Response to the Second Consultation by the Commission on a Bill of Rights

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28th September 2012

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Introduction

Garden Court Chambers is a multi-disciplinary set which has always been driven by strong ethics and a passionate belief in human rights and social justice. This ethos is reflected in the work we do. Chambers was formed almost 40 years ago by a small group of forward thinking lawyers including Baroness Helena Kennedy QC. It is now 140 strong but remains committed to its founding principles. Barristers in Chambers are very experienced in human rights ligation both pre- and post-the Human Rights Act (HRA) 1998 and thus well positioned to respond to the second consultation by the Commission on a Bill of Rights[1]. Our experience demonstrates how the HRA 1998 can assist ordinary individuals in their daily lives, for example, by enabling people to obtain a sufficient level of social services to protect basic health and dignity, by ensuring appropriate scrutiny where a person is deprived of their liberty in a care home, by ensuring that people are not needlessly evicted from their homes without justification, and by ensuring that an inquest is conducted where a question arises over whether adequate care was provided in a psychiatric hospital. These are but a few examples of the areas in which we see the HRA 1998 having a beneficial effect for ordinary people.

[1] http://www.justice.gov.uk/downloads/about/cbr/second-consultation/cbr-second-consultation.pdf

Question 1

What do you think would be the advantages or disadvantages of a UK Bill of Rights? Do you think that there are alternatives to either our existing arrangements or to a UK Bill of Rights that would achieve the same benefits? If you think that there are disadvantages to a UK Bill of Rights, do you think that the benefits outweigh them? Whether or not you favour a UK Bill of Rights, do you think that the Human Rights Act ought to be retained or repealed?

1. Question 1 may be founded on a false premise. The false premise being that the European Convention of Human Rights and Fundamental Freedoms (the Convention or ECHR) as incorporated into domestic law by the HRA 1998 is not a UK or "British" Bill of Rights. The history of the development of the Convention is identified in the attached debate which occurred recently in the House of Lords. The Convention is of UK origin and the debate opens with statement of Lord Irvine of Lairg:

   "My Lords, my purpose is to dispel some of the many myths peddled about human rights. In fact it is the Conservative Party, not Labour, that can make the strongest claim to credit for the European convention. Its main proponents were Churchill, Macmillan and John Foster, with some Liberal and Labour support. Its principal author was David Maxwell Fyfe, the future Conservative Chancellor, Viscount Kilmuir. The convention was substantially the work of British jurists within a tradition going back to the Petition of Right of 1628 and our own Bill of Rights of 1689."

   He later commends reading of the following text:

   "To Conservative critics of the Convention and the Act, I recommend the recent short study by Norman and Oborne, Churchill's Legacy: The Conservative Case for the Human Rights Act. They detail the history and debunk the myths. They emphasise that, "A large element of the selling power of some British newspapers depends on their ability to break stories about the private lives of celebrities",
   and conclude that,
   "it is unlikely that reform of the HRA would be on any political agenda, were it not for the potent advocacy of the most powerful media groups in the country".
   In Chapter 4, "Dispelling the Myths", they accuse the media of a culture of deception about the Act since the media believe that they have an interest in its destruction because of its protection of privacy in Article 8:
   "Any politician who denounces the HRA, however incorrectly, is generally guaranteed a round of applause from the press".
   They say that a politician who argues the contrary, "tends to get pilloried"."

2. It would seem that some of the concerns expressed here are the subject matter of the Leveson Inquiry and the relationship of the Press to the Political Elite. It is our position that the Convention and the HRA 1998 clearly already constitute a UK Bill of Fundamental Rights. In the commentary to the consultation paper (para 17) it is stated that:

   "…a UK Bill of Rights would have an important symbolic and emotional appeal to the public that they believe that the Human Rights Act has lacked".

The simple response to this point is dealt with by reference to the House of Lords debate and that is (1) the Convention and HRA 1998 has been deliberately misrepresented by politicians and those with vested interests and (2) it is time for all politicians to tell the truth about the Convention and its origins and focus on its benefits.

3. The disadvantages of a new UK Bill of Rights are such that it would create confusion in respect of the existing jurisprudence and the development of domestic law. Again the question shows a fundamental misunderstanding as to how the Convention and the HRA 1998 work. The Convention and its jurisprudence offer a "floor" of fundamental rights and the HRA 1998 provides, by incorporation, for those rights to be developed domestically by the courts, Parliament, devolved Parliaments and assemblies and other public authorities. In this context there can be no advantages to developing a UK Bill of Rights as the Convention and the HRA 1998 as drafted provides for this already. The HRA itself is a UK Bill of Rights.

4. There does not seem to be any realistic, practical or other alternative. The present arrangements accord with a common sense view of how the law should develop in the UK and are a cornerstone to the UK remaining a member of the Council of Europe and the European Union. We note that there is no proposal to withdraw from the Convention. So long as the UK adheres to the Convention, its incorporation into UK law makes perfect sense. As well as incorporating basic values, that avoids issues being dealt with in Strasbourg which can be dealt with satisfactorily and brought to a more speedy conclusion in the UK Courts.

5. If the provisions of the Convention and the HRA 1998 are properly understood, and are given the backing from the politicians which they deserve, then there ought to be no need to consider the adoption of a UK Bill of Rights.

6. We consider the HRA 1998 ought to be retained.

Question 2
In considering the arguments for and against a UK Bill of Rights, to what extent do you believe that the European Convention on Human Rights should or should not remain incorporated into our domestic law?

7. The Convention is incorporated into domestic law by the HRA 1998. A proper analysis of the HRA 1998 protects Parliamentary Sovereignty and the "authority" of the Convention over domestic law is one of persuasive but not binding precedent on the domestic courts. Further, Parliament remains sovereign in respect of issues of compliance.

8. This arrangement could only be altered in one of two ways:
   (1) to enhance the status of the Convention rights so that they have direct effect and supersede UK law as with certain Treaties of the European Union. That could require the establishment of a separate legislature and court with a binding jurisdiction which would seem undesirable from the point of view of developing domestic rights from a floor of rights; or
   (2) to seek to diminish compliance with the Convention as an international instrument and to ignore the rulings of the Strasbourg Court. This option would seem highly undesirable (a) as a matter of non-compliance with the concept of the "rule of law" and (b) politically in terms of the UK Government having any meaningful status in promoting fundamental rights in other countries in the world while diminishing them at home.

9. The present arrangement under the HRA 1998 provides a satisfactory balance.

Question 3

If there were to be a UK Bill of Rights, should it replace or sit alongside the Human Rights Act 1998?

10. First of all, as we hope is clear from our answers to Questions 1 and 2, we are not in favour of a Bill of Rights. We are content with the HRA 1998 as it is currently drafted. Even if there were a UK Bill of Rights, it should not replace the HRA 1998 but should act to strengthen and enhance those rights already incorporated. In any event this could be achieved by amending the HRA 1998.

Questions 4 and 5

Should the rights and freedoms in any UK Bill of Rights be expressed in the same or different language from that currently used in the Human Rights Act and the European Convention on Human Rights? If different, in what ways should the rights and freedoms be differently expressed? What advantages or disadvantages do you think there would be, if any, if the rights and freedoms in any UK Bill of Rights were expressed in different language from that used in the European Convention on Human Rights and the Human Rights Act 1998?

11. The rights and freedoms should be expressed in the same language as used in the HRA 1998 and the Convention. This would avoid confusion and conflict with the Convention Rights. The current "confusion" which is presented at paragraphs 22-25 of the consultation paper is not recognised by practitioners when explaining these rights to lay clients or the courts. The concepts and principles underlying these rights are well understood. The risk posed by having a separately worded document on UK Rights alone is that it would, in our view, enhance the risk of conflict and also show a fundamental misunderstanding as to how the Strasbourg Court and its Jurisprudence operates. The Strasbourg Court is there to provide rulings for a "floor" of rights which applies across all the signatories of the Convention and not merely to address the individual domestic situation.

12. There do not seem to be any advantages to a separate UK Bill of Rights at present as the existing arrangements fit with the present constitutional arrangements. A separate written document would merely add to confusion, create a climate of inconsistent decision making and create uncertainty as to the law and its development.

Questions 6 and 7

Do you think any UK Bill of Rights should include additional rights and, if so, which? Do you have views on the possible wording of such additional rights as you believe should be included in any UK Bill of Rights? What in your view would be the advantages, disadvantages or challenges of the inclusion of such additional rights?

13. We find it difficult to accept that there is any political will to enhance the basic rights enshrined in the HRA 1998, given that the UK has not yet ratified all the additional rights already available in the Protocols to the ECHR and has not yet removed certain reservations to international treaties that it has signed.

14. For the reasons we have already given we do not consider that the Commission should recommend that the Government amend the HRA 1998 or adopt a Bill of Rights.

15. We note the Commission's reference to proposals that have been made for additional rights to be contained within a Bill of Rights. In our view most of those rights are already adequately protected by the HRA 1998, other legislation and our judicial system.

16. Those that are not yet adequately protected would be if only the Government ratified all the Protocols to the ECHR and removed certain reservations to international treaties.

17. With those points in mind we make the following observations on some of the specific proposals.

A Right to Equality

18. Like the Joint Committee on Human Rights (JCHR), we believe that the UK should sign up to and ratify Protocol 12 of the ECHR (as opposed to introducing a new right to equality in a Bill of Rights). In its Seventeenth Report (23 March 2005)[2], the JCHR made the following observations and recommendations:

[2] http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/99/9902.htm

*“**Protocol 12 ECHR***

29. Protocol 12 to the ECHR guarantees a free-standing right to equality. It states—

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

30. Protocol 12 is designed to advance the ECHR's protection of equality beyond the relatively limited guarantee in Article 14, which guarantees a right to non-discrimination only in the enjoyment of other rights under the Convention. For Article 14 to apply, therefore, it must be established that the difference in treatment falls within the scope of one of the other Convention rights.

31. Protocol 12 comes into force for those states that have ratified it on 1 April 2005.[39] The UK has not, however, signed or ratified the Protocol. In the Report of the Review, the Government states that whilst it agrees in principle that the ECHR should contain a free-standing guarantee of non-discrimination, it considers that the text of Protocol 12 contains "unacceptable uncertainties", in particular—

- *The potential application of the Protocol is too wide, since it covers any difference in treatment, applies to all "rights set forth by law" in both statute and common law and could therefore lead to an "explosion of litigation";*
- *"Rights set forth by law" may extend to obligations under other international human rights instruments to which the UK is a party;*
- *It is unclear, pending decisions by the ECtHR, whether the protocol permits a defence of objective and reasonable justification of a difference in treatment, as applies under Article 14 ECHR.*

32. Mr Lammy, in oral evidence, confirmed that the Government intended to adopt a cautious approach: "let us see how, given our concerns, the case law develops in Strasbourg and take a view on that down the line".[40]

33. We do not believe that such a cautious approach is warranted, or consonant with the Government's aspirations to international leadership in the development of equality laws. In previous reports, we have recommended that the Government should ratify Protocol 12 ECHR, and include it within the rights protected in the Human Rights Act, in order to provide protection in domestic law equivalent to the equality rights which bind the UK internationally, under the ICCPR, CERD, and the ICESCR.[41] The rights enshrined in Protocol 12 are rights which the Government has accepted through its international commitments to human rights instruments. These commitments should in our view be given reality in national law through a free standing right of non-discrimination.

34. It is certainly the case that, as the Government contends, the scope of the equality right under Protocol 12 is wide. Beyond the obligation not to discriminate in relation to "rights set forth by law" in Article 1.1 of Protocol 12, there is an obligation of non-discrimination by public authorities, in Article 1.2, irrespective of whether any other right is engaged. Nevertheless the Government's view that Protocol 12 could lead to an "explosion of litigation" is, in our view, alarmist. As we have previously pointed out,[42] there is every reason to expect that both the UK courts and the European Court of Human Rights would apply the new Protocol in accordance with the settled principles of Strasbourg jurisprudence, including the principle of objective and reasonable justification of discriminatory treatment, by which differences in treatment may be found not to amount to discriminatory treatment. It is these principles which will make the equality guarantee in Protocol 12 a valuable, but workable protection against non-discrimination.[43] ***In our view, the Government's caution in refusing to ratify Protocol 12 is unwarranted, and fails to give sufficient effect in national law to the UK's international human rights obligations. We recommend that this decision should be reconsidered at an early opportunity, and that the issue should form part of the recently announced review of anti-discrimination legislation to be undertaken by the DTI."***

19. We appreciate that the JCHR's criticism was written before the enactment of the Equality Act 2010 which reflects the extent to which Parliament was prepared to protect such rights at the time. However, if there is to be any further protection provided, then we consider that the Commission should recommend that the Government ratify Protocol 12 without further delay.

Rights for Victims

20. We note the suggestion that that there should be specific protection for the victims of crime. We draw the Commission's attention to the recent debates in the European Parliament on this very issue. On 11 and 12 September this year, the EP in Plenary debated, and then adopted almost unanimously, its own legislative resolution supporting the text of a new directive establishing minimum standards on the rights, support and protection of victims of crime, and calling for the Council to do likewise. For the draft report, as presented to the EP see: http://bit.ly/OoGje7. The Council is expected to follow suit in the coming weeks, whereafter the directive will enter into force. The agreed text aims to ensure that whatever the crime - robbery, assault, rape, harassment, hate crime, terrorist attack, or human trafficking - and wherever it is committed in the EU, all victims enjoy the same basic rights in criminal proceedings, are treated with respect and dignity and have access to victim-support services (such as psychological help) justice (conducted in a language they understand) and compensation. No doubt the Government will introduce legislation in the near future, which will implement the directive.

21. We also suggest that effective protection for victims can only be achieved by a properly funded criminal justice system and criminal injuries compensation scheme. To enact an additional right for victims in the absence of sufficient funding to ensure that such a right is practical and effective would be mere window-dressing.

Children's Rights

22. Although we are aware (as pointed out in the Consultation document) that the rights contained in the UN Convention on the Rights of the Child (CRC) 1989 are not justiciable in the UK, by ratifying the treaties the UK has pledged to ensure that its domestic laws concerning children's rights are compliant with the Convention. As noted by the EHRC, the CRC and other UN human rights treaties are an essential and important component of the overall human rights architecture of the UK but there is no doubt that they lack the strength of the HRA 1998. The EHRC notes that this is partly because they lack the force of law
"*but for the most part it is because the treaties are not routinely well known or used. The treaties are as powerful as we make them. By citing the treaties (the articles of the different treaties and the concluding observations issued by the UN) in our advocacy and campaigns work, through Parliamentary questions and debate, in legal cases and in communications with the media and the public we can enhance their profile and in turn, their power to effect change. Where there has been a high level of stakeholder activity on a treaty, for instance by children's groups using the Children's Rights Convention, higher media coverage and government action has ensued. For instance the Welsh Assembly Government has adopted the CRC as the blueprint for its children's rights strategy*."

23. There is no need for additional rights to be incorporated in a Bill of Rights.

24. The UK has ratified 7 of the UN's international human rights treaties to date but not all without reservation. In order to make those treaties more effective in their protection of the rights of all members of our society we would suggest that the Commission urge the Government to withdraw its reservations to the treaties and recognise the competence of the various committees that monitor them to receive and consider individual and collective complaints.

25. Likewise, we would suggest that the Commission makes similar recommendations to the Government in respect of the UK's position with regard to the Revised European Social Charter 1996 (including the right to housing) and the collective complaints mechanism.

Question 8

Should any UK Bill of Rights seek to give guidance to our courts on the balance to be struck between qualified and competing Convention rights? If so, in what way?

26. Our short answer is 'no', The UK domestic courts are capable of balancing the various rights for themselves, applying precedent decisions by the Court of Appeal and Supreme Court in the usual way. We refer to *Campbell v MGN Ltd* [2004] UKHL 22 [2004] 2 AC 457, HL. We appreciate that the particular interests involved in Article 8 (and especially the right to respect for a private life) and Article 10 (right to freedom of expression) involve difficult balancing acts. It is our view that general guidance would not assist the domestic courts in their task of applying the different rights in particular cases. Each case differs on its facts and the different rights have to be applied to those individual facts.

Question 9

Presuming any UK Bill of Rights contained a duty on public authorities similar to that in section 6 of the Human Rights Act 1998, is there a need to amend the definition of 'public authority'? If so, how?

27. We do not believe that there is any need to amend the current definition of public authority. The formulation in s.6(3)(b) HRA 1998 provides that: *"any person certain of whose functions are functions of a public nature"* so that the test is one of whether or not the functions are those of a public nature, rather than the precise nature of the authority. Increasingly, more and more public functions are being delivered by institutions which are indirect emanations of the State: registered private providers in the area of social housing, residential care being provided by private companies, custodial and security services, and potentially health providers in the future. Whilst Parliament and the courts have not always agreed on whether or not a body is a public authority for the purposes of the HRA 1998, Parliament retains the power to legislate in order to prescribe certain types of bodies as public authorities and did so following the well-known decision of the House of Lords: *YL v Birmingham City Council* [2007] UKHL 7, [2008] 1 AC 95, HL.

Question 10
Should there be a role for responsibilities in any UK Bill of Rights? If so, in which of the ways set out above might it be included?

28. We are firmly of the view that the existence of rights is a separate and distinct concept from that of social responsibility. We believe that rights should be accessible and enforceable by every member of society, without any conditions or contingent responsibilities. If rights were contingent upon responsible behaviour, the question arises as to who decides whether or not a potential applicant has acted responsibly in order to be entitled to the rights that he or she is claiming. That concept comes close to the idea that rights should only be exercised by people of whom the majority of the public approve.

29. To a certain extent, the qualified rights already contain an assessment of responsibility. For example, the right to respect for a person's home (Article 8(1) of the Convention) can be interfered with where the interference is necessary in a democracy society, in accordance with the law, for a legitimate aim and proportionate. For example, where a landlord seeks possession against a tenant because of some proven or admitted fault on the tenant's part (such as anti-social behaviour or rent arrears), it will almost inevitably be proportionate to interfere with the right to respect for the tenant's home.

30. In respect of the specific proposals at paragraph 68 of the consultation:
    a) statements such as "a duty to society" would in our view be meaningless;
    b) we do not believe that a debate around rights is the correct place for the essentially political decision as to whether citizens should be compelled to perform military or community service, or whether there should be compulsory voting;
    c) there is already a balance between the right to freedom of expression and the right of individuals to respect for their private and family lives and not to be defamed.

31. Finally, we strongly believe that concepts such as "that the right to freedom of expression could be conditional upon that right not being abused to attack the free democratic order" could, if contained in legislation, have a chilling effect on freedom of expression. It would mean that anyone, for example, who suggested that Parliamentary democracy was a sham, and was powerless to control the interests of big business, would be vulnerable to criminal prosecution.

Question 11
Should the duty on courts to take relevant Strasbourg case law 'into account' be maintained or modified? If modified, how and with what aim?

32. The present duty on courts and tribunals with regard to the interpretation of the Convention is that:
    "2 Interpretation of Convention rights
    (1)A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
    (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
    (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
    (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
    (d) decision of the Committee of Ministers taken under Article 46 of the Convention,
    whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.
    (2)Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules."

33. The UK constitution relies on the expertise of the courts to interpret the law made by Parliament. The present arrangement ensures that the courts are obliged to take the Convention into account in deciding a case which engages the Convention. It is clear that the UK courts are not explicitly bound by the Convention but must take it into account, together with the jurisprudence of the Strasbourg Court. This relationship is distinct from the direct effect of the law of the European Union under the European Communities Act 1972. This enables the courts to take a principled and consistent approach to the application of the Convention and to develop the Convention in a domestic context from the floor of rights provided by the Convention. To dilute this duty to a power would arguably lead to inconsistency and uncertainty as to what the law means and would likely result in more references to the Strasbourg Court. Under the present system of Parliamentary sovereignty, it remains open to Parliament to legislate on any issue which may arise in respect of a decision by UK courts. The UK courts remain subordinate to Parliament in respect of the application of domestic legislation.

34. In respect of the use of case law from other common law countries, referred to at paragraph 72 of the consultation document, and broadening the duty under section 2 of the HRA 1998 we respond as follows:
    - firstly, the courts may already take into account case law from other common law countries if it is relevant to their decision (albeit only in a case where there is an absence of domestic binding precedent and in such circumstances it would only constitute persuasive precedent);

- secondly, imposing a duty to do so as with section 2 of the HRA 1998 is fraught with difficulty given that often the relationship between the legislature and the courts under the constitution of other common law countries will differ significantly from that under UK law and the Convention; and
- thirdly, it is clear that courts in the UK already adopt an approach to interpretation of the Convention by reference to other international conventions and treaties and the approach taken by other courts in order to develop domestic case law on Human Rights in accordance with common law principles established in other countries.

35. If the policy is for Human Rights to develop in the UK according to the principles of the Convention then Parliament should allow that to develop under the present legislation.

36. We see no clear or compelling argument to modify section 2 of the HRA 1998 and it is our view that it should remain unmodified.

Question 12
Should any UK Bill of Rights seek to change the balance currently set out under the Human Rights Act between the courts and Parliament?

37. In the consultation paper and the question we note a glaring omission, which is that, in introducing legislation to Parliament, the relevant Minister makes a declaration as to compatibility of a Bill with the Convention prior to its second reading on behalf of the Government and sponsoring Department of State pursuant to section 19 of the HRA 1998. This declaration is made with the benefit of expert independent legal advice and the assistance of experienced Parliamentary Counsel when drafting bills to ensure that the issue of compatibility with the Convention is addressed as part of the Parliamentary process and this may be examined in detail by the JCHR. It should therefore be the case that it would be extremely rare for the High Court to declare a provision in an Act passed since 1998 to be incompatible with the Convention. It follows that if the High Court is required to declare a section of new UK legislation as incompatible with the Convention in the future then those circumstances will have arisen as a result of a gross defect in the Ministerial and Parliamentary process.

38. Although not stated expressly in the consultation it is only the High Court, (and the Court of Appeal and Supreme Court) which can make declarations of incompatibility. That is likely to be rare and only after a high degree of scrutiny and intense argument by highly experienced counsel. The case law on declarations of incompatibility is relatively small compared to case law, which interprets the Convention by means of conventional statutory interpretation to give meaning to a statute in accordance with Convention rights. The case law concerning declarations of incompatibility by and large relates to pre- HRA 1998 legislative provisions and such changes appear to have been welcomed, for example, changes to the Mental Health Act 1983.

39. We do not consider that any UK Bill of Rights should seek to change the balance between the jurisdiction of the High Court and Parliament in respect of the declaration of incompatibility for reasons mentioned previously in response to questions of 1-5. If the High Court were to be given the power to strike down an Act of Parliament or a section once enacted it would undermine the principle of sovereignty of Parliament and create a democratic deficit in respect of law-making, thereby likely resulting in highly politicised judiciary. This would require a major alteration to the UK Constitution. We consider that the present arrangement under the HRA 1998 is appropriate.

40. If the High Court makes a declaration of incompatibility with the Convention relating to a section of primary legislation then it is not the case that Parliament has to "comply" with the court's ruling as suggested in the consultation paper. Parliament ought to take steps to make the legislation compatible with the Convention. Such changes are invariably minimal and often correct a clear injustice or lacuna in the law.

41. We consider this is the right approach for four reasons. Firstly, the declaration of incompatibility is linked to the duty of the court to interpret legislation in section 2 of the HRA 1998 in line with the Convention and only when this is impossible may a declaration be required. So a declaration of incompatibility will be extremely rare and only issued after the court finds it is unable to construe the legislation in accordance with the Convention. Secondly, it is for Parliament to determine how legislation is to comply with the Convention and this feature brings domestic democratic principles to bear on the matter. Thirdly, Parliament has signed up to the Convention and agreed to be bound by it and its institutions as a matter of international law and principle. Fourthly, given the declaration made by the Minister of State responsible for introducing legislation to Parliament and the present methods of Parliamentary scrutiny, declarations of incompatibility of any legislation made after the enactment of the HRA 1998 should be rare and if they do occur, result from a failure by Government and Parliament.

Questions 13-15

To what extent should current constitutional and political circumstances in Northern Ireland, Scotland, Wales and/or the UK as a whole be a factor in deciding whether (i) to maintain existing arrangements on the protection of human rights in the UK, or (ii) to introduce a UK Bill of Rights in some form? What are your views on the possible models outlined in paragraphs 80-81 above for a UK Bill of Rights? Do you have any other views on whether, and if so, how any UK Bill of Rights should be formulated to take account of the position in Northern Ireland, Scotland or Wales?

42. The current arrangements, whereby we have a UK-wide set of core values in the ECHR and HRA 1998, with scope for devolved legislatures to enact legislation to confer additional rights specific to their country should they decide to do so, are sensible and should be retained.

43. We do not perceive there to be any gain in seeking to replace the existing arrangements with the models outlined in paragraphs 80 – 81. The process of reformulating the arrangements between the central and devolved legislatures as regards their respective powers to legislate on basic human rights would be complicated and unnecessary, and require an investment of time and resources needed elsewhere.

Conclusion

44. The above views reflect our general response to the consultation: that we have a good set of basic rights in the HRA 1998 and that there is no need to seek to re-invent them in a new Bill of Rights.

45. We trust that these comments are helpful.

28th September 2012

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European Convention on Human Rights

Debate

11.37 am

Moved By ***Lord Irvine of Lairg***

> To call attention to the European Convention on Human Rights; and to move for papers.

Lord Irvine of Lairg: My Lords, my purpose is to dispel some of the many myths peddled about human rights. In fact it is the Conservative Party, not Labour, that can make the strongest claim to credit for the European convention. Its main proponents were Churchill, Macmillan and John Foster, with some Liberal and Labour support. Its principal author was David Maxwell Fyfe, the future Conservative Chancellor, Viscount Kilmuir. The convention was substantially the work of British jurists within a tradition going back to the Petition of Right of 1628 and our own Bill of Rights of 1689.

Britain became the first state to ratify the convention, on 8 March 1951, yet it was not until December 1965 that the then Government accepted the right of individual petitions to the Commission and the compulsory

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jurisdiction of the European Court of Human Rights at Strasbourg. Then for a long period, until 1993, both major parties were united in rejecting incorporation of the convention into our domestic law. That in itself was extraordinary, because it meant that our citizens could not argue for their convention rights in our own courts but had to take the long and expensive road to Strasbourg.

Then came the late John Smith's seminal Charter 88 speech on 1 March 1993, committing Labour in government to incorporate. That translated into a 1997 manifesto commitment, and the Human Rights Act 1998, which began its parliamentary progress in this House, followed. Its purpose was to bring home to be enforceable in our own courts the rights contained in the convention. Our courts are of course closer to the traditions of our society, and through their judgments they can make a distinctive British contribution to the development of Europe-wide human rights laws.

To Conservative critics of the Convention and the Act, I recommend the recent short study by Norman and Oborne, *Churchill's Legacy: The Conservative Case for the Human Rights Act*. They detail the history and debunk the myths. They emphasise that,

"A large element of the selling power of some British newspapers depends on their ability to break stories about the private lives of celebrities",

and conclude that,

> "it is unlikely that reform of the HRA would be on any political agenda, were it not for the potent advocacy of the most powerful media groups in the country".

In Chapter 4, "Dispelling the Myths", they accuse the media of a culture of deception about the Act since the media believe that they have an interest in its destruction because of its protection of privacy in Article 8:

"Any politician who denounces the HRA, however incorrectly, is generally guaranteed a round of applause from the press".

They say that a politician who argues the contrary, "tends to get pilloried".

Among the most controversial recent cases are those where the courts have granted injunctions to prevent the press publishing details of the private lives of celebrities. The Prime Minister himself has entered the fray, on the side of the press. Unsurprisingly, he has secured a good press. He said that the judges were creating a privacy law, whereas what ought to happen in a parliamentary democracy is that Parliament should decide,

> "how much protection we want for individuals and how much freedom of the press".

Essentially, the charge is that the judges are usurping the role of Parliament. This is either ingenuous or disingenuous; your Lordships can decide which.

There are two straightforward answers to the charge. First, the judges are under instruction from Parliament in the HRA to balance the right of respect for the claimant's private and family life against the right to freedom of expression in Article 12, and of course the judges obey. The scales are weighed in favour of freedom of expression because the Act requires the courts to have particular regard to its importance. No other right is given this privileged status. We should remember

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that in those cases it is often not only the Article 8 rights of celebrities that are at stake but also those of innocent third parties, including children. There is typically no significant public interest in the disclosure of the peccadilloes of actors, footballers or reality television contestants, although that helps to sell newspapers. A prurient interest does not equate to a legitimate public interest. The weight that the courts give to freedom of expression is strongly illustrated by the recent Strasbourg ruling in Max Mosley's case in favour of the media.

The second answer to the charge is that the Government could introduce tomorrow a freedom of expression and privacy Bill compatibly with the convention if they took their courage in both hands. Members of the other place would undoubtedly show huge

interest in such legislation, equalled no doubt only by the inevitable wrath of the tabloids-so your Lordships should not be in the least surprised if no such legislation is ultimately brought forward. Far easier to go on berating the judges, however unfairly, for doing what Parliament has instructed them to do than to take the knock of legislation oneself.

I should not leave this subject without emphasising that the media have gained greatly from the convention and the Act: enhanced protection for journalistic sources; a dramatic reduction in the level of libel damages; and the right to report on a much wider range of court proceedings. However, I emphasise that when impartial courts hold the balance between privacy and freedom of expression, the media cannot expect to have it all their own way.

I move to another recent controversy-votes for prisoners-where misconceptions also abound. We have clear primary legislation in Section 3 of the Representation of the People Act, which prevents convicted prisoners being registered to vote. No other interpretation of Section 3 is possible. Although Section 3 was declared incompatible with the convention by the courts, voting claims brought by prisoners under the HRA were rejected on the grounds that Section 3 was clear and the sovereignty of Parliament must prevail. All that the European Court held was that our blanket ban should be reconsidered. However, as a result of the HRA, it will be reconsidered in the proper forum: Parliament.

Your Lordships should know that our blanket ban has put us out of step with a clear majority of the other states in the Council of Europe, most of whom, including Germany, France, Italy, the Netherlands, Portugal and Spain, allow some or all of their convicted prisoners to vote. In that context, it is surprising that the Prime Minister went as far as to claim that he felt physically ill at the prospect of giving the vote to prisoners. All that was held at Strasbourg was that the blanket ban was disproportionate because it applied irrespective of the length of the sentence or the gravity of the offence, and without regard to whether the prisoner had completed that part of the sentence relating to deterrence and punishment. At any rate, it is now up to Parliament, which will want to consider whether some opportunity to participate in democratic elections could help prisoners' restoration to the mainstream of society.

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Another example is the sex offenders register, a subject on which the Prime Minister and his Home Secretary have become so choleric that your Lordships should worry for their peace of mind. The antidote that I would prescribe is a strong dose of rationality. The Supreme Court recently considered statutory provisions that imposed on certain sex offenders lifelong notification obligations to inform the police of their whereabouts or foreign travel plans. The basic point was that they could not even apply for their names to

be removed from the register, regardless of the rehabilitation that they might have achieved over many years. The Supreme Court made a declaration that the provisions were incompatible with the convention in the absence of a procedure that allowed an individual to apply to be taken off the register. It would be for Parliament to determine the criteria for success, when an application could first be made and who would decide. Alternatively, the Government are free, under the Act, to do precisely nothing, wait to see if it is taken to the Strasbourg court, and argue there why any review would always and for ever be inappropriate.

The Prime Minister and his Home Secretary joined in telling Parliament how appalled they were by the decision, with the Prime Minister adding that the decision was completely offensive and flew in the face of common sense, while the Home Secretary questioned its sanity. However, all that the judges were doing was applying the law. Surely, this intemperateness must stop. Respect for the rule of law underpins our democracy. That respect is not a commodity to be marketed away for perceived short-term political advantage. When it is, Ministers undermine respect for the rule of law and diminish both themselves and our democracy.

I greatly look forward to the reply of the noble Lord, Lord McNally, to this debate. On 18 March, the Ministry of Justice announced the establishment of an independent commission to investigate the case for a UK Bill of Rights. Its terms of reference follow the language of the coalition agreement-namely,

> "to investigate the creation of a British Bill of Rights that incorporates ... all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties".

So, the European Convention will continue to be a guaranteed floor, but not a ceiling, for the protection of human rights in Britain. I congratulate the noble Lord's party on these terms of reference. The commission provides an excellent opportunity for his party to put-if this is the correct expression-clear blue water between themselves and their coalition partner. I invite him to take this opportunity to confirm that the continued incorporation of the European convention rights into our domestic law is non-negotiable. I beg to move.

The Lord Speaker (Baroness Hayman): The Question is that this Motion be agreed to.

Lord McCluskey: My Lords, before the noble and learned Lord sits down, will he comment on the matter of the judges doing what Parliament instructed them to do? He will recall-

Baroness Hayman: The Question has been put. We are now into the debate. The noble and learned Lord could, of course, speak in the gap if necessary, if he is not on the speakers' list.

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11.51 am

Lord Mayhew of Twysden: My Lords, I shall look forward to that intervention.

I begin by expressing my gratitude to the noble and learned Lord for giving us the opportunity to debate this topical and extremely important subject. Unfashionable though it may be, I remain glad that our country has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is not often recalled-I was very glad to hear the noble and learned Lord do so a few moments ago-that we did so by one of the first acts of Sir Winston Churchill's second Administration. We were the first of the member states of the Council of Europe to do so.

Like many of your Lordships, I am old enough to recall, and to have shared in, the surge of international idealism that flowed from the full realisation of the horrors that had been experienced in the recently concluded world war, and which had been inflicted on human beings before and during it. Those horrors had been inflicted by tyrants upon victims in a Europe that had lacked the political will to formulate, let alone enforce, any statement of their basic rights as human individuals. On all sides the determination was "never again". So uncontroversial was the new convention, that to the best of my knowledge its ratification was never debated in Parliament. Though we became one of 12, our particular participation as a country was, I believe, to offer oppressed people elsewhere in Europe and beyond a beacon of hope and faith. From it they took heart and strength.

More controversially, however, I am also glad, though more critically, that 60 years later we remain bound by the convention, and that the coalition Government have declared that we shall continue to be so bound. That is not to say that there is not an urgent need for reform. In 60 years there have evolved, in large part with the consent of the member states, very significant changes to structures and jurisdiction. Whereas initially there was no court but only a Commission and a Council of Ministers, now the Strasbourg Court is at the heart of the convention, and, it must be said, at the centre of its problems. There is, for example, the horrifying and absurd backlog of applications to the court. Perhaps predominantly, there is the popular conception, which some of the court's decisions have allowed to develop, that its decisions are typically out of touch with reality and with what is sensible. It is very damaging, surely, that this development should have led an authority of the stature of the noble and learned Lord, Lord Hoffmann, the former Law Lord, to be reported as saying that

> "human rights have become, like health and safety, a byword for foolish decisions by courts and administrators".

He has written that,

> "the Strasbourg court has taken upon itself an extraordinary power to micromanage the legal systems of the member states of the Council of Europe".

The Justice Minister, on behalf of the Government, has endorsed-though more gently-the thrust of that criticism. I think that there is much of which complaint in a similar vein can be made in the development by the court of its own jurisprudence. But it has been

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unfair in the main. Here I very gladly follow what the noble and learned Lord has just said. It has been unfair to attach that criticism to our own judges, who are obliged under the Human Rights Act 1998 to "keep pace with" the jurisprudence of Strasbourg.

It is not therefore wholly apt-to put it mildly-merely to assert that human rights should be determined by Parliament, not by judges. Whatever the words employed by Parliament, it will always fall to the judges to interpret and apply them to each individual case that comes before them.

Nevertheless, something must be done, and it is easy to understand how impatience can give rise to the answer, "Have done with the convention and all its works. Renounce it and make a fresh start".

I believe that such a course would be an act of almost wanton destruction. Just as the convention itself derived from international determination to remedy for individuals the absence of legal protection against tyrannical abuse, so its renunciation by this country, of all countries, would tragically undermine the valiant efforts of protestors everywhere to secure basic rights and freedoms for themselves. That would be hard to forgive.

The wiser course, surely, is that now adopted by the coalition Government: the appointment of the commission in March to investigate the creation of a UK Bill of Rights that incorporates and builds on our obligations under the ECHR, ensures that those rights continue to be enshrined in UK domestic law and protects and extends our liberties.

It has been our destiny to be, for oppressed millions, a beacon of hope and faith. We can and must remain true to that destiny.

Baroness Northover: I would remind noble Lords-and my noble and learned friend was admirably within time-that this is a time-limited debate. When the clock hits seven, noble Lords have completed their seven minutes. We also have a noble Lord who wishes to speak in the gap.

11.58 am

Lord Prescott: My Lords, I congratulate my friend of many years, my noble and learned friend Lord Irvine, on the presentation that he has made today and on the call for these papers on human rights to be brought forward. There could not be a more appropriate time than now to raise this particular issue. The role of human rights and the protection of private interest and public interest, as embodied in the European Convention on Human rights, were not challenged for a number of years but that has not been the case over the past five years. Clearly there is a fundamental challenge under way. The Minister of Justice in the other place has now admitted that the Government are looking at how they might change human rights legislation. We will have the presidency under the Council of Europe perhaps to do some of that. We look forward to the debate and the conclusions of the Government.

I should perhaps declare an interest, as the leader of the Labour group in the Council of Europe, leading a delegation from these two Houses. We have been

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concerned about the reforms that are necessary in human rights legislation. We made recommendations 10 years ago about the length of time taken for cases and about other matters. There is a need for reform, as has been said in this House on a number of occasions. However, I say to my noble and learned friend Lord Irvine that our debates in 1997 which he led in this House made a compromise that has not helped the situation. I refer to the role of the press complaints body that deals with some of the obligations of the press in observing public and private interests. We made a rod for our backs by not making public bodies accountable regarding the Council of Europe and human rights obligations. We exempted the Press Complaints Commission from that. If we did not have a body that claimed the right to be self-regulatory, we would be able to bring standards and provide advice to editors when dealing with these cases. The point that I want to make today is that in referring newspapers to another body for further discussion, the role of the Press Complaints Commission should be considered.

I attended the other place when it discussed the right of prisoners to vote. That was not a simple issue, and the Government recognised that the House should decide on whether there should be a vote for everyone or whether there should be an area of discretion or appreciation. We can decide on whether the right should be limited depending on how long a person is in prison and the offences involved. The House was not denied the opportunity to make that decision-and many other Parliaments have done that. Only three have said that they are not prepared to accept the ruling. However, the issue behind the debate in the Commons was about getting out of Europe. Those who wanted that did not distinguish between the Council of Europe or the European Union. They wanted to get out of those bodies. They said that Parliament should be the supreme body for legislation. They were same people who voted for us to join the European Union-and I voted against it in 1972. What gives them the right to override the supremacy of those bodies? The Lisbon treaty again makes that clear. We recognise that that is something that already happens to our legislation. The debate was really about how you get out.

I also heard during that debate that judges are ignorant, they are from foreign countries, and they are not elected. I have to say that I am one of the people who elected the judges to the European court. I do not know what the press will make of that, but nevertheless we were involved in exercising that democratic right through our delegation.

The other example was the Max Moseley case, in which our courts-our courts-under our legislation actually said that there was a breach of privacy that was relevant, if you like, to Articles 8 and 10 of the Council of Europe convention, and found a balance in that. Moseley went to the Europe court to seek a ruling on notification-that a person should be told in advance of publication. When I hear the Press Complaints Commission saying that we have a right to notification, we all know what that means. There is a call at 5 pm on a Saturday night saying, "We've got this story. Do you want to comment?". They do not give you notification, and if you can afford to sue them, they do not give you

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notification, because they know you might go to the court. That is precisely what Moseley did. I can see what is involved in all this talk about rich people getting that right, but an awful lot of people cannot afford it. Why? It is because the press is made up of powerful rich bodies that prevent you taking any action under our legal system.

It is interesting to note that our press praised the common sense of the judges who rejected Moseley's application for notification, but they condemned the same judges over the issue of prisoners. All of a sudden, those judges became well informed and wise. Frankly, that is all we can expect from our press. I am not a fan. Even the recent super-injunctions are sought under our law, not the European court's law. I will not go into those arguments. I can see why people are getting increasingly concerned about them. I must say that I am not excited by the idea that some footballer can say, "Publication might affect my sponsorship money". That is not about human rights; it is about commercial interests, which is the motivation of most of these injunctions. So there is this kind of anti-European dimension, which is not at all helpful.

I come to the point that I really wanted to make in this debate. I think we agree that Articles 8 and 10, which identify these rights, are rights in our constitution and in the European legislation. As the noble and learned Lord, Lord Hoffmann, pointed out in a debate in this House on defamation, the American system provides no rights for people or celebrities. There is just media freedom. That is what the press here is after. There is a clash between what we might call the European tradition and the American tradition. The American tradition hands over the freedom to the press. We have to decide here whether we have in legislation protection for individuals or a balance between the public interest and freedom of speech and indeed freedom of the individual. We will do that in legislation and we will do it in the consultation. However, I am worried about the Press Complaints Commission believing that somehow it can rule on that. In many cases the PCC ignored the Information Commissioner, who said that thousands of pieces of information were being obtained illegally and that thousands of pounds were being paid by hundreds of journalists. The PCC did nothing about it. It totally ignored that in the

hacking inquiry. The Culture, Media and Sport Select Committee said that the inquiry was "simplistic". It did nothing other than mouth the arguments of the press. Indeed, the chair of the PCC was found for a libellous statement in that very case. It is not very good for the chair to be accused of putting out unfair information.

Therefore, we need to look at the Press Complaints Commission. It was left out of the legislation but I hope that it will be covered by it. The noble and learned Lord, Lord Hoffmann, tried to seek out the essential issues, as did the noble Lord, Lord Lester, in his Defamation Bill. We should ensure that this whole matter is covered by legislation. I am not necessarily talking about statutory control but about the need for a body which is independent, accountable and answerable and which is concerned about the private individual, not just the editors who control them on their editorial board.

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12.05 pm

Lord Thomas of Gresford: My Lords, the introduction of the Bill of Rights into Hong Kong in 1991 towards the end of British government put into effect the International Covenant on Civil and Political Rights in that territory. It was a Conservative Government who introduced it and, with the aid of the noble Lord, Lord Wilson of Tillyorn, and later the noble Lord, Lord Patten, negotiated that the Bill should be enshrined in the basic law which now applies to Hong Kong.

That Bill of Rights remains as a bulwark of the right to life, to freedom of expression, assembly and religion, the right to equality and to the presumption of innocence, the right to property and to privacy, a right to travel, and a prohibition against arbitrary arrest, detention, imprisonment, search and seizure. I mention these matters because you have only to go a few miles over the border to see what it is like to live in a country where no such rights are enshrined in the constitution or, if they are, they are not put into effect. It is a stark contrast with what happened in Hong Kong.

The Bill of Rights in Hong Kong in its original form gave the courts the power to strike down any law that was incompatible with those rights. The Privy Council here in the case of Lee Kwong-kut in 1993, in which I was involved, tested that power in relation to a criminal charge where the burden of proof had been reversed. The noble and learned Lord, Lord Woolf, who gave the judgment in that case, concluded:

"The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion. If this is not done the Bill will become a source of injustice rather than justice and will be debased in the eyes of the public ... It must be remembered that questions of policy remain primarily the responsibility of the legislature".

The Labour Government, led by the noble and learned Lord, Lord Irvine, and possibly in the light of that 1993 judgment, were less ambitious than their predecessor. The remedy for a breach of the European Convention on Human Rights under the 1998 Act, as the noble and learned Lord has already said, is merely a declaration of incompatibility, and it is left to Parliament to remedy the defect that the court demonstrates.

We have yet to consider the legislative reaction of this Government to the decision of our Supreme Court in the case of F in April 2010, to which the noble and learned Lord, Lord Irvine, has already referred. When a Statement was recently made by the Home Secretary and repeated in this House, I said that I was shamed by the language used. The noble and learned Lord has referred to the Home Secretary using expressions such as "disappointed and appalled" and to the Prime Minister finding the judgment "offensive" and questioning the sanity of the court.

We have not heard any more about that. The issue was whether a person could have the right to apply to remove his name from the sex offenders register and not have to give notice of wherever he happened to be in the world. Perhaps it is now realised that the solution put forward by the Home Secretary-that it should be left to the discretion of a policeman to revoke the order of a court-has not been further advanced because clearly it would not survive scrutiny.

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I concur with the wise words of the noble and learned Lords, Lord Irvine and Lord Mayhew, about current criticism of the European convention. I will deal with the beneficial effect of the incorporation of the convention by illustrating the changes that have taken place in courts martial, largely as a result of the work of Gilbert Blades and John Mackenzie, who took a highly unsatisfactory system of courts martial to be examined by the European court. I was surprised two weeks ago to be approached by a senior judge advocate who praised the reforms to the system that had been caused by the application of the European convention. I thought that he might have been one of those crusty old judges, but he was not.

The court martial system was challenged in the European court by Corporal Findlay in 1996. The soldier had pleaded guilty at his original trial, but complained that the system whereby the convening officer appointed the members of the court and the prosecutor, directed the charges and then, post trial, became the confirming officer, was not independent. The European court upheld his complaint, which was the catalyst for the Armed Forces Act 1996. Parliament passed the Act, which set up an independent Army prosecuting authority with prosecuting officers who were drawn from professionally qualified lawyers and were independent of the chain of command. Further cases followed in the European Court that led to other changes. Some noble Lords may recall that it led

to the ending of the practice in naval courts martial where the defendant was pushed in at the point of a cutlass.

The Armed Forces Act 2006 created a single tri-service prosecuting authority, known as the Service Prosecuting Authority, under the leadership of an independent director of service prosecutions. There was opposition. When I proposed that the pool for the panel should be widened, a noble and gallant Lord said to me in the corridor on the way to the Bishops' Bar: "You should be shot". The first DSP is Bruce Houlder, a civilian Queen's Counsel. He has introduced further excellent changes that make the system the envy of military courts in other jurisdictions, as I found out last month at an international seminar at Yale University. That is the way in which the European convention has changed the military justice system so much for the better. It is no longer a case of "march the guilty bastard in", but a court that gives justice to the defendant.

I consider the Human Rights Act 1998 to be the outstanding piece of legislation of the previous Labour Government-next to the Government of Wales Act 1998. I congratulate the noble and learned Lord, Lord Irvine of Lairg, not simply on introducing the debate but on being the architect of an important piece in the structure of justice in our country.

12.13 pm

Lord Pannick: My Lords, as the noble Lord, Lord Thomas of Gresford, said, the enactment of the Human Rights Act 1998 was due in very substantial part to the ministerial and parliamentary skills of the noble and learned Lord, Lord Irvine of Lairg. It was due also to the persistent advocacy of the noble Lord, Lord Lester of Herne Hill. I pay tribute to both of them for their remarkable achievement. I also thank

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the noble and learned Lord for giving us this valuable opportunity to remind ourselves-and, I hope, the Government-of some basic principles that may have been forgotten during recent controversies.

I will make two points. First, I will address the suggestion made by many Members of Parliament that judges simply have no business involving themselves in matters of policy such as votes for prisoners or the notification requirements for sex offenders; these are, they suggest, matters for Parliament to decide. What those MPs fail to understand is that one of the central purposes of human rights law is to protect the interests of those sections of the community who lack political power, who Parliament has failed to protect against unfair treatment by the majority. The great cases of the past 30 years in which judgments of the European Court of Human Rights in Strasbourg persuaded Parliament to change the law of this country arose precisely because Parliament and the Executive failed to secure a fair balance in the treatment of persons who did not have the support of MPs and the press.

I declare an interest as an advocate involved in some of these cases, sometimes for the United Kingdom Government, sometimes for applicants-cases such as those concerning gay men and women who were excluded, entirely unreasonably, from military service; children subjected to corporal punishment; the refusal to recognise basic rights for transsexuals; the prohibition of the involvement of politicians in the setting of tariffs for murderers. These unfair laws, and many more of them, were simply not addressed by Parliament until the European court identified the unfair treatment. This is quite simply a better country because of the judgments of the European court in such cases. Indeed, it also needs to be emphasised, as the noble and learned Lord, Lord Irvine of Lairg, did emphasise, that Parliament remained sovereign on all these issues, but it was the judgment of the European Court that persuaded Parliament that it was time to change our law.

That is not to say that I agree with all the judgments of the Strasbourg court. Who would? The court gave 1,500 judgments last year alone. I entirely agree with the noble Lord, Lord Prescott, about the urgent need for reform of the procedures of the Strasbourg court, not least to address the unacceptable delays. I would also like to see the European court recognise that, now that our judges apply the Human Rights Act, Strasbourg should give greater weight to the views of our distinguished Supreme Court judges when it is deciding difficult issues. The noble and learned Lord, Lord Mayhew of Twysden, made this point very forcefully.

The other matter that I want to address, like some other noble Lords who have already spoken, is the quite extraordinary conduct of the Prime Minister and the Home Secretary in March when they stated that they were appalled by a judgment of the Supreme Court given in April 2010 in relation to sex offenders. The noble and learned Lord, Lord Irvine of Lairg, referred to this matter, as did the noble Lord, Lord Thomas of Gresford. Many lawyers and judges are appalled not by the Supreme Court judgment but that the Government should think it appropriate to use such language in relation to a judicial decision. In each

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and every Government of the past 40 years there have been tensions between Ministers and the courts. The noble and learned Lord, Lord Woolf, who acted as Treasury Counsel in the 1970s, wrote:

"When I die there may be found burnt on my heart the names Laker, Congreve, Tameside and Crossman just to name a few of my defeats when acting for the Government".

All Crown counsel since then could make a similar statement. I have represented in court most of the Home Secretaries who have served during the past 20 years and I have the scars to prove it. Some of them were more tolerant of legal setbacks than others, but the wise ones understood that those countries in which the Government win all their cases in court are not places in which any of us would wish to live. The Government and Parliament are of course entitled to disagree with a Supreme Court judgment or a ruling

by the European court on human rights issues, but Ministers have a responsibility to encourage reasoned debate and not to shout out abuse and insults which undermine the rule of law.

Difficult though it is for the public to understand this principle, and tempting though it is for politicians to try to win support by fighting a battle of Parliament Square against the Supreme Court, the current Administration need to be reminded that there are many issues where the dispassionate assessment of public policy by an independent judiciary, and by a reference to standards of fairness and proportionality, serve a valuable public purpose.

12.21 pm

The Lord Bishop of Bath and Wells: My Lords, I, too, welcome the opportunity to participate in this debate and thank the noble and learned Lord, Lord Irvine, for initiating it. The tradition of human rights legislation was forged, as other noble Lords have said, in the mid-20th century as a consequence of the experience of the depth of humanity's inhumanity. Human rights legislation has its very roots in Europe's Christian heritage and embodies the church's teaching on the moral significance of every person. We may say, therefore, that the ECHR is one of the remedies against history repeating itself. Recent experience in the Balkans should warn us that totalitarianism is not so distant that it can be treated as a thing of the past in Europe.

The term "human rights" finds its first usage in the Middle Ages. However, from the very earliest laws, such as the code of Shulgi in Mesopotamia, the need to establish dignity and justice was recognised. The king of Lagash in 2094 BCE promised the native god that,

> "he would never subjugate the orphan and widow to the powerful",

nor,

> "surrender the man with one lamb to the man with one bullock".

The king concludes,

"I did not demand work, I made hate, violence and the clamour for justice disappear. I established justice in the country".

One might say that the objective of human rights is to end hatred, violence and the clamour for justice, but what is noticeable about the role of the king is that he acted as a mediator between gods and humans, and his legitimation came from "above". Today, much human rights legislation is compatible with Christian

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theology and some would argue-I would include myself among them-that they require a concept of the divine if they are to be coherent.

We may illustrate the danger of a wholly secular approach with reference to the Enlightenment. Towards the end of the 18th century, the philosophers, Hegel and Weber, took the view that all had been prepared in universal history so that, in Hegel's words, Europe was,

> "the end and centre of world history".

There is little doubt that such a view led not only to European expansionism and superiority but to exploitation and, ultimately, the godless totalitarianism of the 20th century.

The aim of human rights is to treat human beings as ends and not means. One of the dangers of a liberal democracy and market economies is to reduce the human person to certain activities, units of labour, consumers and voters, and when human beings are treated as ends, unscrupulous Governments and regimes open the possibility of the torture chamber and holocausts of ultimate meaninglessness.

Equally, however, we cannot regard human rights as simply a list of just entitlements dropped into the cradle. If we ask what it means to be a human being in today's world, we may conclude that there are the time-honoured material essentials of food and drink, shelter and a safe, healthy and hopeful environment, but these are hardly sufficient in themselves. Humanity requires an environment in which to experience the benefits of the virtues of dignity, love, freedom, justice and relationship. In the African concept of ubuntu-I am because you are, because you are, I am-my rights and my humanity and yours are inextricably linked. People who are dignified through human rights also have the responsibility for others.

No system of human law is infallible. In relative terms, the European Convention on Human Rights is short. Undoubtedly there is much to be improved upon. Reform may well be necessary in certain circumstances, and there is probably some baggage to be discarded. There is certainly the need for a better understanding of what it is to be human. It has been said that we are not human beings on a spiritual journey, but spiritual beings on a human journey. Such a journey should include the disappearance of hate and violence, and the clamour for justice. I continue to believe that in some small but very significant way, the European Convention on Human Rights offers a positive contribution to it.

12.27 pm

Lord Faulks: My Lords, I, too, congratulate the noble and learned Lord, Lord Irvine of Lairg, on securing this debate. More than 10 years after the enactment of this momentous piece of legislation, it is time to consider whether the Human Rights Act has lived up to

expectations. It is a subject rarely out of the news, but a dispassionate look at its successes and its failures is required.

The title of the White Paper, *Rights Brought Home*, published in 1997, echoed the consultation document published earlier by the Labour Party entitled *Bringing*

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RightsHome. The rhetoric surrounding the introduction of the legislation created a picture of rights invented by usat last being brought into our courts, sparing citizens the long, tedious and expensive journey to secure justice in Strasbourg. It is not without irony that the recent publication by the Policy Exchange is entitled *Bringing Rights Back Home*. This paper advances the case not for steps to "give further effect" to the convention, as did the Human Rights Act, but rather that control should now be retaken of the convention so as to limit or even eradicate the effect in this country of decisions of the European Court of Human Rights in Strasbourg.

No one in your Lordships' House or outside can be against the idea of protecting human rights. Few would quarrel with the identification of fundamental rights included in the convention, which we signed in 1950, but even the most fervent supporter of the Act must have quietly despaired at the popular disaffection with it. Sadly, the idea of human rights, once such a noble aspiration, has become trivialised. Since the passing of the Act, I have been engaged as a barrister representing public authorities in claims in tort and now under the Human Rights Act, mainly in the Appeal Court. The Act did not make an immediate impact in this field, but I can tell noble Lords that there has now been a positive explosion of activity. Was this to be expected?

More than a decade ago, a great deal of time and money was spent in educating judges and the legal profession about the forthcoming legislation. Revisiting some of the literature now, it is instructive to see how speculative were the views of commentators about the likely impact of the Act. Perhaps it should have been more obvious that those who would rely on the Act would not be, for the most part, the most attractive members of society. Unfortunately, it has not always been the poor, the sick, the disabled and the homeless who have used it, but prisoners, bogus asylum seekers and illegal immigrants. This has not helped to endear the public to the Act.

One of the more surprising features of the Act has been the response of our judges to the challenges that is has thrown up. Section 2 imposed an obligation on courts to "take into account" Strasbourg jurisprudence rather than to follow it, but the House of Lords Judicial Committee in the case of Ullah said that it was the duty of national courts,

> "to keep pace with the Strasbourg jurisprudence as it evolves over time: no more: but certainly no less".

I do not think that Parliament truly expected such acquiescence.

In the passage of the Bill, an amendment was put down the effect of which was to limit the binding effect of Strasbourg case law. In opposing the amendment, the noble and learned Lord, Lord Irvine, said:

"As other noble Lords have said, the word 'binding' is the language of strict precedent but the convention has no rule of precedent ...We take the view that the expression 'take in account' is clear enough ... it is important that our courts have the scope to apply that discretion so as to aid in the development of human rights law. There may also be occasions when it would be right for the United Kingdom courts to depart from Strasbourg decisions".-[*Official Report*, 19/1/98; col. 1270-71.]

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The way decisions are reached in the ECHR is very different from the approach in this country, where there is a strong regard for precedent and consistency in decision-making. Our courts have expended enormous intellectual energy in trying to impose some sort of order on the ad hoc decisions that emanate from Strasbourg. Despite these efforts, considerable uncertainty has resulted as to what the law is, with the result that many Human Rights Act cases reach the appellate courts, with consequent expense to all parties, principally public authorities.

For those who were prospectively concerned about the potential loss of identity in our law by reason of the impending legislation, reassurance was offered by the prospect of the "margin of appreciation". The Secretary of State for the Home Department, Mr Jack Straw, said on 3 June 1998:

"The doctrine of the margin of appreciation means allowing this country a margin of appreciation when it interprets our law and the actions of our Governments in an international court, perhaps the European Court of Human Rights. Through incorporation we are giving a profound margin of appreciation to British courts to interpret the convention in accordance with British jurisprudence as well as European jurisprudence".-[*Official Report*, 3/6/98; Commons, col. 424.]

Those who were concerned that the Human Rights Act would have insufficient impact on our law were afraid that too much respect would be paid to the margin of appreciation-that there would even be a double margin of appreciation-but the reality is that it has featured hardly at all in the responses by courts here to the often-controversial decisions emanating from Strasbourg, which have largely been remarkably creative interpretations of the fundamental rights embodied in the convention. The courts have thought it appropriate not restrict to themselves to the protection of fundamental rights but frequently to reinterpret United Kingdom obligations in areas such as policing, social

services, education and even the administration of prisons. These are surely areas where one would expect the courts to reflect the margin of appreciation.

Judges here have been perhaps slightly supine in the face of some curious decisions coming from Strasbourg, but there has of late been a flicker of a response. In the recent case of Horncastle, the Supreme Court declined to follow a decision of the ECHR and encouraged what it described as a "dialogue" to begin between the courts here and there. Experience suggests that any such exchange is less likely to be the elegant exchanges of a Noel Coward play and rather more a Beckett monologue, with Strasbourg the only speaking part.

This leads to prisoners' votes. A significant majority of the UK population is against their voting, although some might regard the right to vote as slightly less controversial than the right to receive heroin substitute, which has been the subject of a large number of claims against those responsible for the "health" of prisoners. However, Strasbourg has decided that the parliamentary ban is insufficiently nuanced and has persisted in this view, notwithstanding the view expressed by the House of Commons in the recent debate.

I welcome the commission set up by the Deputy Prime Minister, which has an enormous and vital task to perform. The members of the commission will not be short of advice. I am sure that they will not be

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swayed by the tabloid headlines that have so disfigured the debate so far. I only wish that I could tell the House that all the newspaper stories were fundamentally wrong, but they are not.

No one who followed the introduction of the Act can question the motives of those behind the legislation. It took tenacity and intellectual courage to see it through. It would take even greater courage to accept its major shortcomings and the need for change.

12.35 pm

Baroness Whitaker: My Lords, my noble and learned friend Lord Irvine of Lairg has put into brilliant context a most important subject, but one that is stereotyped and made into a ridiculous Eurosceptic nightmare in the pages of the tabloid press and the minds of some people.

The reality is the opposite. The domestication of the European Convention on Human Rights, via the Human Rights Act, far from licensing various kinds of absurd or even criminal behaviour, has achieved respectful, compassionate and fair treatment for very many of our fellow citizens oppressed by systems or bureaucracy or misguided or oppressive elements of the state, as the noble Lord, Lord Pannick, eloquently described. Enemies of red tape and bureaucracy should welcome the Human Rights Act. It is there to give a human dimension back to state operations. It is not, *pace* noble Lords, primarily

for lawyers any more than water is for water engineers. It is for citizens to rely on and public servants to have regard to.

As a board member of the British Institute of Human Rights, I draw some examples of this reality from its experience in training public sector officials such as those working in the NHS or empowering groups such as pensioners to access appropriate facilities fairly. Many of the successes that they have told me of have used the Human Rights Act to avoid going to court.

The parents of a mentally ill son in residential care were not allowed to visit after they complained of unexplained bruising. Human Rights Act training enabled them to challenge this successfully. Children in foster care were not allowed to see their mother, prone to mental ill-health after the death of their father, because of the lack of supervisory staff, to the great distress of both parties. The mother's advocate was trained to argue, successfully, that the children had a right to see their mother. They now remain very close.

Of course, some problems end up in court-I have many more examples of those that do not, but it is important to realise that they can. One such decision was that, before the closure of care homes, effects on the residents must be investigated and their rights safeguarded. Vulnerable old people in all care homes are more secure because of this. Another case overturned the dreadful decision that a woman fleeing her violent husband made herself intentionally homeless.

The courts found that the Mental Health Act 1983 did not comply with the Human Rights Act because it did not put the onus for proving the need for continued detention on the detaining authorities. As your Lordships know, only Parliament can change our laws. In the Joint Committee on Human Rights, we agreed new regulations to redress this plainly oppressive state of

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affairs. People have had their liberty restored because of this use of the Human Rights Act.

Many of these rights are not absolute. They need to fit in with other rights. The Human Rights Act provides a mechanism for balancing those rights.

Some say that our emerging human rights culture is deficient in the concept of responsibility, but human rights are inextricably also responsibilities. If a person has a right to peaceful enjoyment of their possessions, other people have a responsibility not to interfere with that-the law would notice that. The proper understanding of rights produces socially responsible behaviour and therefore leads to greater social cohesion.

And in our multicultural society, for it is one whatever politicians say, we need one universally accepted set of basic values to share, to underpin our differences, so that we

can be equal before the law. The separate faiths cannot all of them provide that; the Human Rights Act can. The fact is that "human rights" is simply an international legal description of what we would in ordinary speech call respect for the dignity of a fellow human being.

Anyone who believes that every person is of equal worth will find in the Human Rights Act the process to safeguard that worth. That is what it is for. That is what the European Convention on Human Rights is for. We could add to the convention rights, for example, jury trial or freedom of speech. We could have something easier, for instance, to teach in schools to fix it in our sense of national identity-a sort of Gettysburg address for Britain. But let us not try to impair it in any way.

12.39 pm

Lord Wills: My Lords, I join others in thanking my noble and learned friend Lord Irvine for securing this important debate.

Memories fade-not all politicians have as good a memory as the noble and learned Lord, Lord Mayhew. He reminded us that the ECHR was inspired by Winston Churchill, was largely drafted by British lawyers and was seen after the horrors of totalitarian tyranny as a way of protecting the individual against the arbitrary power of the state. The Human Rights Act incorporates those protections into British law so that British citizens can seek them in British courts. Yet too often now, these rights are viewed as an irritant by politicians seeking easy headlines and by journalists who are eager to write them.

Human rights can challenge everyday assumptions in a modern democracy and, in interpreting legislation to protect fundamental individual rights, courts can sometimes reach judgments that upset majority opinion-and, of course, courts here and in Strasbourg can err. However, while the rule of law must command broad respect in society for it to be sustained, this should not come at the price of requiring majority support for every legal judgment. As the noble Lord, Lord Pannick, set out, this could leave powerless individuals and minorities defenceless. This has been forgotten today by those who oppose such protections for unpopular minorities and individuals and who dislike anything that emanates from Europe on the basic assumption that anything that comes from over there must be damaging here.

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As my noble and learned friend Lord Irvine set out so cogently, such views are often based on a toxic stew of misinformation and misinterpretation. As my noble friend Lady Whitaker has reminded us, the Human Rights Act works well in protecting individuals

against the arbitrary actions of the state-a mission that everyone ought to be able to sign up to.

The most recent myth-and it is a myth-is that the European Court of Human Rights dictates the interpretation of human rights instruments by British courts. It does not. As the noble Lord, Lord Faulks, has reminded us, Section 2 of the Human Rights Act requires British courts to take into account Strasbourg case law but no more than that-they are not bound by it. In taking such account when interpreting the Human Rights Act our courts also frequently rely on our common law and other sources of authority. There is a margin of appreciation to British courts to interpret the convention in accordance with British jurisprudence as well as European jurisprudence.

With great respect to the noble Lord, Lord Faulks-who is a most distinguished lawyer and, as is evident to your Lordships' House, I am not-I understand that in a number of early cases-for example, in Alconbury and Anderson-even though British judges determined that they were bound by Strasbourg jurisprudence, they were careful to make clear the room for discretionary judgments. In Alconbury, Lord Slynn said:

"In the absence of some special circumstances, it seems to me that the court"-

this judgment was given in the House of Lords, as the Supreme Court then was-

> "should follow any clear and constant jurisprudence of the European Court of Human Rights".

In endorsing this in Anderson, Lord Bingham said that the House of Lords,

> "will not without good reason depart from the principles laid down in a carefully considered judgement of the court"-

that is, the European Court. I am not a lawyer, but the qualifications "in the absence of some special circumstances", "any clear and constant jurisprudence", "without good reason" and "carefully considered judgement" signal considerable freedom of action for the British judiciary. On more recent occasions this clearly seems to be the prevailing trend. In Animal Defenders, for example, UK judges have acted as if they are not bound by Strasbourg jurisdiction.

This is not an academic discussion. The Government have said that they want to bring in a new Bill of Rights and they have set up a commission including distinguished Members of your Lordships' House to pave the way. There is nothing necessarily worrying about that. The previous Government launched a Green Paper-I was the Minister responsible for it-which discussed the possibility of a new Bill of Rights. However, for us, the purpose of that consultation was not to scrap the Human Rights Act but how best to build on it: how sufficient was it; did we need to go further; was there a case, for example, for entrenching further economic and social rights that we have so far taken for granted?

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In contrast, the Conservative Party has said that it wants to scrap the Human Rights Act, although it would not withdraw from the European convention. However, if a Conservative Bill of Rights will still incorporate the ECHR then, whatever the detailed tweaking, the question must arise: why bother? It is hard to avoid the conclusion that the Conservative Party has fallen victim to the occupational disease of politicians-raising expectations in search of short-term political advantage, reckless of the fact that they are doomed to disappoint such expectations in the longer term.

Conservative talk of scrapping the Human Rights Act must give rise to expectations that human rights judgments that have provoked disquiet in sections of the media and the wider population will no longer occur. This is simply not true-not least because many of such cases have resulted not from judgments in British courts but from the European Court of Human Rights. Conservative policy would not prevent such judgments; it would simply force British citizens to go to Strasbourg to seek protections, once again exporting British rights to Europe.

It might be argued that if the Government replaced the Human Rights Act with a Bill of Rights that simply reworded it, it would not be anything other than a waste of precious legislative time but the damage would be only presentational. But is that really the case? If the Conservative Government tried to deincorporate the ECHR through scrapping the Human Rights Act and then reincorporate it in some other way, there is at least a real risk that the Strasbourg court, to which British citizens would still have recourse under Conservative policies, may well be less inclined to defer to rulings by British courts. In other words, any such legislation would be likely to restrict the margin of appreciation rather than extend it.

It is with relief that all of us who care about human rights see the presence of the Liberal Party in the Government. Its members have been admirable advocates of the Human Rights Act. At Second Reading of the Human Rights Bill, the noble Lord, Lord Lester, who is a founding father of the Human Rights Act, called the Bill well designed and well drafted. I look forward to his speech later in the debate and to that of the Minister; they have been redoubtable defenders of the Human Rights Act.

There is an important debate to be had but it should not be about replacing the Human Rights Act. As the late Lord Bingham said:

"The rights protected by the Convention and the Act deserve to be protected because they are ... the basic and fundamental rights which everyone in this country ought to enjoy simply by virtue of their existence as a human being".

The debate we now need to have is not about scrapping the Human Rights Act but how to build on it.

12.47 pm

Lord Goodhart: My Lords, I am delighted that the noble and learned Lord, Lord Irvine of Lairg, has introduced the debate on this very important subject. I am delighted for two reasons: first, we have heard far too few speeches from the noble and learned Lord since the day in June 2003 when he was suddenly

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expelled from his office as Lord Chancellor; secondly, it was the noble and learned Lord, Lord Irvine, who, in the early days of the Blair Government, secured the enactment of the Human Rights Act. Without him it is doubtful that we would have had anything like as good an Act as we now have.

The purpose of the debate is to draw attention to the European Convention on Human Rights. The element of that convention and of the Human Rights Act on which I wish to concentrate-along with the noble and learned Lord and several other speakers in the debate-is the endless delay of British Governments to alter the law to allow some prisoners to vote in elections. This has been held by the European Court of Human Rights to be a breach of the prisoners' rights. This has aroused aggressive responses from much of the media and many citizens, not least the Prime Minister.

However, if we think a little more about the situation, we may decide that this is a strong conclusion at which to arrive. There will be no particular pleasure for prisoners in casting their vote. In the open world, casting votes is a right, but it is also regarded by many as a duty-not a legally binding duty, of course, but a civil obligation. Many prisoners have never voted-sometimes because they have failed to register, sometimes because they have never bothered to go to the polling station. Prisoners getting towards the end of their sentences should be encouraged to take an interest in public life and what is going on outside the prison-that includes voting.

Providing opportunities to vote should be regarded not as some sort of gift or present to the prisoners but as part of the rehabilitation process. I do not believe that prisoners serving a life sentence or with many years to go before release should have a vote nor that the European Court of Human Rights would require them to but prisoners with, let us say, less than four years of imprisonment remaining should have the right to vote. Given that most forms of election in the United Kingdom run in a four-year cycle, this means that prisoners would be released while the winners of the elections in which they voted were still in office.

The issues involved in voting by prisoners reminds me of the great penal reformer from the 1920s to the 1940s, Sir Alex Paterson, and his dictum that,

> "men come to prison as a punishment, not for punishment".

The loss of liberty is the punishment, not harsh treatment in prison. The issue of prisoners voting is an interesting and unusual example of human rights. Voting, as I have said, is a mixture of right and of obligation. I do not think that it is an absolute right which can be exercised by everybody in prison but the duty element of voting needs to be kept in mind, as must the quotation from Alex Paterson. There is no reason why, for prisoners approaching release, deprival of voting should be regarded as a justifiable punishment. Instead, voting should be regarded as training for release. This is how the Government should handle it.

12.52 pm

Lord Ramsbotham: My Lords, I, too, am grateful to the noble and learned Lord, Lord Irvine, for obtaining this important debate. As with other noble Lords, I

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will concentrate on the issue of voting for prisoners, which has already been raised by the noble and learned Lord, Lord Irvine, and the noble Lords, Lord Prescott, Lord Thomas and Lord Goodhart. As the noble Lord, Lord Prescott, said, when the issue was raised in the other place on 10 February, the discussion appeared to be nothing about voting for prisoners but objections to Europe, which was not the point. When we look at the issue in the context of human rights, it deserves better than that and so do we if we think of ourselves as a civilised nation in our approach to the resettlement of offenders-as the noble Lord, Lord Goodhart, has mentioned.

I must declare an interest, first as an advisory member and now a trustee of an organisation called the International Centre for Prison Studies. Its job is to go round the world advising international prison systems on what is described in its manual as a,

> "human rights approach to prison management".

The reason for this is that when people have looked at the way prisons are run, there is absolutely no doubt that the decency which accompanies a humans rights approach is most likely to result in successful resettlement. To quote from this manual,

> "The legitimacy of this handbook on good prison management comes from its solid grounding in these international human rights standards, which are recognised around the world .... [The] concept of human rights is not merely another subject to be added to the training curriculum. Rather, it suffuses all aspects of good prison management and is integral to it."

That manual was launched in January 2002 by the then Foreign Secretary, Jack Straw. I have personally used it in Libya and Turkey, and have been fascinated by its reception by

governments who saw-and still see-their prisons as a way to improve their reputation for human rights around the world.

I was Chief Inspector of Prisons in 1998 when the European convention was introduced into English law. At the time, a large number of people said that this introduction would be followed by an absolute torrent of litigation by prisoners who would claim that their human rights had been breached by the way that they were treated in prison. I asked a lawyer to run prison rules against the European convention and alert me to where there were any discrepancies. There were none. In other words, if prison rules were breached, the European convention was being breached. It is fascinating that, when one looks at the amount of litigation brought by prisoners since then, nothing has really been brought about the European Convention on Human Rights, with the exception of this alleged breach of Article 3 of the First Protocol, about prisoners voting.

Article 3 of the First Protocol merely says that,

> "free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature",

are guaranteed. It makes absolutely no mention, as the noble and learned Lord, Lord Irvine, said, of prisoners voting. When this lack was brought to my attention, I asked the Home Secretary why prisoners were being denied the vote. He replied that prisoners had lost the moral authority to vote. I did not know that moral

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authority came into voting and suggest that, if it is applied, there are several other people who would be denied the vote.

So began the litigation which has been the subject of quite a lot of today's discussion. I do not intend to go through it, but it is now more than seven years since the European court ruled unanimously that we were in breach of the convention because we did not allow prisoners to vote. The solution has been in our hands ever since. I recommended to the Government in the first consultation document, which the noble and learned Lord, Lord Falconer, published that we should adopt the same approach as Germany and France. At the time of sentence, and bearing in mind the crime committed, the judge should remove the right to vote during the period of that sentence. I seriously believe that that would have taken the whole of this issue out of the realms of where it has got to. Parliament would have made the decision, which is what Parliament wants to do. The decision would be related to the crime. When you look at the people in prisons, there are vast numbers in the sad category or the short-term category, not masses of rapists, arsonists and all the other people who are quoted in particular in the 10 February debate-which was, frankly, as the noble and learned Lord, Lord Mayhew, suggested, an exercise in getting overexcited.

That is the way to go. I hope that what happens now will put this seven-year delay behind us and that we will take this away from any suggestion that the European convention or the European Court of Human Rights is at fault. When we sign up to conventions, we agree to their conditions. We cannot pick and choose. Any Government who deliberately appear to be either breaking the law or picking and choosing send an appalling message to those people whom it imprisons-the very people we are trying to resettle.

12.59 pm

Lord Dubs: My Lords, I am grateful to my noble and learned friend, Lord Irvine of Lairg, not only for initiating this debate but also for the enormous contribution that he made as Lord Chancellor to the development of human rights in this country. Many noble Lords have referred to the responsibility of Parliament and of politicians. I want to develop that theme. After all, we have in this Parliament the Joint Committee on Human Rights-of which I am a member. That committee itself has a big responsibility for ensuring that we adhere to the European Convention on Human Rights and that our legislation works sensibly in relation to that.

We have a good story to tell, so I am disappointed that, as a country that did so much work historically in developing the concept of human rights, we are now treating it as a bit of a political football rather than as a very serious issue and one fundamental to the values of our society. We have had reference made to the part that Winston Churchill played, and the Labour Government played an important part in developing the Human Rights Act. Of course, nothing is perfect, and of course it is right that those of us who support the European Convention on Human Rights and the

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European court and the Human Rights Act have criticisms to make, and it is right that we should be able to make them. Of course, human rights are not just for lawyers, although lawyers have made very powerful contributions to this and previous debates.

I would like to say a little bit about the backlog of cases in the Strasbourg court. My understanding is that 70 per cent of the court's judgments concern the repetitive applications defined as issues that the court has already decided but which have not yet been properly implemented at a national level. Clearly, if there is a delay in implementing a decision, other people will also bring their cases forward, which apparently accounts for a large proportion of the backlog of cases. The Hirst case regarding prisoners' rights has already been referred to by a number of your Lordships, but it is one example of an issue that results in repetitive applications coming forward.

The other way in which the heavy pressure on the European court can be lessened is for all member states to have proper parliamentary scrutiny of their legislation. The Joint Committee on Human Rights has as its responsibility looking at all legislation coming forward to see whether it complies with the Human Rights Act. Clearly, on occasions, we have been very critical of Governments and have had Ministers come before us to

challenge them on why they were not producing legislation compliant with the Human Rights Act. Better parliamentary scrutiny across countries would result in fewer cases going to Strasbourg. Of course, it is one of the key responsibilities that the Human Rights Joint Committee has, as well as the responsibility for following up on Strasbourg cases.

I do not want to spend a lot of time on the Hirst case and votes for prisoners, because it has been fully dealt with, except to say that I am astonished by what has happened with an issue that is important in principle but is actually trivial. If the Government had given the right to prisoners serving up to four years, apart from one or two newspapers commenting for a moment, it would have all happened. I do not think that elections would have been determined by the votes of prisoners in our jails. So it is a very minor issue, although important in principle-but goodness, we have been making a fuss of it, and not just now. When I was in the Commons, I introduced a Private Member's Bill dealing with giving rights to prisoners. Although it concerned mainly rights about letters, cells, visits and so on, it did have one clause giving rights for prisoners. No one mentioned anything about the rest of the Bill, except the fact that I was suggesting rights for prisoners, and the media got very excited about it. Nevertheless, the issue has come back, thanks to the Strasbourg court. I hope that the Government will get on and do something about this, as it is a disgrace that we who believe in the rule of law should be disobeying a basic law from a basic court that we have helped to create.

Of course, I realise that human rights are not easy for Governments, which is why Parliament has to be active and why an effective culture of human rights depends on the part that national Parliaments play. I wish that other Parliaments had a Human Rights Committee, as we have here.

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I mention in passing the vexed question of a Bill of Rights for Northern Ireland, which the noble Lord, Lord McNally, has occasionally dealt with in Answers to Questions here. There is a hold-up there which I hope will be eased so that the Bill of Rights for Northern Ireland, which was agreed in the Good Friday agreement, will be proceeded with.

The Joint Committee on Human Rights produced a report some time ago on a Bill of Rights for this country. Some of the issues in it have been referred to by my noble friend Lord Wills. We suggested that a Bill of Rights for this country should include social and economic rights-something that is quite contentious but which has happened in South Africa, for example, and which would give human rights even more of a cutting edge than they have had so far. I hope that the Government will consider that.

I am disappointed by the Government's attitude to human rights, but I note that there are some excellent people on the commission that they have appointed, some of them in your Lordships' House. I hope that that will achieve a sensible report.

From November this year, the United Kingdom will hold the chairmanship of the Council of Europe. Some Members of this House are active in the Council of Europe. I hope that it will enable this country to argue for increasing parliamentary involvement in human rights as a central theme during its six months of chairmanship. Human rights are fundamental to the values of this country and I hope that they will stay an important part of the culture and attitudes of the British Parliament.

1.05 pm

Lord Black of Brentwood: My Lords, we are all indebted to the noble and learned Lord for securing this fascinating debate. I want to address the impact of the convention on press freedom and privacy. I declare an interest as chairman of the Press Standards Board of Finance, which funds the Press Complaints Commission and appoints its chairman, and as an executive director of the Telegraph Media Group.

As a starting point, I make it clear that I am an ardent admirer of the European convention, which as we have heard was established after the Second World War to limit the power of the state-an aim that I wholeheartedly support. I think it no coincidence that the British Member of Parliament guiding the drafting of the convention was a lawyer at Nuremberg, Sir David Maxwell Fyfe, who saw up close the horrors of totalitarianism. The noble and learned Lord, Lord Irvine, in his opening remarks, characterised the media, of which I am part, of wanting to destroy the Human Rights Act. Let me make it clear that I do not wish to see the Human Rights Act destroyed, not least because I see the great good that has come from it, which the noble Lord, Lord Pannick, outlined with his customary eloquence. But there are valid criticisms of it, and I want to make one or two today.

I am no lawyer, but I believe that the architects of the convention intended it to be used, in the words of the White Paper preceding the Human Rights Bill,

> "to enable people to enforce their Convention rights against the State",

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not as a charter to regulate private dealings. If the convention has become the subject of some opprobrium in recent years since the passage of the Human Rights Act, it is because it is being deployed as it was never intended to enforce those rights in private disputes. That is why real problems have now arisen, in particular with the developing privacy law.

There is an important point here, which has been made a number of times but which I want to reinforce. It is commonplace to attack judge-made privacy law and lay the blame for this at the door of the judiciary. That is wide of the mark, and I agree with the comments of the noble and learned Lord. It is not the courts that are responsible for the changing balance between privacy and freedom of expression; they are merely interpreting the law, which does not spring from some form of public policy ether but from the Human Rights Act and the manner in which it incorporated the European convention into our domestic law. Parliament is responsible for that-not the judges.

Indeed, those involved in scrutinising the Human Rights Act and understood the delicate ecology of personal privacy and freedom of expression warned of such consequences. My noble friend Lord Wakeham, for whom I used to work, speaking in Committee on this legislation, told this House that the Bill,

> "would damage the freedom of the press and ... inevitably introduce a privacy law".-[*Official Report*, 24/11/1997; col. 771.]

He added specifically on the issue of injunctions, with his typical prescience,

> "in privacy cases the courts would inevitably err on the side of caution and would not refuse an injunction, despite the fact that a newspaper said that there was a public interest defence".-[*Official Report*, 24/11/1997; col. 773.]

The Government took those concerns to heart and amended the legislation, with Home Secretary Jack Straw committing that,

> "we have no plans to introduce legislation creating a general law of privacy",

adding, on prior restraint,

> "interlocutory injunctions should be granted ... only in the most exceptional of circumstances".-[*Official Report*, Commons, 2/7/1998; col. 541.]

That it has not worked out that way is because Section 12 of the Act did not, I believe, deal explicitly enough with the mischief that was predicted and the way in which claimant lawyers have now abused the legislation with injunctions, sometimes anonymised injunctions, increasingly becoming the new weapon in the armoury of reputation management for some whose reputations do not deserve to be defended. I can only speculate what Sir David Maxwell Fyfe would think about the convention being used by cheating footballers to protect their commercial image.

I will not spend time on the injunction issue other than to say that one of the reasons Governments of all persuasions have opposed privacy laws is that they know how statutory legal frameworks are too slow to keep up with the breakneck speed of media development in a digital age. The internet has had a permanent, transformative and highly positive impact on the press, one aspect of which has been the huge propagation in the

number of platforms available to it. When the Human Rights Act was put on to the statute book,

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Google, Twitter, Facebook and other social media were all far off in the future. The law has remained static but the media have changed, which is one of the reasons I believe Jack Straw talked during the passage of the Act about the need to preserve self-regulation-in an internet age, it will always be the only truly effective way to protect personal privacy in a manner that can keep up to date with the bewildering and rapid pace of media development.

Indeed, the Press Complaints Commission has proved highly adept at dealing with often highly complex privacy issues in a common-sense, unobtrusive way that does not raise all the problems of public court cases or secret injunctions. The noble Lord, Lord Prescott, treated us to his customary bashing of the PCC. I do not think that that is borne out by facts; you need only to look at issues such as harassment, a key aspect of personal privacy, where the PCC has been hugely successful in dealing with so-called "media scrums". There is also the PCC's vital but unsung pre-publication work, of which the noble Lord himself once made use, which helps to deliver privacy to many ordinary people without impinging on freedom of expression.

Those successes-and they are successes-help to bring perspective to this issue. It is easy to think that there is some sort of crisis of privacy in this country. Yes, there are problems with injunctions and the relationship of the law to social media, but the truth is that, while not perfect, and I accept that point, in recent years the British media have greatly improved the way in which they deal with personal privacy, particularly for ordinary people who could never afford to use the courts. The problems are at the margin and we do not need new legislation to deal with them; in my view, that would be the wrong course. Instead, one of the ways in which we could help to deal with the issue of injunctions would be for the courts to say to claimants, "There is a code incorporating your convention right to privacy that binds all newspapers, and a body that enforces it. Try that before coming to us". That is the logic flowing from the very welcome European Court judgment in Mosley, which I hope the Secretary of State will ponder during the review that he is conducting.

I finish as I began. The European convention is something to be celebrated. One of the best ways that we can deal with the controversy surrounding it is for the Government to go back to Section 12 of the Act, look at the issues that gave rise to it, assess its efficacy and, if necessary, put a hand on the tiller to adjust it as I have suggested. I am sure that there is no more delicate hand than that of my noble friend the Minister to do just that.

1.12 pm

Baroness Kennedy of The Shaws: My Lords, my noble and learned friend Lord Irvine is to be congratulated on the Human Rights Act, which he introduced when Lord

Chancellor, and which introduced the European Convention on Human Rights into domestic law. I particularly want to commend this aspect of my noble and learned friend: he did so and then was the Act's champion in the years thereafter, sometimes in the

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face of a touch of authoritarianism that came from Home Secretaries, even those whom he sat with in Cabinet. He was a great liberal Lord Chancellor, and I pay tribute to him for the role that he played.

My noble and learned friend reminded us of the gear change that took place back in March 1993 when John Smith gave the Charter 88 lecture, which I had the great privilege of chairing. It was a gear change because John Smith committed the Labour Party then to this change in law and its ability to protect our rights.

When my noble and learned friend Lord Irvine introduced the Second Reading of the Human Rights Bill into this House in 1997, he indicated the weakness of the traditional position of our unwritten constitution. He explained that it gives no protection from the misuse of power by the state, nor from acts or omissions of public bodies that harm individuals in a way that is incompatible with their human rights under the convention. Of course, he was right. I now chair Justice, the lawyers' organisation that has membership across all parties and none, which has long supported the incorporation of the convention and supported the Human Rights Act. Some 11 years on, it is our view-it is certainly mine-that our constitution is immeasurably the better for that incorporation.

These positive rights are not alien imports, as my noble and learned friend has said; they are largely a distillation of English common law, often misunderstood by many in the public and in the Conservative Party. It was about reintroducing many of our own principles into European law. It was an organised code, drafted by lawyers from our own Foreign Office and by our own parliamentarians. There is a great pamphlet that I recommend to the House, written by Peter Oborne and Jesse Norman-not the opera singer but the Conservative Member of Parliament-describing how the Human Rights Act is rooted in common law.

The first major case in which our domestic judges seriously grappled with this changed world was the Belmarsh case. The judgments of the House of Lords in that case provide a revealing comparison with the infamous decision in Liversidge v Anderson, a case during the Second World War. The point was almost the same: the rights of those who faced internment or imprisonment without trial. Mr Liversidge was a Jewish émigré whose original name was Perlzweig. Because he had changed his name, he became a subject of suspicion and ended up being incarcerated without trial. The earlier case is famous for Lord Atkin's dissenting speech where he talked about the rule of law and justice prevailing even amid the clash of arms.

The majority of the then House of Lords saw no problem in depriving people of their liberty on the say-so of the Home Secretary. In Belmarsh, though, under the Human

Rights Act, the judiciary, led by Lord Bingham, carefully compared what the Government had done with the provisions of the convention and found it wanting. We saw how the common law has been enriched by the incorporation of the European convention.

In this way the Belmarsh judgment demonstrates what my noble and learned friend Lord Irvine had talked about, and talked about again in his Tom Sargant memorial lecture in 1997 where he spoke of the Human Rights Act providing a citizen with the

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right to assert a positive entitlement and for it to be expressed in clear and principled terms. The incredibly positive thing is that it is provided not just to citizens but to any human being. As the right reverend Prelate says, the Act recognises the moral significance of every person, not just citizens.

The convention has proved its worth in the intervening decade. It has encouraged our judiciary seriously to hold the Government to account, particularly with regard to their approach to terrorism. I see that from my own experience in those cases. Indeed, the European Court established by the convention has given the domestic judiciary a lesson in how to interpret the convention in key decisions, where their own domestic decisions were too deferential to the Government of the day. Those included the retention of DNA taken by the police from innocent people; the misuse of police powers under the Terrorism Act, in the case of Gillan; and the extent of control orders, in the case of A. They are all cases where the judges of the European Court were bolder than our judiciary, which is always being complained about. In my view, the European Court was correct there.

In a small number of cases, the jurisdiction of the European Court has been challenged as having gone too far, and some of them have been mentioned today. There has been considerable adverse comment against the decision in Chahal that the prohibition against torture should extend to a prohibition against a state effectively conniving in torture by sending someone back to a state where there is a reasonable likelihood that they will be tortured. In the light of what we now know about the US extraordinary rendition programme, how right that decision was-and how shameful that the UK Government thought to intervene in another case, Saadi v Italy, to overthrow the principle.

The Arab spring has shown us the true nature of a number of the regimes to which the UK wanted to expel people. For example, there can now be few illusions about the regime of Colonel Gaddafi or about the true nature of his English-educated son. Yet the UK wanted to close its eyes to the reality and send people back on the basis of undertakings that were likely to be of little worth. It took the courts to express scepticism of the value of undertakings from such sources in the cases of AS and DD, and in a case that I was involved in to do with possible undertakings from Pakistan.

The European Court of Human Rights is an important part of the apparatus of the ECHR. Its doctrine that the convention is a living instrument has kept it up to date and avoided some of the absurd originalism associated with the American constitution. Its value has to be recognised. I accept that there are problems around the issue of the margin of appreciation. I hope we will be able to visit that in our commission, which I sit on and which will look at how the court's decisions should deploy that doctrine. Another issue concerns judicial dialogue. I hope there can be more of that in the case of Horncastle, which is currently before the European Court's final chamber. It is a case that we should follow with some interest.

Finally, the convention is to be welcomed. The new commission that will look at a British Bill of Rights recognises that there is a guaranteed floor-the ECHR.

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We as a country have gained immeasurably from the way in which the Human Rights Act has brought it more visibly into our constitution. In proclaiming his crucial role in this process, I salute the noble and learned Lord, Lord Irvine.

1.21 pm

Lord Hart of Chilton: My Lords, I am extremely happy to join other noble Lords not just in congratulating the noble and learned Lord, Lord Irvine of Lairg, on securing this topical debate today, but in paying tribute to his work on human rights. The Act that we are discussing will constitute a permanent monument to him far better than any statue we may later think it right to erect.

The Human Rights Act has enabled British judges to make their own distinctive contribution to the development of human rights law in Europe. It has also achieved major improvements in our domestic law when the state overreaches itself. Let me cite just a few examples: the right to attend peaceful demonstrations without interference from the police; a duty on local authorities not to house vulnerable people in insanitary and dangerous accommodation; a requirement for the DPP to clarify his position on prosecuting in cases of assisted suicide; and an end to discrimination on the grounds of sexual orientation.

A constructive dialogue has also developed between the British courts and the Strasbourg court, which has benefited the development of European human rights jurisprudence. Sometimes we have had to accept a correction from Strasbourg. A good example concerns the extensive and previously unchallengeable DNA database, as in the case of Marper in 2009.

Far more common have been situations in which the Strasbourg court has followed the British courts in rejecting a human rights complaint, having had the benefit of the reasoned judgments of our own Supreme Court. A good example of the interplay between our courts and Strasbourg is provided by the decision in the case of Horncastle, which has

been mentioned twice in this debate. Our Supreme Court held that where Strasbourg decided a case with insufficient understanding of our domestic law, it could decline to follow Strasbourg. The Supreme Court felt that Strasbourg had failed in a previous decision to take proper account of our carefully crafted statutory code for the admission of hearsay evidence in criminal cases. Thus, the Supreme Court declined to follow Strasbourg and held that the defendant's convictions should be upheld. Effectively, the Supreme Court was asking Strasbourg to think again. This is precisely how a constructive dialogue should develop.

Finally, a major triumph of the Act has been to change the culture of Whitehall. As your Lordships know, every Bill that comes before Parliament must be accompanied by a ministerial statement of its compatibility with convention rights. I know that Whitehall takes this very seriously. Much effort goes into the preparation of legislation to ensure that this statement can be made properly. This is a cultural change that does not hit the headlines but is a huge gain from the Human Rights Act.

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1.25 pm

Lord Lester of Herne Hill: My Lords, I salute the noble and learned Lord, Lord Irvine of Lairg, for his courage and liberalism. It is probably not generally understood that when he was Lord Chancellor there was a sustained campaign by the media to obtain a complete exemption from the Human Rights Act. I helped the noble and learned Lord to stand up against that. Section 12 of the Human Rights Act, which was introduced by the noble Lord, Lord Wakeham, was the compromise that we secured to achieve the passage of the Bill. First, I salute the noble and learned Lord, Lord Irvine, because he paid a personal price for his courage. The media campaign against him was not about the price of wallpaper or whether he peeled his own oranges, but came very much from straight hostility to him for standing up against this completely misguided media campaign. I emphasise that at the beginning.

Secondly, I very much regret the fact that the previous Government refused my repeated requests to publish the preparatory work on the Human Rights Act. I will probably not live long enough to see the full record. However, on this issue the public would find it very beneficial to see that the noble and learned Lord, Lord Irvine of Lairg, was the true architect of the Human Rights Act, although his colleague, the right honourable Jack Straw, would contest this. I hope it may become possible to see that record published.

Thirdly, one of the ingenious provisions of the Human Rights Act, to which the noble Lord, Lord Hart, just referred and which none of us thought significant at the time, was the obligation on Ministers, under Section 19, to make a statement on the compatibility of

a Bill. That, coupled with the work of the Joint Committee on Human Rights-like the noble Lord, Lord Dubs, I served on that committee-has meant that instead of human rights being the property of judges and lawyers, they have been made part of the other two branches of government, the Executive and the legislature, through the scrutiny of Ministers' statements and reasons why particularly measures are or are not compatible with the convention. New Zealand has a weak version of that but no other country that I know of, in the Commonwealth or beyond, has anything like the Joint Committee on Human Rights or that compatibility statement. It is admired across Europe and there are suggestions that it should be adopted elsewhere. It is a very important part of our legislation.

Another very important part is the compromise between parliamentary sovereignty and effective legal remedies. My original Private Member's Bill on human rights sought to give judges the same power that they have under European Union law to strike down inconsistent legislation. The judges came to me and said, "We don't need that and the Commons will never allow it. Why not do something more moderate?". The declaration of incompatibility was invented to reconcile parliamentary sovereignty with the need for effective remedies. That was wise and my first efforts were misguided in terms of our own legal system. Much money-£6 million-was spent on training every judge, magistrate and tribunal chair for two years before the Human Rights Act came into force. One of the master strokes was the appointment of Lord Bingham as

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president of the Supreme Court-or the Law Lords, as they then were-to lead our most senior court, which he did magnificently. We miss him very much today.

It is very important for our judges, lawyers and the public at large to approach European convention law through our law and not around our law. By that I mean that it is very important to make what we regard as European convention rights, but are in fact British rights, part of the fabric of our legal and political system, and not to tear holes in that fabric. I believe that much of that has been done by our judges already, but perhaps more needs to be done to protect our common law traditions in a way that is compatible with the convention. Like the noble Baroness, Lady Kennedy of The Shaws, I am privileged to serve on the Bill of Rights commission. I assure the noble Lord, Lord Wills, that I would not be there if I thought there was the slightest risk of weakening the current protection of human rights. Indeed, if he does not mind my saying so, I spent 18 fairly futile months in his department trying to persuade the previous Government to do something rather similar to what I hope the commission might eventually achieve. This is an area in which political parties sometimes do well. We were a coalition in opposition, were we not, in the 1990s in seeking to get the Human Rights Act on to the statute book. I was on the Cook-Maclennan commission at the time, as was the noble Lord, Lord McNally.

One of the terms of reference of the new commission is to look at the reform of the Strasbourg court. Since I have been arguing cases there since 1967, I think that I understand the weaknesses, as well as the strengths, of the system. Suffice it to say that in

my view, if we really want change, there is a need not only for fundamental reforms of some aspects of the court and its procedures, but for more human and financial support. Unfortunately, there is zero growth and even the meagre resources devoted to the court, compared with the much greater ones for the Luxembourg court, have been held up by the Interlaken process. The noble Lord, Lord Tomlinson, nods. There were to be at least new staff, resulting in more effective case management, but that has been put in the freezer pending the Interlaken process. That is quite ridiculous. The resources, having been voted, should not have been held up in that way. Like the noble Baroness, Lady Kennedy, I and others, will be going to Strasbourg and thinking about reform of the court. I very much welcome the fact that the terms of reference allow us to do that.

1.32 pm

Lord Kirkhill: My Lords, I join other noble Lords in congratulating the noble and learned Lord, Lord Irvine of Lairg, on securing this debate. Nowadays, when we discuss fundamental rights, we inevitably have to talk about the European Convention on Human Rights. This convention is by no means the only international instrument in the field of human rights, but it is certainly one of the most important.

Until the beginning of this century-that dates me a bit-I was for almost 14 years a member of the United Kingdom Parliamentary Assembly of the Council of Europe. For about four years within that period, I was chairman of the council's committee on legal

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affairs and human rights. Therefore, I observed the functioning of the human rights convention and, to a certain extent, played a role in its implementation. We should continue to remind ourselves that the convention is based on the Atlantic Charter signed by Churchill and Roosevelt in the middle of the Second World War and the 1948 United Nations Universal Declaration of Human Rights. Yet, the history of human rights is much older than that-it goes back to the French Declaration of the Rights of Man, the Magna Carta and the Bill of Rights. This means that in many respects the convention has its roots in our own past. Those who pretend that the convention is entirely a continental matter, and has continental legal implication, are wrong in my view.

Half a century ago, the French, under de Gaulle, refused to accept the convention, arguing that it "was too Anglo-Saxon". The truth is, however, that the convention is a well-balanced product of the best of western European legal traditions, of which Britons, French and other Europeans may be equally proud. The convention was concluded in 1949, which means that it is now 60 years old. Since 1949, additional rights have been added and the mechanism of the convention has been modified and strengthened. There is now, of course, a permanent court sitting in Strasbourg, with the judges permanently resident in Strasbourg, which did not apply in days gone by.

Today there is only one country in Europe that is not a member of the Council of Europe and does not adhere to the European Convention on Human Rights-Belorussia. All the 47

other European countries adhere to the system. A large number of them were communist or fascist dictatorships only a few decades ago. Parliamentary democracy in some form, human rights and the rule of law did not exist in these countries until very recent times. Whereas in the United Kingdom the court of human rights may correct marginal imperfections, for the new democracies the court plays an essential role. I do not need to underline the importance of this if we want to prevent their sliding back into some form of dictatorship. It is mainly for this reason that the United Kingdom should do whatever it can to support the court of human rights and to strengthen it.

The court of human rights and the convention itself are often criticised in our Parliament and popular press. Sometimes this criticism is justified although, of course, not always. No man-made thing is perfect. The court is made up of human beings who, like all human beings, may not always be perfect in their decision-making.

One of the problems of this criticism is that it tends to oversimplify things and to disregard the nuances. However, the court hardly ever takes decisions in which it categorically states that this or that is right or wrong. Normally its decisions are couched in much more prudent formulae such as, "under these conditions", "in this particular situation", "in the absence of", and so on. This was the case with the court's decision on the voting rights of prisoners, which raised a storm of protest in this country. Yet most of the effects of the court's decision could be removed were we to pass adequate legislation, as the noble Lord, Lord Ramsbotham, has just indicated.

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On the other hand, if we have serious objections to one or several provisions of the convention, it is not unlikely that other European states share those with us. The convention could be changed, and although this would admittedly be a long and very cumbersome process, it is possible. Indeed, Britain might envisage taking the initiative in such a case.

In international human rights Britain has always played a leading role. I believe that it could, and should, do so in the future as well. Too often in European co-operation our country takes a "wait and see" attitude, to discover later that it has to jump on a running train-a train which might have been better adapted to our needs and traditions if we had been on it from the beginning.

1.39 pm

Lord Scott of Foscote: My Lords, I must add my own expressions of gratitude to those of many others in your Lordships' House to my noble and learned friend Lord Irvine of Lairg for introducing this debate on an interesting and important subject. I have found myself in broad agreement with nearly all that has been said by your Lordships, but I want to say one or two things about the status, function and relevance of the Strasbourg court decisions.

The Strasbourg court is the court of the convention. One uses the expression "the convention" in a slightly misleading sense because the convention as such was not incorporated into our domestic law. What were incorporated were the specific articles of the convention, which are set out in the schedule to the 1998 Act. For convenience, however, I will continue to refer, as others have done, to the convention having become part of our domestic law. The authority of the Strasbourg court, in so far as it was provided for under the convention, was not dealt with by incorporation; it was dealt with in the body of the Act by Section 2, which said in terms that the courts of the UK, in determining questions which arose in connection with convention rights, "must take into account"-those were the critical words-any,

> "judgment, decision, declaration or advisory opinion",

of the Strasbourg court. Surely the words "take into account" must mean what they say: no more, no less.

The judgments of the Strasbourg court are highly persuasive. The court is composed of a number of very eminent jurists and the judgments that they produce, when they are relevant to issues being decided by the courts of this country in relation to the incorporated articles of the convention, are highly persuasive. However, the judgments are not binding. The fact that they are not binding was recognised by the noble and learned Lord, Lord Irving, when that Bill was before this House on Report. At that time he said:

"There may ... be occasions when it would be right for the United Kingdom ... to depart from Strasbourg decisions".-[*Official Report*, 19/1/98; col. 1271.]

So it is that domestic courts are not bound by Strasbourg decisions.

In a fairly recent House of Lords decision, Kay v London Borough of Lambeth, when the House of Lords was the final court in this country, this House

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held unanimously that where there were conflicting decisions between the Strasbourg court on the one hand and the House Of Lords on the other-it would now be the Supreme Court-the obligation of other domestic courts was to follow the House of Lords, not the Strasbourg court. I believe that it is important to bear that in mind: the Strasbourg court decisions are not part of the law of this country. They are highly persuasive and they may be followed, but they do not have to be.

My second point concerns the nature of the Strasbourg court-the court of the convention-as a court of final resort. The Supreme Court now and the Law Lords in days past constituted the final court of appeal in the United Kingdom, not just England and Wales but Scotland and Northern Ireland as well. From time to time, courts of final appeal mould existing law in order to cater for new situations which appear to have arisen, or to

take account of new ideas which have been formulated and appear relevant to cases for decision. That is what the Supreme Court does, what the Law Lords used to do, what the Supreme Court of the United States does and what the High Court of Australia does.

All of this is, in a sense, inconsistent with the strict constitutional principle of the separation of powers. Yet that does not matter because, in all those jurisdictions I have mentioned, there stands over the court a democratically elected and accountable legislature which can always reverse judicial decisions if the legislature considers that that is necessary and the judges have gone too far. That safeguard makes development of the law by judges acceptable and desirable, in my opinion. However, so far as the Strasbourg court is concerned, there is no comparable control from a democratically elected and accountable legislature. That feature of Strasbourg jurisprudence has to be borne in mind: the judges' decisions cannot be reversed, which is another reason for underlining the requirement that the judgments should be treated in this country not as binding but merely as highly persuasive.

The case of prisoners' votes is illustrative, or may become so. Strasbourg ruled that it was contrary to human rights to have a complete bar on prisoners voting. However, that is not binding in this country. It is persuasive, and there may be very good reasons for allowing prisoners, or some prisoners in some circumstances, the right to vote, but Parliament would have to decide that. In my respectful opinion, however, it is quite wrong to say that failure to follow Strasbourg is a failure to accept the rule of law. Strasbourg does not form part of the rule of law so far as this country's jurisprudence is concerned. It is highly important to make sense of the relationship between the Strasbourg court and the courts in this country.

1.45 pm

Lord Tomlinson: My Lords, I have the privilege to be one of the representatives of your Lordships' House in the Parliamentary Assembly of the Council of Europe. I immediately opted to serve on the political committee in that Council but quickly asked if I could additionally serve on the legal affairs committee, which

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had an agenda that I considered far too important to be left as the exclusive preserve of lawyers, so I serve on both those committees.

There has been an absolutely exponential growth in the workload of the European Court of Human Rights. If we take the years from its formation through to 1998, the total number of applications to the court was 45,000. If we look at last year, the total applications were 61,300-a 50 per cent increase in that single year on the total for the first 41 years of its actions. That is one reason why the court desperately needs reform. Its delays are very long. At the beginning of 2001, there were approximately 139,650 applications pending before a judicial formation, more than half of which were from four individual countries: Russia, Turkey, Romania and Ukraine. Yet by the time those long-

delayed cases are heard, 97 per cent of them are judged to be inadmissible. That is causing an astronomical blockage in the court's work and needs to be addressed.

The noble Lords, Lord Prescott and Lord Pannick, and a number of others referred to the need for reform. Sorting out earlier judgments on admissibility is a priority in that reform. Stopping some practices that have emerged after the prisoner voting case is another problem. As noble Lords will know, applications to the European Court of Human Rights are made individually, but since the view on prisoner voting several firms of solicitors have been touting themselves around prisons, signing up prisoners on a no-win no-fee basis and submitting thousands of individual applications. That is also clogging up the system, so that sort of legal abuse needs to be sorted out.

However, the most important reform needed is to the financing of the court. No one so far, I think, has referred to this. The Council of Ministers of the European Union gets all its resources for making decisions from the same treasury that coughs up the money for the contribution to the European Court of Human Rights and the work of giving effect to the European convention. In the last decade those people, who get their money from exactly the same source, found no difficulty when the outcome of the Convention on the Future of Europe was running into difficulty at a European Heads of State Meeting in finding a bribe for the Austrian Government. They could not get unanimity at a European Council meeting and, in order to encourage unanimity, they created the fundamental rights agency in Vienna. That fundamental rights agency was unnecessary. It largely replicated the work that was being done by the European Court of Human Rights, but the same Ministers who pleaded privation when it came to properly funding the European Court of Human Rights, through money to Austria, contributed to the European budget as if money was no object. They could in effect get plenty of money for one useless purpose: undermining the useful purpose of the European Court of Human Rights.

I am not asking the Minister to solve the problem. That would be asking too much even of the noble Lord, Lord McNally. However, I ask him to tell us whether it will be a fundamental part of the British presidency of the Committee of Ministers to finance those two organisations relatively sensibly. My view of relative sense is to take it from the fundamental rights agency and give it to the European court. I do not

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expect him to agree with me, but I give him a possible solution. We have a European Court of Human Rights starved of resources, but the same Ministers of the 27 EU countries have no difficulty finding them for other purposes.

When we come to judgments of the European Court of Human Rights, we have to accept that they cannot be regarded as some kind of à la carte menu from which we pick and choose judgments that we like. We are obligated, particularly if we expect all those newly emerging democracies that are encompassed within the framework of the European Convention on Human Rights to observe the rule of law in the same way as everyone else. We cannot pick and choose the judgements that we observe.

I very strongly subscribe to the view of the European Human Rights Commissioner, Commissioner Thomas Hammarberg. I read one small sentence of his views:

"Prisoners, though deprived of physical liberty, have human rights. Measures should be taken to ensure that imprisonment does not undermine rights which are unconnected to the intention of the punishment".

He goes on to elaborate on that. That is fundamentally important.

This has been an excellent debate, and I am truly grateful to my noble and learned friend Lord Irvine of Lairg for initiating it. I hope, because of the importance and utility of this debate, that the Minister, when he winds up, will perhaps tell us that, after the six-month presidency of the Committee of Ministers, when we have an agenda for reform, he might well produce a report and score sheet on our activities during that period, and then arrange for a similar debate early in 2011.

1.53 pm

Lord McCluskey: My Lords, first, I apologise to your Lordships and to the House for being out of order in seeking to intervene at an early stage, which was plainly the wrong time to do so. If I may, I will now put a brief question to my noble and learned friend Lord Irving of Lairg-indeed, I hope it will also be addressed by the Minister. The noble and learned Lord referred in his speech to the judges doing what Parliament instructed them to do. He will recall, as the noble Lord, Lord Faulks, and the noble and learned Lord, Lord Scott of Foscote, and others reminded us, that when the clause that became Section 2 of the Human Rights Act 1998 was before Parliament, he and his fellow Ministers repeatedly advised the legislature that it meant what it said-the noble and learned Lord, Lord Scott of Foscote, has referred to this-that the courts of the United Kingdom had to "take into account" any relevant judgment or opinion of the Strasbourg court. Ministers, including my noble and learned friend, said that those judgments and opinions were not to be treated as a strictly binding precedent for the United Kingdom courts.

My question is this: is the noble and learned Lord-and is the Minister-able to reconcile that advice with certain recent judgments of both the House of Lords and the Supreme Court that hold that the UK courts had no alternative but to apply definitive judgments of

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the Strasbourg court? As the noble and learned Lord, Lord Rodger of Earlsferry, put it in a case in 2009, which was quoted with unanimous approval by the judges in Horncastle:

"Strasbourg has spoken, the case is closed".

My question is: is that what Section 2 of the 1998 Act must now be taken to mean?

Lord Irvine of Lairg: My Lords, I believe the advice that I gave to the House at the time of the passage of this Bill was correct, but I am not going to be drawn into a commentary on subsequent decisions.

1.55 pm

Lord Falconer of Thoroton: My Lords, it has been an impressive and important debate. Not one speaker suggests that we leave the European convention or resile from the incorporation of the convention rights that we have incorporated into our law.

I join noble Lords in congratulating my noble and learned friend, Lord Irvine of Lairg, on procuring this debate. There are people who have played their part in procuring the incorporation of the human rights convention into our law. The noble Baroness, Lady Kennedy of The Shaws, and the noble Lord, Lord Lester of Herne Hill, are among them. However, one person above all others stands out in procuring it as part of our law. There is no doubt that it would not have become a part of our law without him-the noble and learned Lord, Lord Irvine of Lairg.

I point to two particular things that the noble and learned Lord did. First, he persuaded my party-and we were the only party who took this view-that we should make it a part of our commitment to the future. He did that by persuading Mr John Smith and Mr Tony Blair, and when we got into Government he made sure that it happened. Remember, this sort of law is not popular among politicians. I can assure you, having been there, that without the noble and learned Lord, Lord Irvine of Lairg, it would not have become a part of the domestic law of this country. I agree with my noble and learned friend Lord Hart of Chilton that it is better than any statute or portrait that one has the Human Rights Act 1998 as one's achievement. The Act has had a profound effect on our law and on the culture of our constitution. The right reverend Prelate the Bishop of Bath and Wells might well be right when he says that it provides a positive contribution to humans on a spiritual journey.

The twin pillars of our constitutional settlement are our parliamentary democracy and the rule of law. The rule of law carries with it two principles. The first is that the conduct of individuals should be judged in accordance with the law applied equally to all by an independent judiciary. The second is that each of us is entitled to have our human rights protected. The incorporation of the convention into our domestic law confirmed that the rule of law did indeed carry with it the entitlement to the protection of our human rights, and it provided, for the first time in English law, a definition of what those rights were.

For all the strengths of the common law, it had never, before the Human Rights Act 1998, offered a comprehensive definition of what an individual's human

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rights were. In consequence, it had not provided to the individual protection of those rights. Real protection of human rights can come only from the law and not through

politics. Politics reflects domestic democratic tides. Politicians are swayed by what is popular. The people, or a majority of them, will frequently favour courses that do not respect the rights of individuals. If the rights of individuals cannot be protected against the state expressing the will of the majority, irrespective of an individual's rights, there is in reality no adherence to the rule of law. I strongly agree with what the noble Lord, Lord Pannick, and my noble friend, Lord Wills, said when they said that one of the purposes of our convention is to protect people who are unpopular and who the majority, given a chance, would not protect.

The effect of introducing the convention into our domestic law is that there is immediate and real protection for people's basis rights. Let me give just one example. In the mid-1990s, three members of our Armed Forces were investigated by the military because it was thought they might be homosexual. The investigation discovered that they were homosexual and they were dismissed from the forces. They appealed to the English courts, saying, "This can't be right", and the English courts said that it was not right, but nothing could be done about it because no part of English law protected them. The men went to the European Court of Human Rights, which held that their treatment was a breach of the convention, but the court could do nothing for them, because it happened just before the convention had been introduced into our domestic law. Now the position is different. Such rights can be enforced in our domestic courts. As a consequence, when people talk about human rights, the "basic fundamental rights", as Lord Bingham described them, exist and there is protection.

Since the Human Rights Act has been passed and these rights have been incorporated into our law, they have been the subject of sustained criticism and attack-not just because the media want to publish salacious stories, but because, in essence, the rights are frequently there to protect people who cannot protect themselves because they are not powerful enough or are unpopular.

The right to privacy comes from the convention. It is a right that prevents the publication of personal secrets. It is a right that prevents the newspapers revealing that a child has AIDS. It is a right that allows you to make telephone calls without someone else listening in to see whether they can publish the contents of those calls. It is a right that allows you not to have your voicemail box hacked into by the press. It is a right that allows you to live your family life behind closed doors without anyone knowing what is going on.

My noble friend Lord Prescott put his finger on it when said that we can make a choice as a society; we can say that press freedom is so important that anything goes and you can publish anything you like about people's lives, or you can make the choice that we rightly make whereby certain things are private and should be kept private. If you are serious about a right to privacy, it has to be enforced by the courts. That means looking at each individual case and asking, "Is

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this part of someone's private life?". If it is, we will protect it unless there is a public

interest-for example, if that person is taking a hypocritical, commercial or political stance that entitles people to know about it. Otherwise, they should be entitled to privacy. The only way in which that can effectively be enforced is by the courts looking at each case.

The consequence of my noble and learned friend Lord Irvine's courage is that that is effectively the current law. Do not change it. Do not listen to the beguiling appeal of the press, which says, "We want to be able to tell you which footballers are having affairs, even though we know it will damage their children. They should have thought about that before they had the affairs". How does that protect their children? There may well be footballers who are acting purely for commercial interests, but the courts can draw the balance between the two.

The effect of incorporating the European Convention on Human Rights is that we have a law that is there and is sensible. The attacks on the judges are, with the greatest respect to those who do so, are utterly misplaced. All those noble Lords who have said in this debate that the judges are only doing what the law says are absolutely right. That is but one example of the effects of incorporation. There are so many. For example, the European convention ensures that you will not be separated from your wife when you are elderly because it is convenient for the local authority to put one of you in one care home and one in another. That would be a breach of Article 8. The convention also helps you if, for example, you are in a care home and left for long periods on a commode because the local authority will not provide adequate care for you. That is part of your personal dignity which the Human Rights Act ensures will be protected.

The effect has been not only on individual rights but on the culture of the courts. No better example was given than that given by my noble friend Lady Kennedy of The Shaws on the comparison between Belmarsh, where the judges see themselves as having to protect individual rights, and Liversidge v Anderson, where the judges, in the middle of the war, saw their role as being simply to back up the Executive. That is a very significant change.

What changes have been suggested? It was suggested that the European Court of Human Rights act more quickly-I agree. More money should be spent on it-I agree. There should be better parliamentary scrutiny-I agree. The margin of appreciation issue should be addressed-yes, but that does not require a change in the law. The coalition has set up a commission of distinguished people, including the noble Lord, Lord Lester, and the noble Baroness, Lady Kennedy of The Shaws. They will ensure that incorporation is not retreated from. However, I think this is a mistake. The important thing is to defend the principle of those rights and their incorporation into our law. Setting up the commission raises expectations that something will change when, as I understand it, it does not intend to change anything.

I ask the Minister to give a guarantee that the Government are not going back on the incorporation of human rights into law. He will give that assurance

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because he is a decent man who represents a political party that is not going to go back on incorporation. Do not create the expectation that we are going to change the position. Say that we are proud that we incorporated these rights and that it has made a real difference. It was a moment in time when we did it, because my noble and learned friend was there and he managed to achieve it. It would never happen now, because political parties are not brave enough, but there is no going back. That is a very good thing, and I hope that the noble Lord, Lord McNally, will say so.

2.06 pm

The Minister of State, Ministry of Justice (Lord McNally): I love following the noble and learned Lord, Lord Falconer, because he always finishes as if he has made the final case for the prosecution in some case where the poor mutt in the dock has to stand up and say, "I did it; I did it".

It is always a little daunting for a non-lawyer-like the noble Lord, Lord Wills, I am a non-lawyer-to reply to a debate opened by one former Lord Chancellor and closed by another former Lord Chancellor, and with half the contributions coming from QCs. Our learned friends were truly out in force. That is partly a tribute to the noble and learned Lord, Lord Irvine, and the standing that he still holds in the legal profession and more widely. I was delighted when I saw his name down for this debate, because I knew that it would attract speakers of quality and knowledge about the issue. When opening the Second Reading of the Human Rights Bill, he said:

"People will be able to argue for their rights and claim their remedies under the convention in any court or tribunal in the United Kingdom".

That is in no doubt and it is the major success of the Act. He also said that he hoped that:

"A culture of awareness of human rights will develop".-[*Official Report*, 3/11/97; col. 1228.]

That has not happened sufficiently so far.

I would recommend reading the part of the speech of the noble and learned Lord, Lord Falconer, before he reached his grand peroration. There he set out in a list, as did the noble Baroness, Lady Whitaker, our human rights and how the Human Rights Act protects the rights of individuals. Of course the media are always going to find cases whereby the seemingly most undeserving rascal is given protection. However, in some ways, that in itself is what makes us a civilised society-we give guarantees in those cases, not always just to the saintly and the deserving.

I welcome the contributions of all speakers today and I think that they will help those who take the trouble to read the debate. I hope that our distinguished commission will

take the *Hansard* report of this debate as useful evidence, because there have been many contributions which deserve recognition.

The noble and learned Lord, Lord Falconer, rightly paid tribute to the noble and learned Lord, Lord Irvine, over the birth of the Human Rights Act. The noble and learned Lord, Lord Irvine, in his turn, was generous in his tribute to the consistency of my party on these matters. The noble and learned Lord, Lord Mayhew, and the noble Lord, Lord Kirkhill, among

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others, valuably pointed out to us the history of the Conservative Party with regard to the European Convention on Human Rights. I recently attended a dinner at Gray's Inn, at which Sir David Maxwell Fyfe's daughter was present. A treasure trove of long letters had been found that Sir David had written from Strasbourg about the creation of the Human Rights Act in the days before the internet and before it was so easy to make telephone calls. It was very moving to have his family there and to hear about his commitment and about how Churchill pushed and guided him on these issues. Therefore, I hope that, when we debate this matter, we remember the various contributions that the parties have made.

In answer to the noble and learned Lord, Lord Falconer, I have never said that the Human Rights Act is some precious vase that should be kept on a high shelf and never be looked at. Indeed, I think that the greatest damage that could have been done to it would have been to allow the various criticisms of and attacks on the Human Rights Act and the convention to remain unchallenged and unexamined. Therefore, we have taken it down from the shelf and have put it in good hands to be examined. I hope that this debate serves as an illustration of the kind of informed discussion that we want on how the Act works and how it impinges on our system of justice.

A number of issues have been raised and I shall try to deal with them. Prisoner voting was referred to by the noble and learned Lord, Lord Irvine, and the noble Lords, Lord Prescott, Lord Faulks, Lord Goodhart and Lord Ramsbotham. The old ministerial fallback position of "We are considering the position" is as far as I can go on that, but I am not sure that it is a particularly edifying exercise. The other night, I watched an excellent documentary on BBC Four about the abolition of the death penalty in this country. In a way, I came to the same conclusion that the noble and learned Lord, Lord Falconer, came to about the passage of the Human Rights Act. I doubt whether this Parliament would abolish the death penalty in the way that Parliament did in the 1960s. However, that does not mean that in my opinion Parliament has not improved over the past 40 years or so in terms of its courage in addressing some of these issues.

I liked the statistic that at the recent general election in Ireland every prisoner had the right to vote but only 0.5 per cent exercised it. On the sex offenders register, my ministerial fallback position is that we are looking at the implications of the judgment. However, I also note that it has been applied in Scotland for the past year. Before I leave

the subject of prisoner voting, and before people get ready to castigate this weak, flaccid and vacillating Government, I look at the Lord Chancellor who sat on the judgment for six years and did nothing.

The debate on press complaints was useful. The contributions of the noble Lords, Lord Prescott and Lord Black, showed the two sides of the debate that is to be had. The Press Complaints Commission has a job to do in convincing the public that it can be the robust, independent regulator that it was agreed it should be when the special arrangements were made at the passing of the Act. The implications of Section 12 were drawn to my attention. Section 12 asks courts to

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give proper regard to public interest, and I think that the question of whether that needs sharpening and defining will bear investigation.

I am not supposed to tell your Lordships that the Master of the Rolls is going to deliver his report tomorrow. Government secrets are not what they used to be so I shall be very surprised if he does not deliver it tomorrow, as the *Daily Telegraph* has already said that he will be doing so. More seriously, I hope that we will be able to look at what he says about procedure with a view to making it more effective-a point emphasised by the noble and learned Lord, Lord Falconer-as well as looking at the procedure for super-injunctions. The noble and learned Lord pointed out that super-injunctions can be issued in secret without the press being able to make their case, and I suspect that the Master of the Rolls will be looking at that, and properly so. However, let us wait to see his recommendations. They will certainly be treated extremely seriously.

The noble Lord, Lord Dubs, and I have discussed the Northern Ireland Bill of Rights before. It was a commitment in the Good Friday agreement. However, I think that successive Governments have said-as has been said about so many things in relation to Northern Ireland-that, when we can get agreement in Belfast, there will be no problem on that issue.

On the specific question of the sex offenders ruling, further to the Home Secretary's Statement in the House of Commons on 16 February, the Government will shortly bring forward proposals to implement the ruling of the Supreme Court. However, a robust review, led by police and involving all relevant agencies, will be carried out so that a full picture of the risks to the public can be considered. Sex offenders who continue to pose a risk will remain on the register, and will do so for life if necessary.

I turn to the points raised by the noble Lord, Lord Prescott and Lord Black. The noble Lord, Lord Black, said that the law was reasonably easy to apply to the print media but very difficult to apply to the new technologies. This matter is also being tackled by the Joint Committee on the Defamation Bill. Some of the recent publicity about super-injunctions illustrated that it is difficult to track down messages on the new technologies. I am beginning to sound like a judge now, aren't I? As I even have to ask my son James

to send texts for me, you will know why I struggle with these things. But new technologies make it difficult to make the law applicable. We are consulting widely on that and I hope that we will have some agreements, certainly about the internet-guarantees that prevent some of the abuses that have arisen in terms of libel law and freedom of speech in that regard.

I was interested in the interventions of the noble and learned Lord, Lord Scott, and the noble Lord, Lord Tomlinson. I will not presume to make judgments on the matter any more than the noble and learned Lord, Lord Irvine. The noble Lord's warning was about whether it was worth making the court rulings as subjective as the noble and learned Lord, Lord Scott, seemed to suggest, so that we lost the powerful leverage that the court's judgments have on human

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rights across Europe as a whole. That debate will go on. The noble Lord says that you cannot pick and choose; the noble and learned Lord, Lord Scott, says "Persuasive, but not binding". Our Supreme Court has said that, to get things right, it will follow Strasbourg decisions as it generally does, unless the effect could be inconsistent with a fundamental substantive or procedural aspect of our law.

I will just check quickly through my notes whether I have missed any points that noble Lords made. On the list of good things, I had not realised the real benefit of the Human Rights Act as it applied to courts martial, as spoken about by my noble friend Lord Thomas. He also made interesting comments about Hong Kong.

In reference to the point made by the noble Lord, Lord Pannick, perhaps it needs saying that respect for the rule of law includes total respect for the independence of the judiciary. Occasionally individual Ministers-it has happened in other Governments as well-get tetchy about what judges do, but we should not get too excited that that is somehow an assault on the judiciary. Until 12 months ago I did not regularly mix with the higher ranks of the judiciary, but since then I have had some experience of them. They are fairly tough old characters, so I think that they can stand the occasional word of criticism-as politicians occasionally get words of criticism from the Bench. It is a good and healthy dynamic tension.

I was pleased that the noble Lord, Lord Faulks, spoke, because it was important that the debate had the case for the prosecution, as it were. Has the Act been trivialised? Has there been too much acquiescence by our courts-a kind of mission creep? He made the case for a proper examination of the Act, and that is what we intend to do in bringing forward the commission to look at it.

The noble Lord, Lord Wills, made a point about human rights protecting the unpopular and the minority. That is the essence of a civilised society, as I said before.

By the way, I have just remembered the bit of technology I had forgotten: Twitter. Twittering is hard to track down. The other day I was at a meeting of senior high-tech advisers, and I kept talking about biscuits. Nobody said anything until, in the end, one of them said, "What was that about biscuits?", and I said, "Where they store all this information". He said, "Those are cookies", and then all the experts confessed that they had not interrupted because they thought that the Minister must know about some new technology that they were not aware of.

I am always petrified because the noble Lord, Lord Tomlinson, finishes his speeches with a pointed finger and a question to the Minister, but this time it is easy. I will report back to the Lord Chancellor about the piece of European skulduggery that he outlined in terms of financing. Of one thing we are certain. Ken Clarke went recently to a meeting of the Council of Europe's body in Izmir in Turkey and outlined our ambitions for reform, and the response was extremely encouraging. We will make a really determined effort during our presidency to press the case for reform, advised by our commission.

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Let me end as I began. We are deeply in debt to the noble and learned Lord, Lord Irvine- first, for the Act; and secondly, for inspiring the debate. It has set the parameters of how we will look at the issues, safe in the knowledge that this country had an amazing role in creating the European Convention on Human Rights. We will go forward in the 21st century as firmly committed to that as the generation who, as was rightly said, experienced personally, at first hand, what happens when the state gets out of control- when it does not have checks and balances, and when there are no human rights.

2.28 pm

Lord Irvine of Lairg: My Lords, I thank all noble Lords who have participated in this debate, and thank many of them for their kind words. Meanwhile, I beg leave to withdraw the Motion.

Motion withdrawn.