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Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?

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The United Kingdom has overcome its historic antipathy to a domestic bill of rights. Its recently adopted Human Rights Act (HRA) is distinctly different from the world's best-known rights instrument, the United States Bill of Rights. Faced with inherent doubts about the desirability of abandoning the principle of parliamentary sovereignty in favor of judicial supremacy, and with mounting international and domestic pressures to articulate rights for the purposes of constraining state actions, the United Kingdom incorporated the European Convention on Human Rights into domestic law. But in so doing, it has developed an innovative approach to protecting rights. This model makes a key assumption—that rights will be protected not simply through after-the-fact evaluations by courts but by establishing opportunities and obligations for rights review by ministers, parliamentarians, and public authorities that are distinct from, and prior to, judicial review. The paper assesses the HRA's early effects on political behavior and focuses on the work of the recently created Joint Committee on Human Rights, which plays a pivotal role in ensuring that the government explains and justifies proposed legislation in terms of its consistency with rights.

1. Introduction

The United Kingdom has overcome its historic antipathy to a domestic bill of rights.[1] This was the result of a growing recognition of a paradox in that country's law: that while the rule of law, in principle, might protect individual liberty, in practice, liberties were vulnerable to erosion by the executive,

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[1] John Major captured this antipathy when he declared ''[we in the United Kingdom] have no need of a Bill of Rights because we have freedom.'' As quoted by Lord Irvine of Lairg, *The Impact of the Human Rights Act: Parliament, the Courts and the Executive*, PUB. L. 308, 309 (2003).

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Parliament, and the judiciary.[2] Skepticism about the adequacy of the traditional British approach to rights,[3] reinforced by significant gaps between international rights commitments and their domestic accommodation,[4] convinced the Labour Party to reverse its historic opposition to a bill of rights.[5] The Human Rights Act (HRA) came into effect in 2000 and provides that the European Convention on Human Rights (ECHR) may be enforced in domestic courts.

The HRA has implications for all who exercise power on behalf of the state. It anticipates ministerial and parliamentary review of bills in terms of their compatibility with rights. Public authorities are also compelled to consider the implications of their actions with regard to rights. Finally, judges are required to interpret legislation insofar as it is possible to do so in a manner that is compatible with Convention rights and, where it is not possible, superior courts are empowered to make a ''declaration of incompatibility.'' Such declarations are expected to place substantial pressure on public and political officials to reassess their policy choices. In recognition of the importance of remedying rights' infringements, and in anticipation of a high degree of political acceptance for judicial rulings, the HRA includes a fast-track procedure (see section 3.5, below) to revise legislation where judicial declarations of incompatibility have been made.

The HRA represents an innovative approach to the protection of rights—what I have elsewhere referred to as the parliamentary rights model.[6] A key assumption envisaged by this model is that rights will be protected not

[2] Keith D. Ewing, *The Futility of the Human Rights Act* (extended version of the Bracton Lecture delivered at Exeter University, Jun. 2, 2004), Pub. L. 829, 2004 (Winter).

[3] As Anthony W. Bradley and Keith D. Ewing note, the traditional British approach to the protection of civil liberties and human rights was greatly influenced by Albert V. Dicey. On the Diceyan account, freedom was adequately protected, first, by the common law principle that citizens are entitled to do as they like unless expressly prohibited by the law, and second, by an independent Parliament acting as a safeguard against an illiberal executive. There was thus no need for a statement of principles operating as a form of higher law. The authors' claim that the decline in the power of Parliament relative to the executive over the past 100 years made Dicey's account steadily less persuasive. Anthony Bradley and Keith Ewing, Constitutional and Administrative Law 404–405 (13th ed. Pearson Educ. Ltd. 2003).

[4] The White Paper on the Human Rights Bill states, for instance, that it is ''plainly unsatisfactory that someone should be the victim of a breach of the Convention standards by the State yet cannot bring any case at all in the British courts, simply because British law does not recognize the right in the same terms as one contained in the Convention.'' Home Office, Rights Brought Home: The Human Rights Bill 1997, Cm. 3782, at para. 1.16.

[5] In 1992, John Smith proposed incorporation of the European Convention on Human Rights in his bid for leadership of the Labour Party in 1992, a commitment that was maintained after Smith's death in 1994. For discussion of the Labour Party's position on incorporation, see Keith D. Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 Mod. L. Rev. 79 (1999).

[6] *See* Janet L. Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?*, 82 Tex. L. Rev. 1963 (2004).

simply through after-the-fact evaluations by courts but by establishing opportunities and obligations for political rights review by ministers, parliamentarians, and public authorities that are distinct from, and prior to, judicial review. This paper assesses Parliament's role under the HRA, with a particular focus on a newly created parliamentary committee, the Joint Committee on Human Rights (JCHR), and addresses the following question. If one of the purposes for adopting the HRA was to recognize the inability of the modern parliament to protect rights, is the creation of a special parliamentary committee to conduct rights-based scrutiny a realistic, albeit partial, remedy for this deficiency?

2. Development of a new model

Although the United Kingdom ratified the ECHR a half century ago, it had not yet incorporated Convention rights into domestic law. As a result, citizens were not able to have these rights protected by British courts and incurred costly and time-consuming burdens pursuing claims in Strasbourg. Once elected, the Labour government of Tony Blair reiterated the promise he had made while in opposition: to incorporate ECHR rights into domestic law.

In designing this project of incorporation, political leaders were determined to retain the principle of parliamentary sovereignty. This helps explain why the U.S. Bill of Rights was not emulated. This rejection of the American model was accounted for, additionally, by the recognition that the ECHR already represented the U.K.'s bill of rights,[7] and it envisages a different relationship between rights and responsibilities than in the U.S.[8] The rejection of American-style rights review notwithstanding, proponents of incorporation fully expected that legislative decision making would, and should, be altered by this project of ''bringing rights home.''[9] Governing would be influenced

[7] In *Brown v. Stott*, [2003] 1 A.C. 681, Lord Steyn characterized the ECHR as representing ''our Bill of Rights''; as quoted in BRADLEY AND EWING, *supra* note 3, at 422.

[8] Lord Steyn expressed this difference in the following manner: ''[The framers of the European Convention on Human Rights] realized only too well that a single-minded concentration on the pursuit of fundamental rights of individuals to the exclusion of the interests of the wider public might be subversive of the ideal of tolerant European democracies. The fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights. The direct lineage of this ancient idea is clear: the convention is the direct descendant of the Universal Declaration of Human Rights which in Art. 29 expressly recognized the duties of everyone to the community and the limitation on rights in order to secure and protect respect for the rights of others.'' Brown v. Stott [2003] 1 A.C. 681, 707.

[9] This term is how the Labour Party, when in opposition, conceived of the project of incorporation. Jack Straw and Paul Boateng, *Bringing Rights Home: Labour's Plan to Incorporate the European Convention on Human Rights into United Kingdom Law*, EUR. H. R. L. REV. 71–80 (1997), Once in government, Labour published a white paper and a bill proposing incorporation; *see* HOME OFFICE, *supra* note 4.

by self-imposed and external evaluations of rights as a dimension of legislative decision making. The goal was to facilitate a rights culture that constrains inappropriate decisions from occurring in the first place.[10] A culture of rights was also considered important so that Parliament would promptly reassess legislation, should the judiciary declare it to be incompatible with rights.[11]

Although the HRA does not represent a homegrown bill of rights (and many believe it does not reflect the full scope of rights believed necessary for the modern United Kingdom)[12] it does represent an innovative approach to rights protection. The HRA has been characterized in a variety of ways. One perspective sees it as a hybrid constitutional model, straddling two rival theories: parliamentary sovereignty and judicial supremacy. As Jeffrey Goldsworthy suggests, ''this hybrid model offers the possibility of a compromise that combines the best features of both the traditional models, by conferring on courts constitutional responsibility to review the consistency of legislation with protected rights, while preserving the authority of legislatures to have the last word.''[13] Similarly, Stephen Gardbaum characterizes the HRA as a variant of a ''Commonwealth model'' that seeks to develop a ''coherent middle ground between fundamental rights protection and legislative supremacy.''[14] Mark Tushnet characterizes the HRA as embodying ''weak-form'' judicial review. He sees weak-form systems as those that ''openly acknowledge the power of legislatures to provide constitutional

[10] The Rt. Hon. Jack Straw MP, then Home Secretary, reflected this goal in the following statement: ''The development of [a human rights] culture is partly about developing a sense inside government . . . about those who have authority . . . about the way in which they should exercise that authority and that when they justify acts which are coercive . . . by reference to the public interest they really do mean the wider public interest rather than simply their convenience or the convenience of government.'' JOINT COMMITTEE ON HUMAN RIGHTS [hereinafter JCHR], MINUTES OF EVIDENCE, Mar. 14, 2001, H.L. 66-I, H.C. 332-I, at question 17.

[11] This assumption is clear in the following parliamentary statement by Lord Irvine, then lord chancellor: ''In the very rare cases where the higher courts will find it impossible to read and give effect to any statute in a way which is compatible with Convention rights, they will be able to make a declaration of incompatibility. Then it is for Parliament to decide whether there should be remedial legislation. Parliament may, not must, and generally will, legislate.'' 582 PARL. DEB., H.C. (6th ser.) (1997) 1228–1229.

[12] Some who opposed incorporation did so largely because they believed that the rights contained in the European Convention of Human Rights were incomplete, owing to the omission of social and economic rights. *See, e.g.*, Keith D. Ewing, *The Case for Social Rights*, in PROTECTING HUMAN RIGHTS. INSTRUMENTS AND INSTITUTIONS (Tom Campbell et al. eds., Oxford Univ. Press 2003); and Keith D. Ewing, *The Unbalanced Constitution*, *in* SCEPTICAL ESSAYS ON HUMAN RIGHTS (Tom Campbell et al. eds., Oxford Univ. Press 2001).

[13] *See, e.g.*, Jeffrey Goldsworthy, *Homogenizing Constitutions*, 23 OXFORD J. LEGAL STUD. 483, 484 (2003).

[14] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 742 (2001).

interpretations that differ from—or, in the U.S. Supreme Court's terms, alter—the constitutional interpretations provided by the courts.''[15]

These characterizations present the HRA as representing something of a cross between American-style judicial review and the continuation of the tradition of parliamentary sovereignty. But this emphasis on a hybrid form or variation of American-style judicial review does not fully capture the HRA's innovative character. Its principal innovation, and hence my claim that it represents a different approach to rights protection, lies in its attempt to broaden the scope of rights review beyond judges to include political and public actors. A second innovative feature of this model, which relates to this idea of dispersed responsibility for judgments about rights, is the creation of dialectical tensions between the government and Parliament, and between the judiciary and Parliament,[16] when determining if legislation is compatible with rights or, alternatively, is warranted despite judicial declarations of incompatibility.[17] Together these features create incentives for a critical examination of the relative merits of legislation from a broader spectrum of institutional actors—and in a more reflective manner—than is normally associated with a bill of rights.

2.1. Others' attempts to facilitate a culture of rights

The question arises as to how one facilitates this political culture of rights, and both Canada and New Zealand offered ideas that were both emulated and rejected. Canada and New Zealand provided important reference points for the U.K. because they similarly recognized the inability of modern parliaments to protect rights and yet adopted measures that anticipated an

[15] Mark Tushnet believes weak-form systems of judicial review may be unstable. They risk being transformed either by reverting back to the idea of parliamentary sovereignty, where courts do not believe it is appropriate to review legislation from a rights perspective, or by expanding the scope of judicial power so that weak forms become more similar to the idea of judicial supremacy. Mark Tushnet, *New Forms of Judicial Review*, 38 WAKE FOREST L. REV. 813, 818, 824 (2003).

[16] I am influenced in this observation by Conor Gearty, who argues that the HRA has a dialectical tension at its core. *See* Conor A. Gearty, *Reconciling Parliamentary Democracy and Human Rights*, 118 L. Q. R. 248 (2002). Although this idea of dialectic tension has resonance for government and Parliament, it is not clear whether the judiciary will be influenced by legislative deliberations. Indeed, some judges in the United Kingdom have expressed skepticism about the compatibility of dialogue with their role. *See* the evidence of Lord Bingham, the Senior Law Lord to the JCHR, JCHR, MINUTES OF EVIDENCE, Mar. 26, 2001, H.L. 66-iii, H.C. 333-iii, at question 78.

[17] Although this metaphor has been used to describe both the U.S. Bill of Rights and the Canadian Charter of Rights, its use is misleading in these jurisdictions. The only dialogical ''space'' for Canadian or American legislatures is compelled acceptance of the nullification of legislation or the requirement that they revise impugned legislation to remedy judicially identified deficiencies. Although Canadian legislatures can disagree with judicial interpretations of the Charter by means of the ''notwithstanding clause,'' they are generally reluctant to do so, and when invoked, the procedure merely delays the judicial interpretation of the Charter. *See* JANET L. HIEBERT, CHARTER CONFLICTS: WHAT IS PARLIAMENT'S Role? (McGill-Queens Univ. Press, 2002).

important parliamentary oversight role as part of a new project of protecting rights. In 1960, Canada introduced the twin ideas of vetting bills in terms of rights, before they are introduced to Parliament, and then reporting inconsistencies to Parliament. These obligations were contained in a new statutory bill of rights (the Canadian Bill of Rights) that applied to the federal level of government. The intent was to ensure that rights would play a more prominent role in the evaluation of policy initiatives both before and during the parliamentary process. New Zealand subsequently borrowed these concepts, which were considered particularly valuable in light of indigenous opposition to an entrenched bill of rights that would allow courts to set aside legislation if it violates rights.[18] The U.K., in turn, borrowed both the concept of executive rights review[19] and the obligation to report to Parliament where a bill is not compatible with rights.[20]

Where the U.K. demurred, vis-à-vis both countries, was in the scope envisaged for judicial review. Undermining the desirability of the Canadian approach was the perception that the Canadian Charter of Rights and Freedoms too closely resembled American-style judicial supremacy, particularly in light of a political culture in which the use of the section 33 ''notwithstanding clause'' is discouraged.[21] The New Zealand model was also rejected because judges do not have the ability to declare that legislation is incompatible with rights,[22] leading to the perception that this approach would

[18] Geoffrey Palmer, New Zealand's Constitution in Crisis 59–60 (John McIndoe Ltd. 1992).

[19] Unlike New Zealand and Canada, which have conferred this responsibility on the attorney general and federal justice minister, this responsibility under the HRA is vested with individual ministers. The reporting obligation also differs from Canada's and New Zealand's in its recognition that reports of inconsistency should be made to both houses of Parliament (Canada requires a report only to the House of Commons while New Zealand is a unicameral system). What this means in the U.K. is that when a bill passes from one house to the other, a second statement will be required, one which must take into account earlier amendments made. The respective statements will be made by whichever minister has been given responsibility in the particular house.

[20] Unlike the U.K., neither Canada nor New Zealand has adopted a specialized committee to evaluate bills from a rights perspective. *See* Janet L. Hiebert, *Interpreting a Bill of Rights: The Importance of Legislative Rights Review*, 35 Brit. J. Pol. Sci. 235–255 (2005).

[21] Francesa Klug, Values for a Godless Age. The Story of the United Kingdom's New Bill of Rights 165–66 (Penguin Books 2000).

[22] Judges are instructed in s. 4 that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, this ''meaning shall be preferred to any other meaning'' and are prevented from holding ''any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective.'' There is debate, however, about whether courts are in fact prevented from making or implying declarations of inconsistency. *See* Andrew Butler, *Strengthening the Bill of Rights*, 31 Victoria U. Wellington L. Rev. 129 (2000). This debate appears recently to have been settled by the Court of Appeal in *Moonen*, [2000] 2 N.Z.L.R. 9, in which that Court stated it might have the power to declare legislation ''inconsistent'' with the Bill of Rights.

not provide adequate incentive for public authorities to reassess the implications of their actions for rights.

2.2. Canadian experiences

The twin responsibilities of vetting bills and reporting inconsistencies to Parliament have not significantly altered the government–Parliament relationship. Little discernible change has arisen with respect to increasing Parliament's awareness of the rights aspects of bills or enhancing its capacity to require greater governmental accountability for bills that appear to have adverse implications for rights.

The executive-based system of vetting (conducted by government lawyers for departments and ministers) has become a rigorous and essential element of assessing policy initiatives and approving which of these will proceed from cabinet. The adoption of the Charter in 1982, with a new judicial mandate not only to interpret rights but to provide remedies for their breach (including the invalidation of legislation), entailed serious policy and fiscal consequences for government.[23] But Parliament has generally been ignored as a forum for evaluating the merits of legislative decisions in light of their Charter implications.

Although the minister of justice is required to report to Parliament where bills are inconsistent with the Charter, no such report has ever been made. Four reasons explain this. One is the systematic evaluation of policy initiatives at early stages of the policy process, which identifies perceived problems and attempts to minimize the perceived inconsistency. A second is the emergence at the federal level of a political culture that presumes it is inappropriate to proceed with an initiative requiring a report of inconsistency. The prevailing assumption is that if a policy initiative places a limit on a protected right that cannot be considered reasonable, it should either be withdrawn or amended so as to allow the justice minister to reach a judgment that the initiative is consistent with the Charter. Failure to do so would likely result in the resignation of the minister. Third, the general political criterion for determining consistency—and hence whether a report is required—is whether or not a legislative initiative that restricts rights is consistent with a free and democratic society, that is to say, whether a credible justification of the legislation can be made in relation to the Charter. This is a normative inquiry, subject to philosophical judgment about the proper role of the state, what kinds of social problems are worthy of redress, and policy-laden evaluations of whether the legislation is more reasonable than some hypothetical alternative. As such, the judgment of whether or not a credible Charter justification can be made

[23] Hiebert, *supra* note 17, at 7–13. See also James B. Kelly, *Bureaucratic activism and the Charter of Rights and Freedoms: the Department of Justice and its entry into the centre of government*, 42 Can. Pub. Admin. 476, 486–503 (1999).

is sufficiently broad that it encompasses a wide range of legislative goals, even ones with fairly high levels of Charter risk. A fourth and final reason is that the possibility of subsequent Charter litigation, and the constitutional ability of courts to provide remedies where rights are breached (which can include invalidation of the legislation), would make it extremely difficult for a government to defend legislation successfully if the minister of justice had earlier reported to Parliament that it was not a reasonable limit on a protected right.[24]

The absence of reports to Parliament that bills are not consistent with the Charter should not be construed as an indication that the Charter is ignored or is ineffective at constraining governmental decisions. Although parliamentary oversight is marginal, the vetting process by the executive has profoundly transformed the way policy initiatives are evaluated and has significantly influenced their parameters. An informed study of the vetting process concludes that the vetting procedure has not only operated to minimize the risk of judicial invalidation of bills on Charter grounds but represents a significant influence on policy development.[25] Indeed, some parliamentarians believe that government lawyers have exercised too much influence on policy decisions and have exaggerated Charter risks, resulting in overly cautious legislation.[26]

But the decision to make judgments about consistency with the Charter at the executive level, without explaining or justifying these to Parliament, has important political consequences for Parliament. The political decision to measure consistency in terms of whether a credible Charter justification can be made has kept important information from Parliament, such as the reasons or assumptions that led to the judgment. As a result, Parliament may find itself in the untenable position of passing legislation yet not knowing about the seriousness of the risk that the legislation will subsequently be found unconstitutional. Parliament also lacks the information needed to assess whether the government has been overly cautious, and whether attempts to minimize litigation or to increase the prospects of successfully defending impugned legislation have resulted in the choice of unambitious legislative goals or means.

[24] HIEBERT, *supra* note 17, at 10–12.

[25] Kelly, *supra* note 23, at 476–511.

[26] A good example was the federal government's attempt to establish a national DNA data bank for resolving previously unsolved crimes. The opposition wanted stronger measures that would allow police to collect DNA samples from criminal suspects at the point of arrest. The government rejected this position, arguing that the judiciary would likely rule it unconstitutional, and promoted legislation that allows for DNA samples to be obtained only after individuals have been convicted of serious offenses, such as murder, sexual assault, and breaking and entering. HIEBERT, *supra* note 17, at 118–145.

Canada has not created a specialized parliamentary committee to evaluate bills in terms of their consistency with rights. A committee in each house of Parliament evaluates bills that have constitutional and legal implications. However, these committees may find themselves in the difficult position of having to assess claims by individuals or interest groups alleging a serious Charter constraint even when the silence of the minister of justice infers that there is no serious Charter inconsistency.[27]

2.3. New Zealand experiences

New Zealand has had very different experiences in the reporting of bills that are inconsistent with the New Zealand Bill of Rights Act. Unlike Canada, where no legislative bill has ever been reported as inconsistent with the Charter, New Zealand, at the time of writing, has had thirty-five such reports. Yet both countries utilize similar criteria for determining whether a report is necessary.[28] This raises obvious questions, such as what might explain this difference in reporting practice, and what the significance of the discrepancy, in terms of the larger project of facilitating a rights culture within and beyond Parliament, might be.

New Zealand requires that departments assess whether policy initiatives are consistent with rights. But the Ministry of Justice does not have a monopoly on providing advice about rights compatibility, as does the Department of Justice in Canada, and this creates the possibility of diverse judgments on the issue. Moreover, unlike Canada's presumption against reporting, which assumes that the identified rights violations will not only have been identified but redressed before an initiative is introduced to Parliament, New Zealand's system of executive review does not require verification that policy initiatives constitute reasonable limitations before they proceed as bills to Parliament. This is evident in the frequency with which government bills subsequently result in reports of inconsistency under section 7.

A more practical matter affecting reporting practices is that unlike Canada, where a report of inconsistency could have serious consequences for the survival of legislation if it were subsequently challenged in court, this is not the case in New Zealand. This is because the New Zealand judiciary has more limited powers of review and cannot grant the remedies available to Canadian courts, such as declaring legislation invalid. Thus, acknowledgment by the New Zealand attorney general that a bill violates rights in a manner that cannot be considered reasonable or consistent with a free and democratic society

[27] *Id.*

[28] For discussion of the first twenty-four reports of inconsistency, and their effects, see Grant Huscroft, *The Attorney-General's Reporting Duty*, *in* THE NEW ZEALAND BILL OF RIGHTS (Paul Rishworth et al., Oxford Univ. Press 2003). *See also* Janet L. Hiebert, *Rights-vetting in New Zealand and Canada: Similar Idea, Different Outcomes*, N.Z. J. OF PUB. & INT'L L. 63, 73–89 (2005).

does not have the same consequences as a similar declaration in Canada, where such a report would make legislation extremely vulnerable to subsequent invalidation.

Despite the frequency of reports that bills are not consistent with rights, there is little indication that these have resulted in the New Zealand House of Representatives demanding amendments to redress the identified rights violation. Select committees sometimes question the need for a report and often proceed without addressing the substance of the attorney general's concerns.[29] An explanation as to why these reports seldom result in serious pressures for amendments involves the following factors: First, there is a tendency for the government to report violations even in circumstances where a compelling argument could be made that the restriction in question is reasonable, resulting in ambiguity about the purpose and significance of reporting. The second factor concerns mixed messages about whether or not rights should constrain social policy choices, particularly when the government continues support for a bill that the attorney general has previously decided imposes rights restrictions that are inconsistent with a free and democratic society.[30]

3. Political rights review in the United Kingdom

Whether intentional or not, the U.K. approach appears to remedy some of the deficiencies in the concept of political rights review as it exists in Canada. Unlike Canada, which incurs difficulties arising from the reluctance to report to Parliament that bills are inconsistent with the Charter, even when a serious chance exists that legislation will be litigated and where assurances cannot be provided that the legislation will survive, the U.K. approach imposes an affirmative reporting obligation on a minister, who must indicate one way or another whether or not a bill is compatible. Moreover, unlike the Canadian practice of having no specialized parliamentary committee to evaluate the implications of bills for rights, and having no independent legal adviser to alert Parliament about some of the rights difficulties that may arise, the U.K. has both created a specialized committee and has provided it with a legal adviser. The creation of the committee, with its own legal adviser, also contrasts with the problematic lack of attention that New Zealand select committees too often give to reports of inconsistency.

The Human Rights Act 1998 came into force in 2000, two years after intense preparations by government departments and courts.[31] As suggested

[29] *Id.*

[30] *Id.*

[31] One estimate suggests that the government invested £4.5 million in judicial training and preparation for public authorities. John Wadham, *The Human Rights Act: One Year On*, 6 EUR. HUM. RTS. L. REV. 620, 622 (2001). For discussion of the extent of judicial training, *see Memorandum from the Lord Chancellor*, JCHR, MINUTES OF EVIDENCE, Mar. 19, 2001, H.L. 66-II, H.C.332-II.

above, the significance attached to political rights scrutiny is a distinguishing feature of the HRA. The ideal of protecting rights by preventing their abuses from occurring in the first place is both a laudable goal and a daunting challenge. It is laudable because only a fraction of legislation or the decisions of public authorities can ever be litigated. Thus, reliance on judicial correctives to prevent infringements on rights, as is the approach more commonly used with bills of rights, may result in many rights abuses going without remedies.

Building a rights culture, however, is also an extremely daunting challenge, not only because persistent disagreement should be regarded ''as one of the elementary conditions of modern politics''[32] but also because a Westminster-based parliamentary system produces disciplined parties and often portrays the resolution of complex issues as reducible to two viewpoints—in favor or opposed. The emphasis in parliamentary systems on efficient and executive government encourages a political culture where governments are hostile to objections they perceive as undermining, altering, or delaying the clear pursuit of their policy agenda. It is within this highly charged political and partisan environment that ministers and parliamentarians are now expected to assess legislation in terms of whether it unduly or inappropriately infringes rights (in addition to the more traditional focus on goals, benefits, effects, and costs). Thus, this ambitious goal of preventing rights abuses from occurring requires a significant shift in mindset about how parliamentarians are to conduct their scrutiny function.[33] Stated differently, the HRA attempts to influence the very governing culture that characterizes a competitive, parliamentary, and adversarial system of government.

Another reason why this goal of facilitating a culture of rights represents a daunting challenge is that disagreements can arise that have little to do with matters of intent—whether or not to respect rights. Reasonable individuals can be genuinely committed to rights and yet still differ on philosophical issues such as the scope of rights, whether a particular objective is consistent with the project of protecting rights, as well as on more technical matters, such as whether legislation complies with notions of proportionality. Yet the moral and rhetorical power of the language of rights can result in political, public, or media assessments that portray philosophical differences about the proper role of the state as illegitimate or that disregard reasonable differences on questions of proportionality. No politician is anxious to be the subject of a news headline or sound bite pronouncing that he or she is intent on violating rights. Yet this may be the consequence of being forthright

[32] JEREMY WALDRON, THE DIGNITY OF LEGISLATION 153 (Cambridge Univ. Press 1999).

[33] I borrow here from an earlier publication on the challenges of political rights scrutiny within a parliamentary system. *See* Janet L. Hiebert, *A Hybrid-Approach to Protect Rights? An Argument in Favour of Supplementing Canadian Judicial Review with Australia's Model of Parliamentary Scrutiny*, 26 FED. L. REV. 115, 126–27 (1998).

when defending legislation that might raise tensions with regard to rights, even when one is providing reasons to explain why an action is warranted and proportionate. Thus, politicians may have political incentives to avoid publicly acknowledging the full implications of how a legislative initiative affects rights.

3.1. The role of the executive

The concept of political rights review arises from the requirement in the HRA that ministers report to Parliament, before second reading, on whether bills are compatible with Convention rights.[34] The relevant minister must make one of two possible stipulations: that he or she is of the view that the proposed legislation is compatible with Convention rights (s. 19(1)(a)), or that no such statement of compatibility can be made but the government, nevertheless, wishes to proceed with the bill (s. 19(1)(b)). The very requirement that a minister declare his or her understanding of a bill's compatibility triggers efforts, in the early stages of a bill's development, to identify possible conflicts with rights, consider alternative means to accomplish legislative objectives in a manner more compatible with Convention rights, or reach a judgment about whether the proposed legislative goal and means are justified despite their adverse implications for rights. Yet it is not clear whether the government anticipated the full extent to which this reporting obligation would influence policy development. According to Lord Lester, a member of the JCHR and long-time champion of a bill of rights for the U.K., ''few, if anyone, in Whitehall or Westminster appreciated just how significant the practical impact of [the section] 19 procedure would be upon the preparation and interpretation of proposed legislation.''[35]

The Cabinet Office has formulated guidance (the ''CO Guidance'') to facilitate ministerial review.[36] This document envisages a two-stage process for determining whether a bill is compatible with Convention rights. The first stage, which occurs when policy approval is sought, entails a general assessment of possible issues that may arise with respect to Convention rights. The objective, as outlined in the guidance, is ''to ensure that Ministers are always alerted to substantive ECHR considerations before the policy is determined.''[37]

[34] The HRA encompasses only government bills. Nevertheless the standing orders of each house have now been changed so that whoever promotes a private bill must produce a statement of opinion on whether the bill is compatible with Convention rights.

[35] Lord Lester & Kay Taylor, *Chapter 8: Parliamentary scrutiny of human rights*, *in* HUMAN RIGHTS LAW AND PRACTICE 600 (Lord Lester & David Pannick eds., LexisNexis U.K. 2nd ed. 2004) [hereinafter, *Parliamentary scrutiny*].

[36] Cabinet Office Constitution Secretariat, *The Human Rights Act 1998 Guidelines for Departments* (Dep. for Const. Aff. 2nd ed. 2000), *available at* http://www.dca.gov.uk/hract/guidance.htm.

[37] *Id.* at para. 34.

After a legislative bill has been drafted, departmental lawyers prepare a document analyzing the implications of the bill for the ECHR. This analysis, which involves consultations with law officers and the Foreign and Commonwealth Office, must be cleared with the relevant minister and presented with the bill to the Legislation Committee. This document, which may be revised to take into account concerns raised by the Legislation Committee, then forms the basis for a minister's section 19 statement.[38]

The CO Guidance also provides criteria for ministers' section 19 decisions about compatibility. Ministers are to form their view ''on the basis of appropriate legal advice'' from government lawyers and are advised that other considerations are subordinate to legal perspectives. For example, ministers are advised that a bill can only be declared compatible with Convention rights if, ''at a minimum, the balance of [legal] argument supports the view that the provisions are compatible.'' This legal advice focuses on whether ''it is more likely than not that the provisions of the bill will stand up to challenge on Convention grounds before the domestic courts and the Strasbourg Court.''[39] Omitted from the CO Guidance is advice on how a minister should evaluate a legislative objective that requires an section 19(1)(b) acknowledgment that no statement of compatibility can be made.

One point immediately apparent from the CO Guidance is the priority that appears to be placed on legal advice in decisions about compatibility. This is most evident in the directive to ministers that, even if they believe valid policy or political arguments support a claim that legislation is compatible with Convention rights, they are not to disagree with legal advice to the contrary. Such arguments or policy reasons, they are instructed, do not constitute a ''sufficient basis'' to claim compatibility if the legal advisers do not believe that these arguments would ''ultimately succeed before the courts.'' Yet despite the apparent priority given to legal advice, the JCHR has frequently questioned whether proposed legislative provisions are indeed compatible with rights (discussed below).

Two purposes are served by this ministerial reporting obligation. The first, already considered, is to ensure that ministers and public officials fully appreciate the implications that proposed initiatives may have for rights, and to reflect upon possible problems when determining whether and how to proceed. Yet a second, more transparent purpose is to stimulate parliamentary debate about whether or not bills are compatible with rights or, in cases where compatibility statements cannot be made, whether these bills should proceed. It is this feature of the United Kingdom project that is so innovative, for unlike New Zealand or Canada, where Parliament is a fairly marginal actor when assessing the executive aspect of rights review, the U.K. system envisages a far greater parliamentary role.

[38] *Id.* at para. 35.

[39] *Id.* at para. 36.

3.2. The role of Parliament

The government indicated in its white paper—*Rights Brought Home: The Human Rights Bill*—that ''Parliament itself should play a leading role in protecting the rights which are at the heart of a parliamentary democracy.''[40] The Labour government suggested that although Parliament should determine how best to scrutinize government actions under the HRA, the ''best course would be to establish a new Parliamentary Committee with functions relating to human rights.'' The white paper was not specific about either the structure or the mandate of the committee, but it did suggest three possibilities: a joint committee of both houses of Parliament; a separate committee in each house; or a committee that meets jointly for some purposes and separately for others. With respect to the new committee's mandate, the white paper suggested it ''might conduct enquiries on a range of human rights issues relating to the Convention'' and that it produce reports ''so as to assist the Government and Parliament in deciding what action to take.'' Finally, the white paper suggested the committee might also want to ''examine issues relating to the other international obligations of the UK'' including ''proposals to accept new rights under other human rights treaties.''[41] From these recommendations, the government announced it would create the Joint Committee on Human Rights in December 1998,[42] although it was two years before the JCHR was actually established and held its first meeting (January 31, 2001).

Some might be skeptical about what a parliamentary rights committee can realistically accomplish, particularly within a Westminster parliamentary system. The idea of having a specialized rights committee was initially considered at odds with traditional expectations that rights are protected by Parliament, acting as a whole, while conducting its general watchdog functions.[43] Reflecting this sentiment, a House of Lords inquiry into incorporating the European Convention on Human Rights in 1977 proclaimed a specific rights committee unnecessary: the detection of rights infringements by such a committee would be no more likely than by the

[40] HOME OFFICE, *supra* note 4, at para. 3.6. During parliamentary debate about the proposed Human Rights Bill, The Rt. Hon. Jack Straw MP, then home secretary, indicated that the ministerial obligation to report to Parliament on the compatibility of bills with Convention rights would influence legislative choices at the drafting stage and would also have an important influence on parliamentary review. 306 PARL. DEB., H.C. (6th ser.) (1998) 779.

[41] *Id.* at paras. 3.6–3.7

[42] The Rt. Hon. Margaret Beckett MP, then Leader of the House of Commons, indicated on December 14, 1998 that both houses would be asked to appoint a Joint Committee on Human Rights. 332 PARL. DEB., H.C. (6th ser.) (1998) 604.

[43] Robert Blackburn, *A Human Rights Committee for the U.K. Parliament: The Options*, 3 EUR. HUM. RTS. L. REV. 534 (1998).

House as a whole in its general scrutiny of government bills and administrative practices.[44]

Given the long-standing doubts about the efficacy of a rights committee, it is clear that several conditions are required for its proper functioning. First, its reports must be perceived as being motivated by principled and not partisan deliberations. Second, it must be able to review bills and report back to Parliament within a time frame that allows Parliament to make use of its guidance. Third, it must be generally independent of government influence. Fourth, the committee must command the respect of other parliamentarians and its reports must be taken seriously in parliamentary deliberations.

Political systems that impose relatively strict party discipline can make it difficult to meet all of these conditions. Members of the JCHR, particularly those from the House of Commons, where party affiliation is stronger, effectively wear two hats that are not always complementary. One is as a part of a parliamentary committee that scrutinizes bills for their consistency with rights. The very act of identifying provisions that may conflict with rights, or participating in a report that asks for additional information or questions whether initiatives are consistent with rights, may be perceived by the government as posing obstacles to the successful pursuit of its agenda. The other hat worn is that of a member of a political party, which may have a strong position in favor of, or opposed to, the legislation in question. Managing these conflicting positions and their concomitant perspectives can be particularly challenging for committee members from the governing party. If committee reports were to divide regularly along party lines, this fractious quality would contribute to the impression that the committee's assessments were malleable, given that its judgments on any issue would seem attributable to whichever party the differing opinions belonged. Such an impression would make it easier for a minister (or other parliamentarians) to downplay the significance of a report that identifies a possible rights infringement.

Although divided loyalties present a potentially serious constraint, a number of factors appear to enable the JCHR to overcome this obstacle. One is the size of the House of Commons. If the British House of Commons were relatively small, it could be difficult to find enough committed and independent-minded members to serve on this committee. In a small chamber, the prospects of aspiring to the cabinet might discourage robust scrutiny or critical reporting, where problematic aspects of legislation are identified and ministers are asked for the possible justification for actions that appear wholly inconsistent with rights. But with 659 members, it is unrealistic for the majority of parliamentarians to aspire to become a member of the cabinet, a minister, or parliamentary secretary. The size of the House of Commons also makes it more difficult for a governing party to ensure all of its members

[44] House of Lords Select Committee on a Bill of Rights, Report of the Select Committee on a Bill of Rights, 1977–1978, at 176, para. 38, as referred to by Blackburn, *id.* at 534.

vote consistently with the government. Although many in the U.K. lament the strictness of party discipline, many backbench members of the governing party do vote and have voted against the government, as evidenced by the opposition to the government's commitment to support the American-led invasion of Iraq. A second mitigating factor is the nature of the JCHR's inquiries. Unless the government is willing to denounce both the goals of ''bringing rights home'' and the purported importance of parliamentary review, it is difficult for political leaders to ostracize openly Committee members for their sincere attempts to respect protected rights.

Perhaps the most significant factor that allows the committee to rise above party divisions, however, is the fact that it is jointly constituted, which prevents government domination. The JCHR comprises twelve members—six each from the House of Lords and House of Commons. Formally, it consists of two separate committees—one with six members from each house—but the JCHR sits and reports as a joint committee. Joint committees in the U.K. Parliament are quite rare and most are created in an ad hoc manner to examine a specific issue or draft bill.[45] In contrast, the JCHR has a broad mandate with considerable discretion. Its members believe that the joint nature of its structure allows for greater independence from government influence than if it consisted of members from only one house. Its composition also prevents government domination. Membership from the House of Lords is roughly proportional and reflects party membership in that house, which currently results in two members each from the Labour and Conservative parties, one from the Liberal Democrats, and one who is a cross-bencher. On the House of Commons side, there are currently three Labour members, including the chairperson, one Liberal Democrat, and two Conservatives. Thus, a majority of the committee members is not from Labour and, barring a major restructuring of the House of Lords, governing party members are unlikely ever to dominate the committee numerically.

At the time of writing, two people have chaired the committee—Jean Corsten and Andrew Dismore, both Labour MPs. Initially, opposition parties wanted an opposition member as chairperson. But in its first meeting the committee elected Corsten, who at the time served as chair of the Parliamentary Labour Party and thereby occupied an important position within the governing party. Although some might question whether her close affiliation with the governing party would constrain the independence of the committee, members interviewed did not perceive that the committee's independence had been undermined, for the following reasons. First, Labour members do not constitute a majority position on the committee. Second, those interviewed indicate significant respect for the way Corsten conducted herself as chair, facilitating full and frank discussion and not demonstrating a progovernment

[45] U.K. Parliament, Joint Select Committees, *available at* http://www.parliament.uk/parliamentary_ committees/parliamentary_committees36.cfm.

bias [46] (an assessment that is reflected in her unanimous reelection as chair). Third, some considered her senior position within the Labour Party to be an asset because it allowed for committee concerns to percolate throughout the government, enhancing the influence of the JCHR's concerns. As Lord Lester (a member of the Liberal Democrats) has said of Corsen's role: ''I think it is a great advantage to have someone in the chair who has great political clout and therefore can give early warnings or retrospective warnings as it were. . . .''[47]

To date, the committee has not incurred serious or persistent differences based on party affiliation or division among members from the different chambers.[48] This is not to say there have not been disagreements related in some way to party membership. This is inevitable because the philosophical and policy assumptions that define a member, and explain his or her reasons for joining party X and not party Y, may also influence their judgment about the scope of a particular right or the appropriate role of the state in pursuing a specific social policy objective. Nevertheless, for the most part, committee deliberations and reports are based on consensus, with relatively few votes required. In the words of Lord Lester, getting off to a consensual start was very important for the committee, which ''is working really well now and I hope that we will create a culture that will outlive us.'' He believes consensus is important because reports will have more authority and, likely, more influence.[49]

A final reason for the committee's ability to rise above party divisions is the strong reputation of its two legal advisers. The first was David Feldman, a well-respected legal scholar and expert on human rights, who resigned in March 2004 to assume a chair in law at Cambridge University. The second adviser, Murray Hunt, who took over in April 2004, is a well known barrister, who was previously associated with the prestigious Matrix Chambers legal practice where he specialized in human rights and public law. Members of the JCHR, academics, and interest groups interviewed concur that the strong reputation of these legal advisers has enhanced the JCHR's credibility and legitimacy.

3.3. How the JCHR broaches its task

The JCHR's remit is broad and includes (*a*) matters relating to human rights in the United Kingdom (but excluding consideration of individual

[46] This assessment is based on interviews conducted by the author with several members of the JCHR, members of its staff, leading academic commentators on the HRA, and former and current figures with Justice, May 4–19, 2004 [hereinafter ''Interviews'' unless an individual is specified].

[47] Interview with Lord Lester of Herne Hill, Member, JCHR, in London, U.K. (May 10, 2004).

[48] Interviews, *supra* note 46.

[49] Interview with Lord Lester, *supra* note 47.

cases); (*b*) proposals for remedial orders, draft remedial orders, and remedial orders made under section 10 and schedule 2 of the Human Rights Act 1998; and (*c*) with respect to draft orders and remedial orders, whether the special attention of the House of Commons should be drawn to them.

Early on, the JCHR decided to construe these responsibilities or terms of reference broadly,[50] and has considered not only rights issues that arise from the ECHR but also from the nation's other international human rights obligations, including the International Covenant on Civil and Political Rights and other UN instruments.[51] Yet the JCHR has made clear that its central focus will be on scrutinizing bills for their compatibility with rights and examining ministerial statements of compatibility under section 19 of the HRA. In a report the JCHR indicated that it ''considers itself to be responsible to Parliament'' for assessing whether section 19 statements ''have been properly made''[52] and, accordingly, will ''make scrutiny of primary legislation for its compatibility with Convention rights its first priority.''[53]

To date, only two ministerial declarations of incompatibility have been made,[54] yet the committee has frequently identified legislative provisions

[50] To help the committee understand how the HRA was affecting political behavior, it sought information on a range of issues, such as how the government had prepared departments for the introduction of the HRA, how the HRA has affected departments' approaches to human rights issues, what its consequences were for the development of policy and delivery of services, how departments approached the section 19 reporting obligations, and the government's own approach to reporting where issues of rights arise. More specifically, it sought information from ministers, law officers, and senior judges on how they were interpreting and responding to the act, as well as from nongovernmental organizations on their perspectives on the development of a human rights culture in the U.K., the HRA's impact on policy, as well as their advice on how the JCHR should interpret its mandate. JCHR, SECOND SPECIAL REPORT, 2000–01, H.L. 66-i, H.C. 332-i.

[51] JCHR, FIRST REPORT, 2000–01, H.L. 69, H.C. 427, at Annex 1. In a subsequent report, the committee indicated in a letter sent to the secretary of state for the Home Department, ''our starting-point is of course the statement made under s. 19(1)(a) of the Human Rights Act 1998; but . . . the committee's remit extends to human rights in a broad sense, not just the Convention rights under the Act.'' JCHR, THIRD REPORT, 2003–04, H.L. 23, H.C. 252, at Appendix 1, p. 23. There has subsequently been some disagreement on the committee about whether it is appropriate to define its mandate so broadly. At least one member believes that the principle of parliamentary sovereignty should restrict the scope of the committee's review to those human rights standards that Parliament has politically approved and passed, such as those contained in the Human Rights Act.

[52] According to Lester, the JCHR approaches nongovernmental bills in a similar manner as it examines government bills. Lester and Taylor, *supra* note 35, at 612.

[53] JCHR, FOURTEENTH REPORT, 2001–02, H.L. 93, H.C. 674, at para. 1.

[54] The first section 19(1)(b) report was made after the House of Lords decided to amend legislation that would have the effect of denying the government's decision to remove a legislative provision (sect. 28 of the Local Government Act) that had forbidden the promotion of homosexuality or banned any teaching that promoted the ''acceptability of homosexuality as a pretended family relationship.'' In March 2000, the government indicated that the amendments made by the House of Lords to the Local Government Bill required a statement that the legislation was not

where it doubts their compatibility with Convention rights. The committee's practice of writing to relevant ministers or departments to elicit further information about the reasons for and consequences of these provisions, and whether they satisfy notions of proportionality,[55] reinforces the dialectic tension, discussed above, that comes about in requiring governments to explain and account for their actions when these are questioned by Parliament.

3.4. Process for review

The committee has a full-time legal adviser who reviews all bills (both Government and private member) after they are introduced, and provides a note to the committee on those bills that engage rights. Where possible, this is done by the time a bill goes to committee in the first house. This note identifies aspects of the bill that raise questions about rights compatibility and suggests questions the committee might ask of ministers and departments. This same note also forms the basis for committee deliberations, with the committee commenting on aspects of bills it finds problematic and identifying the questions and issues that should be included in any correspondence with the relevant minister. A letter is then sent by the chair on behalf of the committee, spelling out specific questions, identifying the legislative provisions that may raise conflicts with rights and the specific right(s) engaged, and asking ministers what justification they have for interfering with a right or how they propose to ensure that violations are prevented in the implementation of the legislation. In asking these questions, the JCHR tries to impose a tight time frame for responses.

At this stage, the committee publishes a progress report, specifying its concerns and the questions asked of ministers involved. Once it hears from the minister, the legal adviser analyses the response and either issues another note or proposes a draft report suggesting how the committee should respond. The committee then determines how to proceed. It publishes a further installment of its deliberations in its next progress report. The tendency is not to iterate overly the examination of an issue, unless the question is considered crucial. Otherwise, if the committee is not satisfied by the minister's response to its queries, it reports this fact and leaves the matter for Parliament

compatible with Convention rights. The second occasion for the section 19(1)(b) report was the introduction of the Communications Bill (H-6) in 2002, a complex bill that sought to introduce a single regulator for the electronic communications sector. Tessa Jowell, the relevant minister, indicated that if the defense of the ban on political advertising subsequently fails in the European court, the government would be forced to ''reconsider'' its position. 395 PARL. DEB., H.C. (6th ser.) (2002) 789.

[55] *See, e.g.*, the first public session of the Joint Committee on Human Rights. JCHR, FIRST SPECIAL REPORT, 2000–01, H.L. 42, H.C. 296.

to decide how to proceed. Ministers sometimes appear in person to give evidence and respond to queries, particularly on very controversial matters such as antiterrorism legislation. But time constraints, both on the part of the committee and the relevant minister, ensure that most of the exchanges are in written form. The committee also requests and receives interventions from nongovernmental bodies or academics with a known interest in the matter before it.[56]

Department responses have ''generally been thorough and informative'' and take various forms. Occasionally, a department disagrees with the committee's perspective that a provision in a bill adversely affects a human right. This response is rare and is likely to provoke an exchange of letters, sometimes resulting in the department's changing its position. More often, the department accepts the committee's view that a particular provision interferes with a right but argues that this interference is justifiable. This claim of justification may involve either legal arguments, such as whether a matter is ''in accordance with the law'' or is ''prescribed by law,'' or policy justifications, to the effect that the legislative bill pursues a legitimate aim and represents a proportionate response to a compelling social need. Occasionally, a department accepts that there is a problem but wishes either to deal with it in quasi-legislative form, such as through a code of practice or a circular, or to delay fixing the problem until there is sufficient time for a more comprehensive bill.[57]

Department officials have also relied on informal inquiries of the legal adviser about what form of change would likely be considered acceptable, upon receiving a communication from the committee.[58] Yet this informal correspondence presents a delicate issue for the committee, which guards its independence and does not want it undermined by the perception that the legal adviser can speak for the committee.[59] Although infrequent, there have been instances where the committee has disagreed with its legal adviser's assessment of a bill's impact on Convention rights.[60]

[56] David Feldman, then legal adviser to the JCHR, indicates that although the committee's tight timetable for comments by nongovernmental organizations does present certain challenges, this form of consultation has often produced useful responses and constitutes ''an important part of the Committee's efforts to involve civil society more fully in the process of scrutiny.'' David Feldman, *Parliamentary Scrutiny of legislation and Human Rights*, PUB. L. 323, 333 (2002).

[57] *Id.* at 334.

[58] Interview with David Feldman, Legal Adviser, Joint Committee on Human Rights, in Cambridge, U.K. (May 7, 2004).

[59] Interview with Lord Lester, *supra* note 47.

[60] Interview with David Feldman, *supra* note 58.

3.5. Functions the JCHR serves

The process of scrutiny serves several functions. The first is to alert Parliament about the implications of bills for rights. As Feldman states: ''The primary role of scrutiny committees is to examine particular aspects of measures brought before Parliament, and to enable the two Houses to deal with them in a well-informed and systematic way.''[61] A second function is proactive and is closely related to the HRA's goal of facilitating a political culture of rights. Its systematic scrutiny of legislative bills provides incentives for ministers, department officials, and drafters to ensure that they are attentive to the consequences of legislative bills for rights. Knowledge that the committee will question provisions that engage or impinge on rights influences departmental assessments of bills because public officials do not want to be called before the minister to explain why he or she failed to recognize that a particular provision adversely impacts on rights.[62] As Feldman suggests, the JCHR's work affects the mindset of public and political officials because they must ask themselves not only ''[a]re we going to be able to make a statement where this is compatible, but are we going to be able to justify that statement if we get questioned on it by the [JCHR]?''[63]

A third function the JCHR performs is assessing government responses to judicial declarations of incompatibility. Section 10 of the HRA establishes a process in which the government can pass a remedial ''order'' (popularly referred to as a fast-track procedure) when the judiciary declares that legislation is incompatible with Convention rights.[64] If a minister ''considers that there are compelling reasons'' to respond to a judicial declaration of incompatibility, he or she ''may by order make such amendments to the legislation as he [or she] considers necessary to remove the incompatibility.'' [65] The HRA contemplates two forms of remedial order, one for nonurgent and one for urgent actions, each with distinct procedures.[66] The JCHR reviews remedial

[61] Feldman, *supra* note 56, at 336.

[62] Interviews, *supra* note 46.

[63] Interview with David Feldman, *supra* note 58.

[64] A remedial order may be triggered by a judicial declaration of incompatibility by a court in the U.K., followed by a written statement by all parties that they do not intend to appeal, the completion of any appeal process, or the expiry of the time limit for an appeal or, alternatively, a European Court of Human Rights finding against the United Kingdom that a legislative provision is incompatible with an obligation of the U.K. under the ECHR.

[65] *See* Human Rights Act 1998, c. 42, 10(2).

[66] *Id.*, Sch 2, paras 2–4. When the nonurgent procedure is being used, an order must be presented in draft and cannot be made until a draft has been approved by an affirmative resolution of each house. In urgent circumstances, an order may be made before it is presented to Parliament, but it ceases to have effect unless it is approved by an affirmative resolution of each house within 120 days of being made.

orders and makes recommendations to Parliament with respect to these in either circumstance.[67]

After reflecting on its initial experiences with reviewing a remedial order,[68] the JCHR made a number of recommendations relating to the process, urging that it be informed by the relevant minister of any judgments of the European Court of Human Rights in cases brought against the U.K. or of a declaration of incompatibility from a U.K. court within fourteen days of the court's decision. It also requested that it receive a statement indicating whether an appeal will made against the judicial declaration of incompatibility, and that it be informed by ministers of their preliminary view of the appropriate way to proceed once a declaration of incompatibility has become final.[69] The JCHR has also recommended a number of guidelines for distinguishing between urgent and nonurgent remedial orders. In its view, the ''decisive factor should be the current and foreseeable impact of the incompatibility on anyone who might be affected by it.'' This includes the significance of the rights that are affected by the incompatibility, the seriousness of the consequences for individuals or groups by allowing the continuance of an incompatibility with a right, the adequacy of compensation arrangements as a way of mitigating the effects of the incompatibility, the number of people affected, and alternative ways of mitigating the effect of the incompatibility pending amendment to primary legislation.[70] The government has generally accepted these recommendations (although the nonurgent form of remedy has not been used subsequently).

A fourth function some ascribe to the JCHR is that it provides legal advice to Parliament with respect to questions of bills' compatibility with rights. In the British system the attorney general is the legal adviser to government, and Parliament itself does not have an independent legal adviser with respect to the HRA. However, Lord Lester believes that the JCHR has effectively become Parliament's ''legal adviser on human rights.''[71] Lester characterizes the committee's scrutiny function as ''similar to the approach adopted by the courts in assessing claims of human rights violations.''[72] But this perspective may be contested. Some might interpret this as suggesting that Parliament

[67] For discussion of the relevant procedures see JCHR, SEVENTH REPORT, 2001–02, H.L. 58, H.C. 473, at paras. 14–23.

[68] The first remedial order made under the HRA involved an amendment to the Mental Health Act 1983. Its effect was to require that tribunals order the release of patients unless they are satisfied that the criteria for detention continue to be met. See JCHR, SIXTH REPORT, 2001–02, H.L. 57, H.C. 472.

[69] *Id.*; and JCHR, *supra* note 67, at 26–31.

[70] *Id.* at paras. 36–37.

[71] 636 PARL. DEB., H.L. (5th ser.) (2002) 1122. This view also revealed in interview with Lord Lester, *supra* note 47.

[72] Lester and Taylor, *supra* note 35, at 604.

operate as an adjunct to the judiciary and argue that, instead, the latter's role should be to provide a context or foundation enabling Parliament to engage in thoughtful debates about the appropriateness of proposed bills in terms of their effects on rights.[73] However, while these debates may have legal dimensions, in terms of addressing the scope of rights or the consequences of pursuing actions that are not compatible with rights, parliamentary evaluation is not confined to legal questions. Indeed, one purpose in retaining the principle of parliamentary sovereignty was to preserve the ability of Parliament to disagree with legal interpretations of how ECHR principles do or should constrain legislation.

While tension has arisen on the JCHR as a result of the differing perspectives of members with legal and nonlegal backgrounds, committee members interviewed did not consider this disruptive. Indeed, some believe it provides a healthy dynamic to the committee's work.[74] The case made for this perspective is the following. If the JCHR were influenced only by legal interpretations of rights, with little emphasis on questions of practicality or the legitimacy of different perspectives about how to define and respond to social problems, its advice might have diminished influence on the government, which may simply choose to take its chance in court, rather than try and satisfy the committee's list of legal concerns. On the other hand, if the committee emphasizes only the policy justification aspects of a bill, without giving due consideration to the severity or consequences of a possible rights infringement, its reports might not sufficiently pressure ministers to justify or reassess provisions where serious concerns of rights arise. The structure of the committee also works to its advantage, comprising as it does an equal number of unelected members, who have some leeway in the extent to which they must respond to the passions and concerns of the electorate, and elected members, who have a vested interest in being sensitive and accountable to public concerns.

4. Constraints faced by the JCHR

4.1. Problems of time

Time can be a significant constraint on the JCHR's ability to comment on bills, obtain responses to its queries, and publish a report early enough in parliamentary proceedings so as to provide useful assistance for parliamentary deliberations. It has used its reports to pressure ministers to be more sensitive to its tight time frame, particularly in terms of their responses to its queries. For example, in its second session, the committee was critical of the government's determination to push through a bill before the relevant minister had responded to the JCHR's queries. It considered the bill especially in need

[73] Interviews, *supra* note 46.

[74] *Id.*

of careful review because of the emotional nature of the debate (the bill was about changes to asylum and immigration rules) and the vulnerability of those affected.[75] As one member indicated, the JCHR had never before ''found it necessary to draw attention to so many serious issues affecting human rights in any of [its] previous reports.''[76] The JCHR argued that failure by ministers or departments to provide timely responses to its queries, particularly where a bill has ''substantial human rights implications,'' should result in a reassessment by the government's business managers regarding the timetable for bills proceeding through the House of Commons.[77] Where time constraints do not permit as full an inquiry as desirable, the JCHR instead publishes a special report, including the written evidence presented to it and correspondence with the responsible minister, so as to provide sufficient materials and context for subsequent parliamentary deliberation.

4.2. Quality of section 19 reports

Another constraint faced by the JCHR, as well as by Parliament, is the lack of sufficient information from ministers about why they believe a bill is compatible with Conventoin rights. Early ministerial reports under section 19 (1)(a) took the form of stark assertions of compatibility, with little if any explanation of the reasons for concluding that rights were not engaged or, if rights were engaged, little explanation why the proposed action should, nevertheless, be construed as a proportionate response to a compelling social problem. The JCHR has been critical of the section 19 explanations provided by the government[78] and, from the outset, has tried to get ministers to provide fuller

[75] JCHR, Seventeenth Report, 2001–02, H.L. 132, H.C. 961, at paras. 2–3.

[76] Lord Lester, 636 Parl. Deb., H.L. (5th ser.) (2002) 1125. At issue was the controversial Nationality, Immigration and Asylum Bill that, among other things, would allow the secretary of state, on the basis of subjective criteria, to withdraw British citizenship from someone who was born a British citizen; to establish the conditions for removal of an asylum seeker; to change the rules that govern support of asylum seekers; and to change the law for appealing immigration and asylum decisions, including making no appeal available in some circumstances. *See id.* at paras. 6–15.

[77] In its report, the committee recommended: ''In future, if a department cannot meet the deadline for replying to our questions about such a Bill, especially one which is programmed in the House of Commons, the Government's business managers should ensure that the Bill's timetable is set to give time for the Committee to Report.'' JCHR, *supra* note 75, at para. 4.

[78] The civil rights organizations Liberty and Justice have also criticized the government's prelegislative review for providing inadequate information for public evaluation of the merits of decisions that are claimed to be compatible with Convention rights, arguing that effective parliamentary scrutiny of human rights compliance should not be ''conducted in the dark, in ignorance of the government's reasons for its certification of human rights compatibility. Neither is it of assistance in ensuring human rights compliance if Parliament is required to engage in a guessing game to extract the government's views piece by piece by asking the right questions.'' *See* JCHR, *supra* note 50, at Appendice; and Jonathan Cooper & Roisin Pillay, Auditing for Rights: Developing Scrutiny Systems for Human Rights Compliance 78–79 (2001).

explanations justifying contentious legislative provisions. One member of the committee described the existing arrangement regarding compatibility statements as ''random and haphazard'' and suggested that a system should be established so that whenever a government publishes a bill, or a draft bill, the reasons why it is compatible or justified should accompany the bill in explanatory notes. This would not only assist the JCHR's legal adviser, when assessing a bill, but would also better inform both houses of Parliament in their subsequent evaluations.[79]

Initially, the government resisted the suggestion that more-detailed section 19 reports were necessary; it suggested that additional information about compatibility would conflict with the confidentiality of the government's legal advice.[80] The JCHR has resisted the implication that it is asking for confidential legal advice and has continued to press for additional information to accompany section 19 compatibility statements. For example, when Home Secretary Jack Straw was questioned by the committee about why the government was not more forthcoming in terms of the explanation and information that accompanies section 19 statements, he was also advised that in the absence of more-detailed explanations the JCHR would have to ''extract reasons from the Government on every Bill.'' He was further reminded that a fundamental objective of the Human Rights Act is to involve Parliament in judgments about rights. In the words of Lord Lester:

> I would be very grateful if both in relation to primary and subordinate legislation the Government could think harder about ways of making themselves more accountable to Parliament and not only to the courts. The philosophy of your Bill, which I entirely approve of, is to engage all three branches of Government, and not only courts and the executive. At the moment the missing player is Parliament, unless Parliamentarians have the energy and skill to raise the questions ad hoc.[81]

As a result of this pressure, the government has amended the guidance that departments are to draw upon when ministers make section 19 reports.[82]

[79] Lord Lester. JCHR, MINUTES OF EVIDENCE, *supra* note 10, at questions 26–28.

[80] The Rt Hon. Jack Straw MP, *id.*, at question 27.

[81] Lord Lester, *id.*, at question 28.

[82] This new guidance, which replaces the earlier paragraph 39, states that explanatory notes should now not only record the fact that a section 19 statement has been made but also briefly draw attention to the main Convention issues in the bill. Moreover, the notes should describe ''in general terms'' the most significant Convention issues ''together with the Minister's conclusions on compatibility.'' The guidance emphasizes that legal advice should not be disclosed. It suggests that in some circumstances it might be sufficient simply to state that an issue has been considered, and a particular conclusion reached, while in others, the notes referring to the policy justification for what is proposed should be provided. Finally, the amended guidance advises ministers that when a compatibility issue arises in debate, ''Parliament will continue to expect a detailed response... Ministers will wish to be as forthcoming as they can in meeting that

Ministers now provide more-specific explanatory notes, explaining which provisions implicate particular rights.[83] Nevertheless, the JCHR has continued to press for still more detailed explanations of why a minister believes that a bill is compatible.[84]

4.3. No requirement that ministers consider whether amendments are compatible

A potential constraint on the committee, and on parliamentary evaluation more generally, is that ministers are not required under the HRA to report on whether amendments to bills are compatible with rights. The JCHR has played an important role redressing this deficiency. In its very first report, evaluating the Criminal Justice and Police Bill of 2001, it indicated that it might be necessary to consider amendments introduced to bills during their passage through either house.[85] A good example of the importance of reviewing amendments for their compliance with rights is the Adoption and Children Bill. Although the bill did not raise concerns regarding rights, when first introduced,[86] the JCHR reversed its assessment in response to amendments proposed in the House of Lords.[87] The bill, as originally conceived, extended eligibility to adopt to any individual or couple, regardless of sex or sexuality, marital status, or cohabitation arrangement. The House of Lords amendment sought to restrict eligibility, in the case

expectation whilst abstaining from disclosing legal advice. In this way Parliament will be able to take the Convention rights into account as an integral part of normal debate.'' Cabinet Office Constitution Secretariat, *supra* note 36, and *Section 19 Statements: Revised Guidance for Departments*, *available at* http://www.dca.gov.uk/hract/guidance/guide-updated.htm.

[83] Interview with David Feldman, *supra* note 58. An example that demonstrates the nature of these explanations, including one of the rare instances of the government's revealing the legal advice it has relied on, may be seen in connection with the Civil Contingencies Bill.

[84] The JCHR acknowledged an improvement in the information accompanying a section 19 report when the minister of state at the Home Office provided a statement of the Police Reform Bill's compatibility with accompanying explanatory notes that included, in the committee's words, ''a rather fuller account of the Convention rights which the Government has taken into account in drafting the Bill and making a statement of compatibility than has previously been provided in such notes on other Bills.'' But the committee expressed the view that although this information ''enhances the value of the statement under section 19(1)(a) by showing which rights the Minister has considered,'' the notes still ''do not set out in very much detail the Minister's reasons for concluding that the provisions of the Bill were compatible with those rights. The Explanatory Notes would be of more use to each House if somewhat fuller reasoning were to be provided.'' JCHR, Fifteenth Report, 2001–02, H.L. 98, H.C. 706, at para. 4.

[85] JCHR, *supra* note 51, at para. 2.

[86] JCHR, Twenty-Fourth Report, 2001–02, H.L. 177, H.C. 979.

[87] JCHR, Ninth Report, 2001–02, H.L. 60, H.C. 574, at para. 9.

of couples, to those who were married. Upon reviewing this amendment, the JCHR reported that this ''blanket ban'' on same-sex couples violates rights.[88]

5. Assessing the JCHR

Assessing the JCHR's effectiveness is an inherently difficult task. Its influence is almost certainly both direct (actual amendments to bills) and indirect (contributing to a culture of rights, where public and political officials are more sensitive to the need to evaluate their own proposals and to justify their assumptions in terms of rights). Moreover, it is but one contributor to the project of facilitating a political culture of rights. Its reports both reflect and stimulate rights-based interventions by others. Thus, its influence cannot be treated as a stand-alone factor in the goal of ensuring rights sensitivity in governance.

Earlier, I suggested that one of the distinguishing characteristics of the HRA is its creation of dialectic tensions—between the government and Parliament and between Parliament and the judiciary—with respect to decisions about whether legislation is compatible with rights. It is the first arena of tension that is relevant here and provides a basis for assessing the JCHR's work and influence. The JCHR assumes a central role in this dialectical relationship, since one of its core functions is to facilitate broader parliamentary scrutiny and debate about whether bills are compatible with rights; whether amendments should be made; whether legislation should be passed, despite potentially adverse implications for rights; and what remedies are appropriate in the face of a judicial declaration of incompatibility.[89]

5.1. Scrutiny of Antiterrorism Bill

The JCHR indicated very early that it regarded its mandate as one of considerable importance in contributing to the protection of rights in the U.K. While reviewing proposed antiterrorism legislation, the JCHR referred to its role as that of ''parliamentary guardian'' of the HRA and emphasized the importance of protecting the ''core values of a democratic society such as individual autonomy, the rule of law, and the right to dissent,'' which ''must not lightly be compromised or cast away.''[90]

[88] JCHR, *supra* note 86, at paras. 16 & 17.

[89] Many civil liberties organizations also make reference to JCHR reports when providing their own critical assessments of bills. See, as one example, the Mental Health Act Commission, which cited with approval a JCHR recommendation that the government publish the risk factors and their reliability in assessing ''dangerousness'' and referred to the JCHR's report on the creation of a human rights commission. Mental Health Act Commission, *Placed Amongst Strangers*. Tenth Biennial Report, briefing note for the press, Dec. 1, 2003.

[90] JCHR, Second Report, 2001–02, H.L. 37, H.C. 372, at para. 5.

The JCHR's review of the Government's controversial Anti-Terrorism, Crime and Security Bill, one of its first undertakings, helped establish its position and reputation as an important component in the HRA project of facilitating a rights culture within government. The Bill proposed extensive changes to the law on immigration and asylum that raised a number of concerns about its compatibility with rights, the most controversial being the provision that enabled the indefinite detention without trial of certain foreign terrorist suspects who could not be deported on human rights grounds (an action that required the government to derogate from the ECHR).[91]

Undaunted by governmental assertions of the powers it would now need to ''counter the threat from international terrorism''[92] and respond to the terrorist attacks on the U.S. on September 11, 2001, the committee questioned the rights compatibility of many elements of the bill, asked the home secretary to explain and justify why it was necessary to derogate from the ECHR, and reported to Parliament in a nonpartisan manner (in a report that also provided a useful summary of the bill, along with a transparent account of the questions asked of the minister and his replies). The committee was exceedingly efficient in its review. With its timetable driven by the government's stated intention to pass the legislation quickly, and the committee's determination to arm Parliament with sufficient information to deliberate on whether the bill was justified from a rights perspective, it questioned the home secretary two days after the bill was introduced and published its initial report two days later.

The JCHR approached this controversial bill from the position that ''any novel powers which are proposed'' should be clearly directed toward ''combating a novel threat, and should not be used to introduce powers for more wide-ranging purposes which would not have received parliamentary support but for current concerns about terrorism and fear of attack.''[93] After hearing from the home secretary, the JCHR reported that it was not convinced the derogation order was warranted. It characterized the U.K.'s armor of antiterrorism measures as ''the most rigorous in Europe'' and reminded Parliament that ''no other Member State of the Council of Europe has so far felt it to be necessary to derogate from Article 5 in order to maintain their

[91] Article 3 ECHR prohibits a government from deporting foreign nationals without regard to the possibility that their rights to be free from torture or other inhuman and degrading treatment might thereby be infringed. However, article 15 states that derogations may be made from article 5, which guarantees the right to liberty in times of war or public emergency threatening the life of the nation, to the extent strictly required by the exigencies of the situation. Thus, the government considered it a proportionate response to the security threat posed by the foreign nationals to detain them indefinitely by entering a derogation under article 15. For a summary of the effects of the act, see *id.*

[92] The Rt. Hon. David Blunkett MP, 372 PARL. DEB., H.C. (6th ser.) (2001) 923.

[93] JCHR 2001–02, *supra* note 90, at. para. 5.

security against terrorist threats.''[94] It recommended that Parliament give serious thought as to whether the threat to the United Kingdom justified this order and, even if it did, whether safeguards should be introduced into the bill in light of the seriousness of the deprivation of liberty to those who are detained indefinitely.[95]

In addition to its concerns about the derogation order, the JCHR focused on the overly broad definition of ''terrorist,'' especially in light of the indefinite detention of suspects. The committee was equally concerned, in this regard, with the lack of due process when appealing a ''certificate'' identifying a person as an international terrorist; the lack of a requirement that suspicions or beliefs be reasonable when determining who constitutes a terrorist; the requirement that fingerprints be taken from immigrants and intending immigrants; the retention of these fingerprints after their cases are resolved; the lack of appropriate safeguards against abuse of the fingerprint database; the lack of sufficient safeguards on new police powers to detain and search suspects; and the creation of police powers to require anyone to remove items that may conceal identity, which may be a matter of sensitivity on religious grounds and disproportionate to the problem they seek to remedy.[96]

The JCHR's report was used in parliamentary deliberation in both houses. A sizeable portion of the Labour backbench opposed aspects of the bill, particularly the derogation order and the lack of judicial review for detention orders. Despite serious doubts about the merits of the bill, as proposed, it was rushed through all stages of the House of Commons, which had only sixteen hours to deal with 126 clauses and eight schedules in the complex bill.[97] Two weeks after its initial report, the committee revisited the bill and provided a further report,[98] which, along with the release of several other reports and publications,[99] provided a rich foundation for renewed debate about the bill, which was now at the committee stage in the House of Lords.

The government felt compelled to make some amendments that reflected JCHR concerns. For example, while the government refused to change its

[94] *Id.* at para. 30.

[95] *Id.*

[96] *Id.* at paras. 17–68.

[97] Feldman, *supra* note 56, at 346.

[98] The JCHR expressed the criticism that it had insufficient time to scrutinize such important legislation and issued a second report to draw attention to those concerns it had raised earlier as well as others not previously commented on but which, on further reflection, caused great concern. JCHR, Fifth Report, 2001–02, H.L. 51, H.C. 420, at paras. 2–3.

[99] These included the reports of the House of Commons Home Affairs Select Committee, the House of Lords Constitution Committee, and the House of Lords Delegated Powers and Regulatory Reform Committee. See Home Affairs Committee, First Report, 2001–02, H.C. 351; Constitution Committee, Second Report, 2001–02, H.L. 41; and the Delegated Powers and Regulatory Review Committee, Seventh Report, 2001–02, H.L. 45. As revealed in JCHR, Fifth Report, 2001–02, *id.*

position with respect to the derogation order,[100] it introduced a legal requirement for reasonableness relating to a decision to certify a person as a suspected international terrorist,[101] modified the overly broad definition of a terrorist suspect, and introduced a sunset clause.[102] The JCHR subsequently conducted a further inquiry into the antiterrorism legislation and reported its concerns that the ''long term derogations from human rights obligations have a corrosive effect on the culture of respect for human rights''; it urged public and parliamentary debate about the responses to terrorism to ''take place within a human rights framework.''[103]

In the end, however, the biggest impact on this legislation did not arise from parliamentary pressure but from judicial review. On December 16, 2004, the British law lords characterized the detention scheme as draconian and ruled that it was incompatible with the European Convention on Human Rights because it ''discriminates on the ground of nationality or immigration status'' by justifying detention without trial for foreign suspects, but not British suspects.[104] Of the concept of indefinite detention, one law lord (Lord Nicholls) stated that ''[i]ndefinite imprisonment without charge or trial is anathema in any country which observes the rule of law,''[105] while another (Lord Hoffmann) suggested that the measures in the act itself comprised a graver threat to the nation than the threat of terrorism: ''The real threat to the life of the nation, in the sense of a people living in

[100] In parliamentary debate, the suggestion was made that if the Government's only purpose in detaining people was to ensure there was a safe country to which they could go, then there might not be any need for the derogation order. In its follow-up report, the JCHR indicated that it remained unconvinced that the government had presented a compelling justification for the derogation order. It recommended that the government clarify the purpose of its power to detain foreign suspects, so that this power would be used only where ''the government has concluded that it would be impossible or inappropriate to prosecute the person, and is seeking diligently for a safe country.'' *Id.* at paras. 4–6.

[101] Nevertheless, the committee still has concerns about ''other changes, which could permit a person to be detained indefinitely, even after new evidence or a change of circumstances shows no basis for this detention'' JCHR, *supra* note 98, at paras. 8–15.

[102] The original proposed definition referred to people who have ''links with'' an international terrorist or international terrorist group. The amended version limits this to people who have links with international terrorist organizations, explaining in a subclause that a person has links with such an organization if he or she ''supports or assists'' it. The committee suggested that, to avoid infringing rights, the word ''supports,'' would have to be interpreted as meaning ''supports in a material or active way.'' Under the sunset clause, the detention provisions in clauses 21 to 23 of the bill will cease to have effect at the end of November 10 2006. *Id.* at paras. 19–20.

[103] JCHR, EIGHTEENTH REPORT, 2003–04, H.L. 161, H.C. 537, para. 3.

[104] A (FC) and others (FC) v. Secretary of State for the Home Department [2005] 2 W.L.R. 87 (HL).

[105] *Id.* at para. 74.

accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.''[106]

The government, faced with the twin pressures of responding to the ruling and the imminent lapse of the now-impugned indefinite detention provisions,[107] introduced the Prevention of Terrorism Bill in February 2005. Although Charles Clarke, the secretary of state for the Home Department, made a statement of compatibility with the ECHR,[108] the JCHR raised serious doubts about whether the bill was, indeed, compatible. The bill proposed new coercive measures known as ''control orders'' which, in certain cases, would allow terrorist suspects to be placed under house arrest without prior judicial authorization. It also proposed a wide range of restrictions on the movements, associations, and expression of terrorist suspects.

The JCHR conducted two reviews of the bill, including proposed amendments, and raised questions about the justification for home detention, particularly in light of the home secretary's indication that there was, currently, no need to derogate from article 5 of the ECHR. It also expressed serious concerns that these restrictions on liberty would be authorized by politicians, not judges, who might be more interested in satisfying public security concerns that protecting the liberty of individual suspects.[109] The bill was subject to heated debate in both houses, with the House of Lords exerting strong pressure for amendments to ensure that judges authorize control orders, and that there be a higher threshold required for their issue as well as a sunset clause. The bill was finally passed after the government agreed to allow judges to authorize these control orders and giving assurance that the legislation would be reviewed within a year.

5.2. Scrutiny of Nationality, Immigration and Asylum Bill

One measure of the JCHR's effects may be seen in the use Parliament makes of its reports. Increasingly, parliamentarians refer to JCHR reports in their deliberations, although this occurs more often in the House of Lords than the Commons and is more likely to happen among opposition members or cross-benchers than government party members.[110]

[106] *Id.* at para. 97.

[107] The existing detention provisions would otherwise have expired on March 14, 2005, owing to the requirement that the derogation order be subject to annual Parliamentary renewal.

[108] HC Bill 61 (2005).

[109] JCHR, NINTH REPORT, 2004–05, H.L. 61, H.C. 389 and TENTH REPORT, 2004–05, H.L. 47, H.C. 333.

[110] A lesser emphasis on party discipline in the House of Lords is considered a principal reason why its members are more willing than members in the House of Commons to take up issues or concerns raised by the JCHR in parliamentary deliberation. Interviews, *supra* note 46.

A good indication that the JCHR's work is considered an important part of the deliberative process concerning compliance with the HRA is a suggestion made in the House of Lords, that amendments should not be made to a controversial bill until the committee's views have been heard. At issue was the question of whether the Nationality, Immigration and Asylum Bill of 2002 was compatible with the HRA. As discussed earlier, the JCHR was critical of the government's handling of this bill, given the latter's failure to provide ministerial replies to the JCHR's queries within the designated period.[111] When the bill reached the House of Lords, some members made it clear they wanted to hear from the JCHR, particularly in light of indications that the home secretary intended to introduce additional changes.[112] These proposed changes, which prompted the United Nations High Commission for Refugees to brief peers about their adverse effects,[113] led to statements in the House of Lords that the JCHR should have an opportunity to review the amendments[114] and to suggestions that the bill be recommitted so that the new amendments could receive careful evaluation.[115]

The JCHR subsequently evaluated these proposed amendments and identified several concerns. These included the potential denial of the right to adequate housing, food, and clothing; the possible separation of members of a family; the absence of support pending an application for judicial review; insufficient safeguards for human rights, such as the lack of any appeal to an adjudicator against a decision denying support; threats to the privilege against self-incrimination; and inadequate safeguards if people are removed to countries deemed to be safe.[116] Although the House of Lords was able to pressure the government into making amendments, many concerns remained that rights were adversely affected.[117]

5.3. Asylum and Immigration (Treatment of Claimants) Bill

Even more controversial was the Asylum and Immigration (Treatment of Claimants) Bill, introduced the following year, which altered some aspects

[111] JCHR, Seventeenth Report, *supra* note 75, at para. 4.

[112] David Blunkett, *We are a haven for the persecuted, but not a home to liars and cheats*, The Times, Oct. 7, 2002, at 18.

[113] JCHR, Twenty-Third Report, 2001–02, H.L. 176, H.C. 1255.

[114] 639 Parl. Deb., H.L. (5th ser.) (2002) 14, 17.

[115] *Id.* at 17. The recommendation for recommission was agreed to on October 9, 2002. 639 Parl. Deb., H.L. (5th ser.) (2002) 263.

[116] JCHR, *supra* note 113, at para. 49.

[117] Among these were ambiguity in the legislation about whether there is a right of appeal if the secretary of state certifies that the claim of a violation of a Convention right is clearly unfounded, and the possibility of removing individuals from the United Kingdom prior to their having an opportunity to challenge the Home Office's decision before an independent and impartial tribunal. See *id.*, at paras. 32–34; and JCHR, *supra* note 75, at para. 98.

of the Nationality, Immigration and Asylum Act. The most contentious issue was the proposed removal of judicial review, popularly referred to as the ''ouster'' clause. The government intended to replace the existing asylum and immigration appeal and the review systems with a single-level appeal process.[118] Also controversial was the bill's intent to remove support for families, which could lead the state to remove children from their families.[119]

This bill represented the fifth asylum and immigration bill in eleven years and the third since the Labour government came to power in 1997.[120] The government's intentions were to prevent unfounded asylum claims and appeals, to speed up the processes for dealing with asylum and immigration applications, appeals, and removals, and to reduce the overall costs. The JCHR produced two reports on this bill: an initial assessment[121] and a more complete evaluation, including its reflections on the minister's response to its earlier questions and on the amendments made to the bill in committee.[122] In its initial assessment the JCHR expressed grave concern that the bill would restrict remedies available under the HRA. The bill would remove all appeals to and judicial review by the ordinary courts in immigration matters and would exclude habeas corpus applications in immigration cases.[123] In its letter to the home secretary, the JCHR asked why the government believed that making the proposed tribunal the final arbiter of a claim that the tribunal itself has violated a Convention right should be thought compatible with ECHR, article 13.[124] The JCHR raised other questions, querying the presumption that certain countries can always be regarded as ''safe'' in relation to the refugee convention or rights under the

[118] At the time of the bill, the U.K. was served by a multitiered system, in which the initial decision by an immigration officer may be subject to administrative review, appeal to an adjudicator, further appeal to an Immigration Appeal Tribunal on a point of law, and finally subject to judicial review by the High Court (with appeals, where permission is granted, to the Court of Appeal and House of Lords) or appeal to the Court of Appeal (Civil Division), followed by a final appeal (with leave) to the House of Lords. JCHR, FIFTH REPORT, 2003–04, H.L. 35, H.C. 304, at para. 52.

[119] The bill also proposed the creation of further criminal offenses for asylum seekers arriving without documentation; the extension of the definitions of ''safe countries''; restructuring the immigration and asylum appeals system; withdrawal of asylum and other support from families who have been refused asylum and refuse to leave the U.K.; giving immigration officers more powers of arrest, search, and seizure; the introduction of electronic tagging for asylum and immigration detainees; allowing higher fees for immigration applications; and giving the Immigration Services Commissioner more powers to regulate immigration advisers. *Id.* at para 42.

[120] *Asylum and Immigration: The 2003 Bill*, Research Paper 03/88, Library of House of Commons, Dec. 11, 2003.

[121] JCHR, *supra* note 51.

[122] JCHR, *supra* note 118.

[123] JCHR, *supra* note 51, at para. 1.23.

[124] *Id.* at Appendix 1, question 8.

ECHR;[125] the bill's reversal of the burden of proof when making a claim to have had a reasonable cause in destroying an immigration document;[126] and the possible discriminatory effects of imposing fees for immigration applications.[127]

In response to these queries, the minister of state at the Home Office indicated that the government would consider ''whether any amendment is necessary" to ensure that refugee claimants who do have proper and justifiable reasons for arriving without documentation are not penalized,[128] and that it would also consider amending the legislation to address the JCHR's concerns that the bill adversely affects the remedy of habeas corpus and restricts the right of a person to damages where he or she has been unlawfully detained.[129] But the JCHR was concerned about other rights infringements that the government was not prepared to address. Most significantly, it was not satisfied that the removal of review jurisdiction of the High Court was appropriate, and it considered this to constitute a fundamental violation of the rule of law and the British constitution:[130]

> Ousting the review jurisdiction of the High Court over the executive is a direct challenge to a central element of the rule of law, which includes a principle that people should have access to the ordinary courts to test the legality of decisions of inferior tribunals. [The bill] seeks to make the immigration and asylum process operate outside normal principles of administrative law and legal accountability. This sets a dangerous precedent: governments may be encouraged to take a similar approach to other areas of public administration.[131]

[125] *Id.* at para. 1.11.

[126] *Id.* at Appendix 1, 24–25.

[127] *Id.* at para. 1.21.

[128] JCHR, *supra* note 118, at Appendices, 36.

[129] As the minister explained:

> [T]he Government recognises, on considering the Committee's view of the effect [of the bill] that [it] may be capable of being interpreted as restricting access to the courts to a greater extent than is intended. Its intended purpose is to prevent a person who has unsuccessfully appealed to the Tribunal against an immigration decision, or who had a right of appeal to the Tribunal which he did not exercise, from disputing subsequently the lawfulness of the immigration decision. . . . It is not intended that [the relevant clause] should affect the remedy of habeas corpus nor any right the person has to damages where he has been unlawfully detained. Nor is it intended to exclude judicial review where a person has no right of appeal against a particular immigration decision. The Government will give consideration to amending this subsection to make its scope clearer. *Id.* at 45.

[130] *Id.* at para. 58.

[131] *Id.* at para. 57.

The JCHR was also not convinced that withdrawing support for rejected asylum claimants was consistent with rights and reminded Parliament that English courts have ruled that withdrawing support from a destitute asylum seeker can be construed as subjecting the person to inhuman or degrading treatment.[132]

The JCHR was, by no means, the only critic of the intent to stop the courts from reviewing asylum cases.[133] The bill outraged the highest echelons of the judiciary, as well as lawyers, academics, and civil liberties organizations, leading to expectations that a constitutional crisis would arise if the government insisted upon removing the review jurisdiction of the High Court. Lord Woolf, in a public lecture, made a particularly damning statement of the ouster clause, when he stated ''the implementation of the clause would be a blot on the reputation of the Government and undermine its attempts to be a champion of the rule of law overseas.''[134]

The government subsequently gave into the strong pressure to abandon its ouster clause. Lord Falconer, the current lord chancellor, informed the House of Lords that the government was ''prepared to bring forward amendments to replace the judicial review ouster with a new system allowing oversight by the Administrative Court in those decisions.'' This came after having listened to arguments by Lord Irvine of Lairg (the previous lord chancellor), debate in the House of Commons, and the reports of the JCHR and the Select Committee for Constitutional Affairs and by the Joint Committee on Human Rights.[135]

6. Conclusions

The HRA represents an important contribution to the international collection of rights-protecting instruments. A conventional view of how a bill of rights operates assumes that rights-based scrutiny only occurs after legislation has been passed and that only courts are actively engaged in such scrutiny. The HRA, on the other hand, is based on the expectation that all institutional

[132] The JCHR reported that the withdrawal of support could conflict with art. 3 of the ECHR and that the Home Secretary had a duty under section 6 of the HRA, when exercising his discretion, not to withdraw support if the consequences of so doing would leave an asylum seeker in a situation verging on a condition that would engage art. 3. *Id.* at para. 35.

[133] For a hint of the opposition to the clause, see *Immigration Wars*, THE GUARDIAN, Mar. 2, 2004, http://www.guardian.co.uk/law/story/0,3605,1159935,00.html, and Immigration Law Practitioners' Association, *A Briefing for Peers on the Asylum and Immigration (Treatment of Claimants, etc.) Bill, available at* http://www.ilpa.org.uk/briefings/ILPAHL2ndR.htm.

[134] Lord Woolf, The Lord Chief Justice of England and Wales, Squire Centenary Lecture: *The Rule of Law and a Change in the Constitution*, 63 C.L.J. 317–330 (2004), delivered at Cambridge University (Mar. 3, 2004).

[135] The Lord Chancellor Lord Falconer, 659 PARL. DEB., H.L. (5th ser.) (2004) 51.

actors will partake in rights review. Herein lies its innovation. Under the HRA, the government, Parliament, and public officials all have responsibilities to evaluate the rights dimension of their actions, both before and after judicial review. Thus, the claim that the HRA represents a new model rests on its attempt both to initiate and disperse responsibility for rights review earlier in the policy process and among a broader spectrum of institutional actors than is normally associated with a bill of rights.

It may take many years to assess properly the effects of the HRA; specifically, its goal of facilitating a culture of rights throughout government, Parliament, public authorities, and the judiciary. This assessment will necessarily be broad in scope, examining what changes have occurred in the behavior and practices of all who exercise public power. This paper has focused on one important dimension of this project: How is the HRA affecting Parliament?

It is ironic that although parliamentary weakness contributed to declining confidence in the traditional British approach for protecting rights, Parliament assumes a central role within this new rights project, which consists, essentially, in assessing ministerial statements of compatibility and deliberating about the justification of bills, not only in the normal policy and political context but also in terms of their compatibility with rights. Yet no formal structural changes have been made to mitigate the domination of Parliament by the executive. Still, the U.K. addresses some of the deficiencies in the earlier expressions of this model in Canada and New Zealand with respect to the role and effectiveness of Parliament when evaluating bills from a rights perspective. It does this by creating a specialized rights committee with independent legal advice and a bicameral composition that allows for a measure of independence from governmental and/or partisan pressures.

The HRA's ambitious goal of discouraging rights abuses rests on the hope that creating multiple sites of rights review will influence institutional behavior. In short, it is hoped that the requirement that ministers report to Parliament on the compatibility of bills will encourage department officials to undertake careful assessments of legislative initiatives; that parliamentary scrutiny will add to the pressure to conduct careful ministerial review, will challenge or clarify the justification of bills and, where appropriate, put pressure on the government to amend bills; and that judicial review of impugned legislation will catch serious breaches of rights, resulting in declarations of incompatibility that prompt political reassessments.

No one can reasonably expect that a government checking itself will engage in a rights review that is as robust as would occur with a different set of critical eyes similarly assessing legislative initiatives. Concentration of power in the executive, short-term objectives, and electoral calculations may combine to produce bills that unduly compromise rights, even where a government's general commitment to respect rights is genuine. The JCHR

provides one important critical counterpoint (interest-group pressures and public opinion more generally, as well as the judiciary, provide others).

Earlier, I suggested that for the work of a parliamentary rights committee to be taken seriously within and beyond Parliament, four conditions are essential. First, its reports must be perceived as being motivated by principled, not partisan deliberations. Second, it must be able to review bills and report back to Parliament within a time frame that allows Parliament to make use of its guidance. Third, it must be generally independent of government influence. And fourth, the committee must command the respect of other parliamentarians, and its reports must be taken seriously in parliamentary deliberations. More research is required to fully assess the JCHR's performance. Will it continue to operate in a nonpartisan manner, for example, and produce reports that avoid bias in terms of particular categories of rights that are addressed or ignored? This preliminary account supports the conclusion that these conditions are generally being met.

Although some might be discouraged that the serious rights concerns identified by the JCHR have not always led to changes to bills, particularly on issues of asylum and detention, it is premature and overly restrictive to measure the committee's effectiveness solely in terms of whether a causal relationship exists between its reports and legislative amendments. The task of changing or adapting a political culture is a long-term project, best measured in small steps such as creating and abetting an awareness within Parliament of the implications of legislation for rights, encouraging civil society to participate in public debates about the appropriateness or justification of government actions, and creating expectations that governments should explain and justify their actions from a rights perspective.

The creation of the JCHR and how it broaches its mandate represent the kinds of steps necessary to facilitate a culture of rights. Although the JCHR is certainly not the only body to raise questions about whether bills are compatible with rights, it is difficult to discount its contribution to the development of this ambitious goal. The regularity of its reports and questions to ministers signal to departments the importance of conducting, in a sufficiently robust manner, their own audits for section 19 purposes in order not to be the subject of a subsequent JCHR inquiry. The JCHR's determined efforts to change the nature of section 19 reports, seeking more-detailed information about why a minister believes bills are compatible with rights, and the constant pressure it exerts for timely ministerial replies to its queries, have contributed to greater transparency and more complete information for parliamentary deliberation. Finally, the JCHR's reports combine critical and nonpartisan assessments of the human rights implications of bills with a transparent account of queries to and replies from the ministers involved. As such, these documents contribute a valuable and timely resource during the crucial parliamentary deliberative process. While there can be no

guarantees that the HRA will be successful in protecting rights from the ''tyranny of convenience,''[136] the JCHR has assumed an important supporting role in the ambitious project of developing a culture of rights within and beyond government.

[136] This phrase is taken from a report written a decade ago, advocating a bill of rights, which pointed to a growing concern about the protection of civil liberties arising from ''a series of policies and decisions in which the rights of individuals have been overridden in the assumed interests of public policy.'' *A British Bill of Rights*, Institute for Public Policy Research, Constitution Paper No. 1, at 5 (1994).