}\) Id. § 9(1).

\(^{346}\) Id. § 8(1).

\(^{347}\) Police and Criminal Evidence Act, 1984, c. 60, §§ 76, 78 (Eng.).


\(^{351}\) Human Rights Act, 1998, c. 42, § 8(3) (Eng.).
award damages, or (b) the amount of an award.”

The main emphasis of the Strasbourg court has been on actual pecuniary damage, distress, and frustration; conversely, exemplary or aggravated damages are not recognized headings of award in European Court jurisprudence.

Apart from the relatively narrow rules of standing, the financial implications of mounting a case under the Act should also be taken into account. Since there can be no claim to substantial damages, contingency fees will not be very helpful to potential litigants. In response, the Government at one point considered a special fund for public interest litigation, but it has since decided against this. As a result, local legal services commissions are left to decide the funding priority of rights litigation. This stance may be problematic, as such issues are often of national, not local, concern. In 1999, however, the Legal Aid Board agreed that the public interest will be a criterion in its funding code: the applicant for funding must show that at least twenty people would be helped and that there is a forty percent chance of success.

A final procedural difficulty placed in the way of judicial remedies is the limitation period that is set at one year or such longer period as the court considers equitable. This period only applies to proceedings based on the Act itself; where a human rights argument is simply part of a wider case, then the normal limitation proceedings apply, though these could be even shorter, as in the case of judicial review.

Despite all of these difficulties, some creativity may be expected. For example, the courts might be drawn into giving affirmative remedies, that is, declarations that call for positive action to be

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352. Id. § 8(4). Article 41 of the Convention states: “If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.” Eleventh Protocol, supra note 179, at art. 41.

353. See Demetriou, supra note 313, at 494 (stating that the level of damages may be higher under European Community Law).


356. See Supreme Court Act, 1981, c. 54, § 31 (Eng.); Supreme Court Rules, (1977) SI 1955/1776. According to rule 4, “[a]n application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.” Id.; see also Regina v. Dairy Produce Quota Trib. ex parte Caswell, 2 W.L.R. 1320 (Eng. H.L. 1990); Regina v. Stratford on Avon Dist. Council ex parte Jackson, 1 W.L.R. 1319 (Eng. C.A. 1985).
taken by executive authorities, rather than just negatively condemning wrongful action.\textsuperscript{357}

Next, the Human Rights Act only provides for a form of \textit{ex post facto} review, albeit on a fairly decentralized basis. There would have been several advantages to having prior review, or, the referral of Bills to a review court before its final stage of passage (royal assent). These include the opportunity of a general review rather than one confined to the facts of a case and a pro-active stance rather than solely a reactive one. There are also disadvantages, including, in absence of controversy, the problem that the facts may not be clearly or forcefully argued and the uncertainty of the referral in the system of precedent. Nevertheless, provisions of this kind already exist in United Kingdom law.\textsuperscript{358} The Crown can make references to the Privy Council under the Judicial Committee Act of 1833, section 4,\textsuperscript{359} and the facility has been used around half a dozen times.\textsuperscript{360} The idea has also made a reappearance in legislation dealing with devolution to Northern Ireland, Scotland, and Wales, including the versions in 1998.\textsuperscript{361} Where remedies are available, then the courts will have to think more carefully about whether a decision concerning rights should have any wider retrospective effect. This is important where the statute of limitation is very short.

2. Legislative Remedies—If a declaration of incompatibility is issued by an English court or there is a judgment from the European Court of Human Rights in response to proceedings in-


\textsuperscript{358} The facility is also available under article 26 of the Irish Constitution. See Joseph Jaconelli, \textit{Reference of Bills to the Supreme Court—A Comparative Perspective, 18 IRISH JURIST} 322, 322-23 (1983). Under U.S. constitutional law, however, the courts must hear real "cases and controversies." \textit{U.S. CONST.} art. III, \S 2.

\textsuperscript{359} Judicial Committee Act, 1833, c. 41, \S 4 (Eng.).

\textsuperscript{360} \textit{See In re Parliamentary Privilege Act, 1770 1958 A.C. 331; In re MacManaway, 1951 A.C. 161 (Eng.); In re Piracy Jure Gentium, 1934 A.C. 586 (Eng.); In re Labrador Boundary, [1927] 43 T.L.R. 289 (Eng.).


\textsuperscript{362} \textit{Compare Linkletter v. Walker, 381 U.S. 618, 658–40 (1965) (holding that a 1961 Supreme Court decision to bar admission of illegally seized evidence would not apply retroactively to state court convictions finalized before the ruling) with Johnson v. New Jersey, 384 U.S. 719, 732–34 (1966) (holding that two previous Supreme Court decisions invalidating the admission of improperly obtained criminal confessions would not apply retroactively to cases where the trials began prior to the decisions) and State v. Fawley, 1978 I.R. 326, 331 (holding that the invalidation of the prior jury selection process as unconstitutional did not apply retroactively to invalidate prior jury trials).
volving the United Kingdom that is perceived as adverse to existing English legislation, there is a fast track procedure to provide a speedy reform of the law. By section 10(2), "[i]f a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility."

Although orders are subject to affirmation in Parliament, which must be allowed sixty days for consideration unless the matter is expressed as urgent and must be accompanied by an explanatory statement from the relevant Minister, this degree of scrutiny is, of course, far less than would be the case for an amending Act. This is itself a very worrying denial of democratic rights. It is within the spirit of the Act that responses to deep inconsistencies between laws and rights are to be reserved for resolution by Parliamentary and not by judicial remedy. There is no obligation, though, placed upon Parliament to consider a declaration of incompatibility within a given time limit either in the English or Strasbourg courts. Nor can it be assumed that, when moved to action, Parliament will always take the correct remedial action or that Parliament is a wiser advocate of rights in comparison to the judiciary. In fact, its record in protecting vulnerable individuals or minorities is often poor; after all, far more of the cases that have come before the European Court have arisen out of the application of legislation rather than out of common law rules.

3. Political Remedies—To try to ensure that problems of incompatibility are not created by future legislation, ministers who are sponsoring new bills will be required before the second reading of

363. See Feldman, supra note 317, at 189 (explaining that this is an extraordinary power that allows effect to be given to an international obligation that has not otherwise been incorporated into national law).

364. Human Rights Act, 1998, c. 42, § 10(2) (Eng.). There are corresponding powers in relation to the parent Acts of incompatible secondary orders or in relation to the orders themselves or in relation to prerogative orders. Id. § 10(3)-(5).

365. Id. at sched. 2(2).

366. Id. at sched. 2(5).


the Bill to make a written statement about its compatibility with the Convention. If the Minister indicates any doubt, then this should lead to close questioning and debate. Previous knowledge of such a debate will hopefully deter the Minister from sponsoring anti-liberal measures.

Will this political sanction actually work? Pending the commencement of the Act, the government has begun to follow this arrangement. In 1998, however, Parliament passed the Criminal Justice (Terrorism and Conspiracy) Bill in only two days and brushed aside concerns about the patent breaches of Article 6. At least without the more considered and independent evidence of a rights select committee or independent commission, Parliament as an institution can be expected to turn a blind eye to safeguards for unpopular groups or causes.

CONCLUSION

It would be premature to overestimate the immediate impact of the Human Rights Act in English law. The Convention rights that it protects were drafted with English law models in mind, models in which pragmatism and social compromise are more recurrent features than principle and libertarianism. What began as a rather reticent and conservative statement of rights has since been applied by the European Court of Human Rights with a great deal of respect for national foibles. Furthermore, the Home Department’s Paper and the Human Rights Act itself are modest, pragmatic, and expressly respectful of English constitutional traditions.

369. Human Rights Act, 1998, c. 42, § 19 (Eng.). By this section:

(1) Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill—

(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or

(b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.”

Id. It is most unlikely that the courts would strike down an Act of Parliament which has been passed without the making of a section 19 statement. See, e.g., British Ry. Bd. v. Pickin, 1974 A.C. 765 (H.L. 1973) (holding valid a private Act of Parliament passed without notice to affected persons).

370. See Walker, supra note 219.
judges are also, in the main, conservative minded. Even the executive in Whitehall does not exactly face a revolution, for it has long worked with the Convention and already engages in “Strasbourg proofing,” and so does not expect many challenges to succeed or any major legal reforms to be undertaken to ensure compatibility.

Nevertheless, one can certainly expect a significant level of interest and challenges based on the Human Rights Act in the immediate future, and there will even be an expectation on the part of litigants and indeed the public for some judicial activism, though not likely to the extent that “the lawyers [will] . . . dominate all the debates.” The pattern of applications to the European Convention institutions themselves is that half relate to criminal process, and the next most common is family and privacy issues under Article 8. This pattern will probably be repeated under the Human Rights Act. Hence, there will be less of an emphasis than would be expected by United States lawyers on freedom of expression, which is given less priority in the corporatist, crowded societies of western Europe, where privacy is given more importance.


To react to this new workload, judges will need to develop new approaches. This will not just involve technical judicial review of administrative action. The judges must now begin to look more at substance than procedure or strict precedent. This approach is demanded by the Human Rights Act insofar as it requires the courts to "take into account" the jurisprudence of the European Court (which has a purposive approach) and not simply to follow the rules of judicial review. This point has also been asserted by the Lord Chancellor, Lord Irvine, who said in December 1997:

This Bill will therefore create a more explicitly moral approach to decisions and decision making; will promote both a culture where positive rights and liberties become the focus and concern of legislators, administrators and judges alike; and a culture in judicial decision making where there will be a greater concentration on substance rather than form.

It becomes important for the courts to try to articulate some underlying values guiding their decisions, such as autonomy, equality, and democracy. Such articulation will form the driving principles for rights review rather than judicial review. Ultimately rights review will reveal that English law already resonates with the values of individual liberty.

377. Compare Feldman, supra note 317, at 186 (arguing the basic values of public law include the principles of the rule of law), with Irvine, supra note 373, at 369 (arguing the courts have construed an individual's right of access to justice as a "constitutional right").