The House of Lords: In defence of human rights?

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CONTENTS

Executive Summary

- The Human Rights Act 1998 is central to the UK's new constitutional settlement. It places a special responsibility on both Government and Parliament to protect human rights. A reformed House of Lords can make a particular contribution in shaping the new human rights culture.

- The current House of Lords does have a significant record in defending human rights. It has been responsible for the introduction of more than 10 Bills seeking to provide the UK with a Bill of Rights. The House of Lords has also often exercised its revising function to improve controversial legislation, or raise concerns about civil liberties issues. The presence in the Lords of legal peers, human rights experts and campaigners has provided the House with valuable expertise. The cross benchers have also provided a degree of party political independence.

- However the Lords has neither been consistent, nor sufficiently robust in its defence of human rights. Its lack of any democratic mandate deprives it of legitimacy to take action in most cases.

- The Human Rights Act increases the responsibility on Westminster to pass legislation which is human rights compliant. A second chamber is well placed to check on such compliance. The Human Rights Act also bestows a variety of powers to pass delegated legislation, including remedial orders under s. 10, which will have a significant human rights impact. A second chamber should have a role in scrutinising such orders.

- In the new constitutional settlement, the Human Rights Act binds the devolved governments and assemblies in Scotland, Wales and Northern Ireland, placing a limit on their legislative and executive capacity. The devolved authorities are also restricted by the UK's other international human rights obligations. A second chamber which represented the interests of the devolved institutions would have a particular interest and stake in monitoring observance of human rights obligations throughout the UK.

- The new human rights culture will therefore require a more stalwart second chamber, which has the expertise to engage in effective dialogue and debate, and the capacity to take action in defence of human rights and fundamental freedoms. Such a second chamber will need in its composition to display independence, expertise and democratic legitimacy.

- To be effective the second chamber will need sufficient powers. It may need special powers over constitutional legislation and legislation amending the Human Rights Act or human rights obligations, such as special powers of delay or a veto. Powers relating to the introduction of legislation and the conduct of enquiries will also be central to a second chamber's human rights role.

- The reformed second chamber will need to build on the experience of the new Joint Parliamentary Committee on Human Rights. It might decide to establish a committee to complement the work of the Joint Committee, and extend the capacity of parliament to monitor and entrench human rights protection.

- A second chamber which enjoys the means and the responsibility to act in defence of human rights would reflect the purpose of the Human Rights Act to place Parliament at the heart of the new human rights culture. It could also reflect the interplay between the constitutional dynamics of devolution and human rights, by providing a forum where the interests of the devolved administrations and the international obligations of the UK government in this field can be considered and safeguarded.

Introduction

The Human Rights Act 1998 forms one of the central aspects of what promises to be a new era of constitutional relations in the UK. Whilst the Act does not remove the sovereignty of the Westminster Parliament, it does alter the balance between the courts, parliament and government. Courts will be able to conduct a much stricter human rights scrutiny of government and parliament by interpreting the laws in the manner which best ensures that human rights are protected. In proposing new laws government, if it wishes to legislate in violation of fundamental rights and freedoms, must be prepared to stand before Parliament, make its intention clear and bear the political consequence of its actions. This new constitutional dynamic places extra responsibility on Parliament to take human rights seriously and demonstrate that it can act as an effective check on a strong executive. While this responsibility falls to be borne by both Houses, a reformed second chamber is in a position to make a particular contribution. As set out in the Constitution Unit's briefing, *Guardians of the Constitution and Protectors of Human Rights,*[1] second chambers have traditionally played a role as constitutional watchdogs. A common characteristic of greater independence and party political detachment than the first chamber is one reason why the second chamber often assumes this role. That same characteristic would also provide a basis for a reformed House of Lords to enjoy a role in shaping the new human rights culture in the UK.

In examining the role which the House of Lords could play, this briefing examines:

- The role which the House of Lords has played in the protection of human rights to date
- How devolution and the Human Rights Act 1998 could affect the role of the second chamber
- Options for the role a reformed House of Lords might play in protecting human rights
- Implications of such a role for the powers of the second chamber
- Implications for the composition of the second chamber

The briefing therefore focuses on the role of the Lords in the protection of human rights *within* the UK, and not its role in addressing human rights abuses and promoting better human rights standards overseas.[2]

[1] See also *Second Chambers as Guardians of the Constitution and Protectors of Human Rights* and *Reforming the Lords: the Role of the Law Lords*, Constitution Unit, June 1999.

[2] References in this briefing to the political affiliation and type of peerage enjoyed by a member of the House of Lords are provided in the following manner: (Political affiliation, Type of peerage), Key: Con: Conservative; Lab: Labour; LD : Liberal Democrat; CB: Cross Bencher LP: Life Peer, H: Hereditary.

Background

In defence of human rights: The track record of the Lords

> *" In the 17 years during which I have had the privilege of being a member of your Lordships House, I have often noted the contribution that noble Lords have to make in the cause of human freedom and human rights..."*[3]

The House of Lords as the revising chamber, should be naturally disposed to play a role in defending human rights. The absence of constituency duties means that Peers can afford to dedicate more time both to duties within the House, such as scrutinising legislative proposals and partaking in parliamentary debate, and be available to engage with interest groups outside the House. Although dominated by Conservative members, the Lords is less party politically driven than the Commons and contains a significant proportion of cross benchers who do not take a party whip.[4] This element of independence can lead to greater objectivity when evaluating legislation as it passes through the House. The relatively high rate of participation by legal-peers, including law lords, also provides a strong 'lawyerly' flavour to the work of the Lords compared with that of the Commons.[5] These traits of the House have resulted in the Lords on occasion taking the lead in defence of civil liberties in a number of ways discussed below.

Parliamentary debate and initiation of legislation

The initiation of the modern debate on the Bill of Rights in the context of the British Constitution has often been attributed to Anthony Lester's *Democracy and Individual Rights*[6] and Leslie Scarman's, *English Law - The New Dimension.*[7] At the time neither author was a member of the House of Lords, however both have since become Peers (Lord Lester of Herne Hill became a Liberal Democrat Life Peer in 1993 and Lord Scarman became a Cross Bench Life Peer in 1977) and have been responsible also for advocating the case for a Bill of Rights from within the House. Lord Hailsham (Con, LP) too in a series of articles he wrote for the Times newspaper in the 1970's provided fuel to the debate, although he changed his position a number of times on the merits of a Bill of Rights.[8] Prior to the passage of the Human Rights Bill 1998, legislation seeking to incorporate the European Convention of Human Rights or to provide for a Bill of Rights was introduced on over 10 occasions in the House of Lords - although never by a Labour Peer.

Proposer	Year	Success of the Bill
Lord Lambton (Con, H)	1969	Ten-Minute Rule Bill: 14 minute debate, Vote lost 161 - 137
Lord Wade (LD, LP)	1969	Bill of Rights Bill: 4 hour debate, motion withdrawn
Lord Arran (Con, H)	1970	Bill of Rights, 2nd reading, motion withdrawn

[3] Lord Mischon, *Hansard*, H.L., Vol 553, Columns 1547- 48 (March 13, 1994)..

[4] As of 1/8/9 of the 1, 320 Peers there were 342 Cross benchers - just under 26%. If all the Hereditary Peers are removed there will be 95 out of 515 - just over 18%. In a transitional Lords with 92 Hereditaries there would be 125 of 607 - 20.5%. Information provided by B. Seyd, Constitution Unit. See further *A transitional House of Lords: the numbers*, Constitution Unit, June 1999.

[5] See Rush and Baldwin, Lawyers in Parliament, in *The Law and Parliament*, Oliver and Drewry (ed.) Butterworths, 1999, p.155 at 167.

[6] 1968, Fabian Tact No. 390.

[7] The Hamlyn Lectures in 1974.

[8] On the history of the Bill of Rights Debate see Zander, *A Bill of Rights?*, 4th edition 1997, Sweet and Maxwell, pp. 1 - 39.

Proposer	Year	Success of the Bill
Lord Wade	1976	Bill of Rights, unopposed second reading
Lord Wade	1977	Bill of Rights, Second reading and referred to a select committee
Lord Wade	1979	Bill of Rights Bill, sent to the House of Commons
Lord Wade	1981	Bill of Rights Bill, sent to the House of Commons - debated.
Lord Broxbourne (Con, LP)	1985	Human Rights and Fundamental Freedoms Bill, sent to the House of Commons - debated. Received 94 votes (a majority) in favour of a second reading, however HC rules require 100 votes for a Private Members Bill.
Lord Holme (LD, LP)	1990	Bill of Rights, motion withdrawn
Lord Lester (LD, LP)	1995	Bill of Rights, sent to the House of Commons
Lord Lester	1997	Bill of Rights, sent to the House of Commons

In 1978 a House of Lords Select Committee, by a narrow majority, recommended incorporation of the ECHR.[9] When the report was debated in the House, Lord Wade moved a successful amendment urging the government to incorporate the ECHR.[10] Although attempts have also been made in the House of Commons to introduce legislation which would provide for a Bill of Rights,[11] it is the developments in the Lords rather than parallel events in the Commons, which have received greater attention. The high quality of debate and the prominent supporters which the proposals attracted along the way, helped to generated a higher profile for the issue. From the 1970's each time legislation for a Bill of Rights was introduced, the Bill was properly debated within the Lords and six bills received the approval of the House and were sent to the Commons. On arrival in the Commons, the Bills received little or no consideration and fell due to lack of time. The same fate befell the Bills which had been initiated in the Commons. Many of the attempts to introduce a Bill are attributable to legal Peers - Lord Wade (LD, LP), Lord Scarman (CB, LP) and Lord Lester (LD, LP). Indeed the contribution of many of the Law Lords, in particular Lord Scarman, to the debates has meant that the arguments in the Lords for a Bill of Rights have been taken seriously. Given the history of legislative attempts and debates in the House of Lords on a Bill of Rights, it is fitting that the Human Rights Bill 1998 was initiated in the House of Lords.

Peers have also been responsible for attempting to initiate numerous other pieces of legislation which promote human rights. Recent examples include the Civil Liberties (Disability) Bill 1995, Disability Discrimination Bill 1995, Sexual Orientation Discrimination Bill 1999. In 1994 the House of Lords debated the constitutional role of the House of Lords in particular having regard to the function it might play in human rights scrutiny.[12] During the debate Lord Lester proposed that the House establish a committee that would scrutinise legislation for compatibility with international human rights. Subsequently Lord Lester, together with Lord Irvine of Lairg, Lord Alexander of

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[9] By 6 votes to 5. *Report of the Select Committee on a Bill of Rights*, Session 1977 - 1978 (176), 24 May 1978. The Committee was established pursuant to an amendment moved by Lord Hailsham during the Second Reading debate on Lord Wade's Bill of Rights Bill 1977.

[10] *Hansard* H.L. Vol. 396 col. 1395 -96 (November 29, 1978)..

[11] See for examples of attempts to introduce similar legislation in the House of Commons the European Human Rights Convention Bill 1983, Bill No. 73 (Mr. Robert Maclennan, Mr. AJ Beith and eight others); Human Rights and Freedom Bill 1986, Bill No. 175; Human Rights Bill 1994. Bill No. 30 (Mr. Graham Allen)..

[12] *Hansard* H.L., 24 March 1994.

Weedon and Lord Scarman, submitted a proposal to a Liaison Committee of the House of Lords that the appropriate machinery be established in the Lords to ensure that legislation would be scrutinised for consistency with obligations under the ECHR.[13] In 1996 in another debate on the constitutional settlement of the UK, Lord Bingham (CB, LP), the new Lord Chief Justice, in his maiden speech, and Lord Donaldson (CB, LP), former Master of the Rolls, spoke out on the relationship between Strasbourg and the UK courts, the status of the ECHR in the UK and the need to incorporate.

The pattern of activity in the Lords on a Bill of Rights and the debates on the constitutional settlement, reflect the presence in the Lords of members who bring with them expertise and practical experience of the issues at hand.

Scrutiny of legislation

One of the traditional functions of the House of Lords is to act as a revising chamber. The quality of debate on legislation in the Lords, assisted by contributions from human rights experts, law lords, and other specialists is frequently considered to be high.[14] The presence of a large number of cross-benchers, with the absence of strong party discipline all contribute to a reputation of being equipped to act in the interest of the rule of law and fundamental freedoms. Many amendments to legislation which have been moved in the Lords have been designed to ensure a check on abuse of government power, in particular to ensure that civil liberties and fundamental freedoms were better protected. During the Conservative governments in the 1980s examples include amendments to the Telecommunication Act 1984 extracting pledges to place the regulation of telephone tapping on a legislative basis, to the Police and Criminal Evidence Act 1989 to limit the right of stop and search to uniformed officers only, and amendments to the Housing Act 1980 and Housing and Building Control Bill 1988 to exempt houses owned by charities and council houses built for elderly and the disabled from right-to-buy provisions.[15] The Law Lords,[16] notwithstanding the convention that they do not participate in politically controversial debate, have also undoubtedly contributed at important junctures to protecting human rights. In 1994 the Criminal Justice and Public Order Act caused much public anxiety about the impact which it would have on civil liberties.[17] The Act, *inter alia*, introduced extra police powers (for example, the power to break-up public assemblies, prevent 'raves', and demand body samples), created new limitations on the right to bail and restricted the right to silence. Government control of the Commons meant that the objections raised by opposition members had little effect. The Lords moved a number of amendments which were also all overturned by the government in the Commons. However the Lord Chief Justice, Lord Taylor of Gosforth, influenced the government to make an amendment so that suspects would be cautioned before their silence could be taken into consideration, and to drop the requirement that suspects who chose to exercise their right to silence be called to give evidence. *The Observer* newspaper noted that

> " If it were not for the Lord Chief Justice and some fellow peers, measures which jeopardise judicial independence and go to the heart of the relationship between the individual and the State would be passing virtually without debate." [18]

In another high profile example, Lord Browne-Wilkinson played an important role in the debate which led to the removal operations from the Police Bill 1997 of the power of chief constables to authorise surveillance.[19]

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[13] Memorandum to the Liaison Committee, July 1994.

[14] See for example, p. 89, Klug, Starmer and Weir, *The Three Pillars of Liberty : Political Rights and Freedoms in the United Kingdom*, The Democratic Audit of the UK, Routledge, 1996.

[15] All examples are quoted in Baldwin, Behavioural Changes, in *Parliament in the 1980's*, Norton (ed.) 1985, p.96 at 101.

[16] There are 33 Law Lords: 12 Lords of Appeal in Ordinary; 16 other Law Lords who are eligible to hear appeals and 15 who are disqualified from hearing appeals. This includes the Lord Chancellor.

[17] See pp. 83 - 89 Klug, Starmer and Weir, *The Three Pillars of Liberty : Political Rights and Freedoms in the United Kingdom*, The Democratic Audit of the UK, Routledge, 1996.

[18] *The Observer*, 23 January 1994, quoted in Klug, Starmer and Weir *ibid.*.

The impact which the Lords' contribution can make to the improvement of legislation is however critically restricted by the absence of democratic legitimacy to oppose the will of the elected members of the Commons. The vulnerability of the Lords in either voting against Bills, or in pressing amendments, even where they hold concerns over the impact on fundamental principles, is often attributable to this deficit. For example, during the passage of the *Firearms Bill 1997,* the legislation was subject to much criticism for the manner in which the scheme was being implemented. Lord Stoddart of Swindon (Lab, LP) called the Bill " .. a thoroughly bad Bill, of which Parliament should be ashamed. ..". [20] All the Lords amendments had been reversed in the Commons. Lord Lester of Herne Hill proposed an amendment that purported to bring the Bill in line with the ECHR requirements on property rights. The amendment, although it attracted widespread support, was ultimately defeated for reasons that exemplify the Lord's dilemma. Earl Peel (Con, H) noted that

> " I am immensely disappointed that another place did not take into due consideration the lengthy and considered debates of your Lordships on this matter.....I take the view ..... that we have gone as far as we can on this matter, and we should now abide by the decisions made in another place, even though I believe that its decisions on this matter are nothing short of disgraceful."[21]

Indeed as the High Court has recently found, the House of Lords has not been able to prevent legislation being passed even where it blatantly undermines fundamental principles of justice.[22]

The rare occasions on which the House of Lords has chosen to defy the will of the Commons illustrate another aspect of the Lords' role in human rights controversies. One such time was during the passage of the War Crimes Act 1991. The Act permits the prosecution of persons suspected of having committed murder or manslaughter in Germany or German-occupied territory during the second world war. On 4 June 1990, the House of Lords defeated the then War Crimes Bill by 207 to 74, despite a vote in the Commons in favour of the Bill 273 - 60. The Bill was defeated for the second time in the Lords on 30 April 1991 by 131 votes to 109 forcing the government to invoke the Parliament Acts. The concerns raised in the House of Lords were whether it was possible to provide a fair trial after such a period of time had elapsed, and whether the Bill imposed retroactive criminal liability. As the Bill was the subject of a free vote in the Commons many Peers considered that to oppose the Bill in accordance with ones conscience was not an affront to democracy. The stance of the Lords, whilst relying in debate on principles of the rule of law, was perceived by many to be contrary to the principles of justice and human rights. Lord Mischon (Lab, LP) pointed out that of those who had spoken in the debate in the Lords only two were under 60 years of age, and he considered this to be an underlying factor in the sharp divide of opinion between the Houses. [23] There were the older, more conservative Lords many who still had memories of the War, versus the Commons as the 'younger' House, giving expression to a popular trend in enabling domestic courts to try World War II criminals.[24]

The most recent occasion illustrates more vividly how the inherently conservative nature of the current House of Lords can also be detrimental to human rights issues. The Crime and Disorder Act 1998 introduced a number of new policies which threatened to encroach upon civil liberties. During the debate in the Lords, many of these concerns were raised. For example, Lord Goodhart QC (LD, LP) pointed out many civil liberties defaults: the wide-ranging and vague nature of the offences, the

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[19] *Hansard,* H.L 20 and 28 Jan 1997.

[20] *Hansard* H.L., 20 Feb 1997 : Column 804.

[21] *ibid.*

[22] In R v D.P.P. *ex parte* Kebilene and others (High Court, 30 March 1999), the Lord Chief Justice, Lord Bingham held that s. 16 A and s. 16 B of the Prevention of Terrorism Act 1989 "... undermine, in a blatant and obvious way, the presumption of innocence....". The Lord Chief Jutice was not a Peer at the time the 1989 Act was passed.

[23] *Hansard* H.L. 4 June 1990 : Column 1203 - 1204.

[24] Similar legislation had been passed in Canada and Australia in previous years.

retrospective aspect of the sex offenders order (which prohibits a known sex offender from engaging in specified conduct), pointing out specifically that the Bill was likely to contravene the ECHR.[25] Also raised was the conflict with Article 10 of the International Covenant on Civil and Political Rights in the mixing of youth and adult offenders. Lord Mackay (Con, LP) too raised questions about the compatibility of sections of the Bill with the ECHR. However during the passage of the Bill through the Lords, the greatest opposition was to a government amendment which would reduce the age of consent for homosexual sex to 16 in order to ensure equality with the age of consent for heterosexual sex. This provision was in fact a measure designed to bring UK legislation in compliance with the ECHR and followed an application to the European Commission of Human Rights.[26] In order to avoid defeat of the Bill in the Lords, the government withdrew the amendment, and instead introduced separate legislation to address the matter: The Sexual Offences (Amendment) Bill. On 13 April 1999 the Bill was defeated in House of Lords by 222 to 146, a majority of 76, blocking a second reading for the measure which had cleared the Commons with the overwhelming support of MPs (the Commons had taken a free vote). The arguments of the opposing Peers, led by Baroness Young (Con, LP), were based on a need to provide protection for young boys and the family.[27] This Bill more than any other illustrates that whilst the Lords can act as a bulwark against ill - thought through government legislation which may threaten fundamental liberties, its inherently conservative make-up leads it to be selective about the human rights it is prepared to protect. The government has indicated that it will invoke the Parliament Acts if the Sexual Offences (Amendment) Bill is defeated again in the next Parliamentary session.

Parliamentary Questions

Another parliamentary function of the Lords is to scrutinise government action through Parliamentary Questions to Ministers. An examination of the record in the Lords of tabling Parliamentary Questions which relate to human rights illustrates the role which the House has played in maintaining some form of pressure on the government to account for its human rights policy. Many human rights questions do concern the response of the UK government to human rights abuses abroad, however an increasing percentage of the questions asked relate to the UK's human rights obligations. The presence in recent years of human rights experts such as Lord Lester has seen the number of questions on human rights tabled rise significantly. Issues raised include questions on the progress of cases against the UK under the ECHR, the government response to findings of violations by the Courts, government commitment to ratification of further protocols and treaties, government's adherence to its obligations under a variety of human rights treaties, the laying of UK periodic reports under human rights treaties before Parliament, government's intention to incorporate the ECHR, and recently government's intention to establish a human rights commission, a parliamentary human rights committee and to set a date for the bringing into force of the Human Rights Act.

The submission of questions on human rights issues has been dominated by Lord Lester. Lords Avebury, Hylton and Kennet also table questions on human rights issues each year, however a significant proportion of these questions relate to the response of the UK government to human rights abuses abroad. In the financial year ended 31 March 1997 the Lords who had asked the most questions were: Lord Kennet (Lab, H) at 305 questions, Lord Lester of Herne Hill (LD, LP), 221, Lord Avebury (LD, H), 147, the Countess of Mar (CB, H) 105 and Lord Hylton (CB, H), 100. The majority of the questions of Lords Avebury, Hylton, Kennet and Lester related to issues of human rights and law reform.

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[25] *Hansard* H.L. 16 Dec 1997 : Column 587.

[26] Sutherland and Morris v UK., Application No. 25186/94, Report 1 July 1997, Decision of admissibility 4 June 1996.

[27] The Bill had the support of such widespread groups as the NSPCC, Barnardo's, the National Children's Home, Action for Children, the National Children's Bureau, Save the Children, the Family Welfare Association, the Health Education Authority, the British Medical Association, the Family Planning Association the National Association of Probation Officers, the British Association of Social Workers, the Royal College of Psychiatrists and the Royal College of Nursing.

The profile of the Peers

It has frequently been argued that one of the strengths of the House of Lords is that its members include many who bring with them a greater and more varied background and experience in human rights issues than one finds in the Commons.[28] As Peers are also considered to be more independent of government and less party political, they tend to retain contact with voluntary sector organisations and human rights organisations when they are members of the House. By contrast, Members of the Commons, often due to increased commitments and in particular where they have a job in government, are not usually in a position to play the same role. The absence of constituency and other duties normally means that Peers can dedicate more time to working with or supporting groups in the voluntary sector, whilst members of the Commons have greater demands on their time. A look at the Lords register of members' interest reveals the wide range of issues and campaigns of voluntary and non governmental organisations to which many Peers are connected.[29] Similarities are not found in the Commons register.[30]

The presence of the Law Lords - active and retired - also enhances the ability of the House of Lords to evaluate Bills against standards of fair administration and the rule of law.[31] However their presence is as controversial as it is beneficial.[32] Although they are bound by convention not to engage on debate on matters of political controversy, they have often made pivotal contributions to Bills. Examples include the interventions of Lord Taylor and Lord Browne-Wilkinson cited above and also the amendment to the 1689 Bill of Rights moved by Lord Hoffman to enable a former MP to take a libel action against *The Guardian* newspaper.

Despite the relatively large membership of the Lords, only a proportion of the members actively partake in the work of the House. This means that whilst those Peers who regularly advocate positions which promote the rule of law and fundamental freedoms are small in number, they do feature prominently in debates (for example, Lord Lester, Lord Goodhart, Lord Alexander and Lord Mischon).

Conclusion

The House of Lords has played an important role in the protection of human rights. Its ability to provide such protection depends on its willingness to scrutinise government legislation in a non partisan fashion, and its capacity to draw on expert opinion in debate. However its democratic deficit leaves it impotent to push many of the amendments it would like to see made, if legislation were really to be human rights compliant. Moreover the conservative nature of the Lords also means that often the issues which it is willing as an institution to defend are 'lawyerly' issues relating to the rule of law and due process. While these are important and worthwhile, the behaviour of the Lords

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[28] Such observations are general in nature and do not mean that there are not a number of persons in the Commons whose background includes a range of human rights experience. For example Rt. Hon. Harriet Harman MP and Patricia Hewitt MP both worked for the the National Council for Civil Liberties. Ms. Harman was legal officer of the National Council for Civil Liberties.

[29] For example of the 5 NGO's on the Human Rights Task Force: Liberty, IPPR, JUSTICE, Charter 88 and 1990 Trust, the Register of Members' Interests show that Lord Eatwell is President of IPPR, and Lords Alli, Brooke of Alverthorpe and Hollick are all Trustees; Lord Alexander of Weedon is Chairman of the Council of JUSTICE, and Lords Archer of Sandwell and Lester are members of its Council. Lord Hylton and Baronness Sharp of Guildford are members of Charter 88, and Baronness Kennedy of the Shaws is a patron of both Charter 88 and Liberty. MPs however do not tend to be involved in similar capacities. Only JUSTICE, which is an all party human rights organisation, ensures that there is an MP as well as a Peer from each of the political parties on its Council.

[30] The registration of such interests is optional, so the register only provides a snap shot of the type of expertise which various Peers bring to the Housee. The comparison of registers should not be taken to imply that in both Houses there are not many individuals who have and do actively campaign for a number of causes, which do not appear on the registers.

[31] There are 33 Law Lords 12 Lords of Appeal in Ordinary; 16 other Law Lords who are eligible to hear appeals, and 15 who are disqualified from hearing appeals.

[32] See *The role of the Law Lords*, Constitution Unit, June 1999.

on the Sexual Offences (Amendment) Bill, where there is a different kind of human rights principle at stake, illustrates that the majority of the current membership of the Lords do not necessarily display a determination to uphold a modern concept of human rights law.

The new constitutional settlement: Devolution and the Human Rights Act 1998

The Human Rights Act

The Human Rights Act 1998 shifts the balance of power between Parliament and the courts. It creates an obligation on public authorities, including the courts, to act in compliance with the European Convention on Human Rights, to interpret legislation as far as possible in conformity with the Convention and gives the courts the power to declare that legislation is incompatible with the Convention.[33] However the Act combines this with parliamentary sovereignty and provides a model of human rights protection which foresees Parliament preserving an important role in the promotion and protection of human rights. The White Paper, *'Rights Brought Home'*, which foreshadowed the Human Rights Act pointed out that

> ' Parliament itself should play a leading role in protecting the rights which are at the heart of parliamentary democracy.' [34]

The Human Rights Act increases the responsibility on Parliament to scrutinise legislation to ensure that it does not encroach on fundamental rights and freedoms and to encourage legislation, policies and practices which give effect to and promote better protection of human rights. In particular the Act introduces two new procedures to the legislative process: section 10 remedial orders and section 19 statements of compliance.

Section 10

Section 10 of the Human Rights Act permits a Minister of the Crown to amend legislation by way of an order so that an incompatibility with the ECHR can be removed. This may arise if a UK court has declared the legislation to be incompatible, or if the European Court of Human Rights has found a violation. Section 10 is to be used only in compelling circumstances, and schedule 2 to the Human Rights Act stipulates that orders are subject to the affirmative parliamentary procedure for delegated legislation; that is they must be approved by a resolution of each House of Parliament 60 days or more after being laid. However where the Minister making the order deems it urgent, the order can be made without being so approved.

Section 10 remedial orders will by their very nature always have an impact on human rights protection in the UK. It is therefore important that they are subject to adequate scrutiny and evaluation by Parliament. The government has stated that they intend to make the orders subject to examination by the Joint Parliamentary Human Rights Committee when it is established (see further below). Currently the House of Lords has no power to amend secondary legislation, and can only reject it. In effect this means that the current House of Lords will have a veto over section 10 remedial orders, which offers the potential to play a significant role in ensuring that government meets full human rights compliance.[35]

Section 19

Section 19 of the Human Rights Act, brought into force on 24 November 1998, requires any Minister responsible for introducing a Bill into either House to make a statement of compatibility, (i.e. a statement that in his view the provisions of the Bill are compatible with the Convention rights), or a

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[33] Sections 3, 4 and 6 of the Human Rights Act 1998.

[34] CM 3782 para. 3.6.

[35] For further on this point see p. 180, Blackburn, Parliament and Human Rights, in *The Law and Parliament*, Dawn Oliver and Gavin Drewry, (eds.) Butterworths,1999.

statement that although unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

Where a section 19 statement of compliance is provided, Parliament should be encouraged to ask questions of Ministers about the measures taken to ensure compatibility and whether those measures are in fact adequate. If a Minister is unable to make a statement of compliance, this will focus the mind of Parliament as to whether it should in fact pass the legislation or not. This is a function which both Houses of Parliament will carry out. However a second chamber, whose role is that of a revising chamber, which is less committed to adhering to the party whip will potentially be able to carry out such a scrutinising role more effectively. This is discussed further below.

Delegated legislation

Under the Human Rights Act there are also several provisions which grant power to Ministers to make delegated legislation. The House of Lords has varying competence to control the use of these powers.[36] Primary of the powers is provided for in s.1 (4) which allows the Secretary of State to amend the Human Rights Act by order to reflect the fact that the UK's obligations under the ECHR have been extended to include another ratified, or signed, protocol. Such an order requires the approval of the House of Lords. Similarly the Secretary of State may by order designate derogations and reservations which affect the scope of the Human Rights Act. Designated derogations and reservations are also set out in Schedule 3 of the Act. The Secretary of State must lay each of these orders before parliament. Designated derogations and reservations have effect for five years before they must be renewed. To renew a designated derogation or reservation the Secretary of State can make an order, but the order must be approved by both Houses. Orders extending the power of tribunals to grant remedies for purposes of the Human Rights Act will similarly be subject to approval by both Houses (see s. 7 (11)). The House of Lords has the power to annul an order made pursuant to ss. 2 (3), 7 (9) 18 (7) or Schedule 4, which relate to the rules on tribunals and the appointment of judges to the European Court of Human Rights. As with section 10 remedial orders the House of Lords has the potential to play an important role in scrutinising these statutory instruments.

Devolution

Linking the introduction of human rights legislation with measures for devolution is not new.[37] In the debate on a Bill of Rights in the 1970s Lord Hailsham and Lord Scarman both considered that if devolution was to be introduced then a Bill of Rights would be imperative. The Lords Select Committee Report of 1978 also pointed out that the case for a framework of human rights guaranteed throughout the UK would have a particular significance if power was to be devolved to Scottish and Welsh administrations.[38] Under the current structures of devolution, the Human Rights Act and devolution have been inextricably linked. The Human Rights Act is entrenched in each of the devolved institutions powers. It is *ultra vires* - or unconstitutional - for any of the legislatures to pass a law or for the executives to do any act which is incompatible with the ECHR,[39] and neither the Scottish Parliament nor the Northern Ireland Assembly can modify the Human Rights Act.[40]

Changes to the Human Rights Act 1998 will therefore affect the legislative capacity of the devolved administrations. However the 'Convention rights' under the Act can be amended simply by order of the Secretary of State.[41] On 20 May 1999 the Home Secretary, Jack Straw, ratified Protocol No. 6 of the ECHR abolishing the death penalty. This came into effect on 1 June 1999. This means that the

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[36] S. 20 Human Rights Act 1998.

[37] See Zander, *op. cit.*, pp. 66-68.

[38] See H.L. papers (176), 24 May 1978 p.31.

[39] Scotland Act 1998, ss. 29 and 57, Government of Wales Act 1998 s.107, Northern Ireland Act 1998 s. 6 and s. 24.

[40] Scotland Act 1998, Schedule 4 s. 1, Northern Ireland Act 1998 s. 7.

[41] See e.g. ss. 1 (4), discussed above.

Scottish Parliament has no power to reintroduce the death penalty if it wished to do so. The government has also committed itself to ratification of Protocols No. 4 and 7 of the ECHR,[42] after a review of legislation to ensure that UK laws comply with the Protocols. Ratification of those Protocols would affect the devolved territories' constitutional framework.

With respect to other international human rights obligations, the Secretary of State has reserved the power to direct the devolved executives to take or desist from action where it is appropriate to meet the UK's obligations. The Secretary of State can also revoke legislation where such legislation is incompatible with the UK's international obligations.[43] Changes to international human rights obligations therefore also affect the capacity of the devolved governments.

Yet despite this Parliament, not to mention the devolved assemblies, currently enjoys no formal role in the process of ratifying human rights treaties, monitoring the UK's international human rights obligations, or scrutinising the UK's periodic reports to the UN Committees. How this could change is discussed below.

Options for a constitutional role in human rights protection

> *" The new second chamber will be an essential element in the protection and promotion of fundamental rights. For it will, in effect, entrench our fundamental rights legislation. In the British system of government there is only one way of preventing a government with a substantial majority and supine backbenchers from transforming Parliament into an elective dictatorship. That is the creation of at least one House of Parliament which, because of its composition and construction, will not automatically accept Cabinet directives..... We propose that the second chamber should be the instrument which prevents the swift repeal of legislation on fundamental rights by any authoritarian government which might, in the future, be elected."*
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> Meet the Challenge, Make the Change: A New Agenda for Britain, Labour Party, 1989[44]

Although traditionally in the UK it has always fallen to Parliament to be the forum for the protection of civil liberties, audits of how effectively Parliament was able to protect human rights, have showed it to be wanting.[45] However the failings of Parliament are in part due to the fact that strong party discipline ensures dominance of the lower chamber by the executive and the determination of controversial issues, even where they encroach on fundamental rights, happens along party political lines.[46] The Human Rights Act provides a different setting in which a reformed House of Lords could help to redress that weakness.

Scrutinising legislation

The House of Lords could enjoy an enhanced role as the revising chamber to ensure that government has complied with the ECHR. Although government is required to make a section 19 statement of compliance, political reality means that few Ministers will be willing to openly state that they would like Parliament to pass legislation which they believe violates the ECHR. There is therefore a risk that Bills, which arguably do violate the Convention, may be introduced with a section 19 statement, suggesting they do not. The House of Lords should be in a position to inquire into the reasoning behind section 19 statements. Already with respect to the Access to Justice Bill Lord Lester tabled two questions inquiring, in light of the s.19 statement, on what grounds the

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[42] Protocol 4 provides for the prohibition of imprisonment for debt, freedom of movement, prohibition of expulsion of nationals, and the prohibition of collective expulsion of aliens. Protocol 7 provides for procedural safeguards relating to expulsion of aliens, a right of appeal in criminal matters, a right to compensation for wrongful conviction, a right not to be tried or punished twice and equality between spouses.

[43] Scotland Act 1998, s. 58, Government of Wales Act 1998 s.108, Northern Ireland Act 1998 s. 26.

[44] At p. 56.

[45] See for example, Klug, Starmer and Weir, *The Three Pillars of Liberty*, The Democratic Audit of the UK, Routledge 1996.

[46] *ibid p. 293.*

Access to Justice Bill was deemed compatible with Article 6 of the ECHR.[47] The government has indicated that they will explain the thinking behind a Section 19 statement if the issue is raised in debate,[48] and HM Treasury provided to the relevant committee a memorandum setting out why it considered that the provisions of the Draft Financial Services and Markets Bill complied with the Convention.[49] These are precedents which a reformed upper chamber could draw on to inform the way in which it conducts its scrutiny of primary legislation.

Two of the current House of Lords' committees which conduct scrutiny already command wide respect: the Delegated Powers and Deregulation Scrutiny Committee and the European Communities Committee.[50] There is also the Joint Committee on Statutory Instruments. If the new upper chamber retains these committees or establishes committees carrying out similar functions to them, the terms of reference of the committees could be extended to include human rights compliance. This was also proposed previously by the four Lords Lester, Irvine, Alexander and Scarman in their submission to the Liaison Committee, and would follow the example set by the Australian Senate Committees whose terms of reference include compliance with personal rights and liberties.[51] As previously noted, the current House of Lords has a very particular role to play in respect of section 10 orders, which will not be subject to the Parliament Acts, and therefore over which the current House of Lords can exercise a veto. The same applies to other statutory instruments which can be made pursuant to powers under the Human Rights Act. Some of these powers, such as the power to amend the rights which are protected under the Human Rights Act and the power to designate derogations and to extend existing derogations are important. A reformed second chamber may wish to consider how it will address these orders and whether it should establish a special procedure for scrutinising such statutory instruments. For example it could be established that the committee which considers the instruments include members representing the devolved administrations, given the potential constitutional impact that many of the S.I.s will have. The terms of reference could also require that the instruments be checked to ensure that they take into account the impact they would have on the devolved administrations.

The current power which the House of Lords enjoys to reject a section 10 remedial order, could be used to ensure that government does not 'hurriedly' seek to pass inappropriate and/or ill thought out measures (government will always have the option of remedying incompatible legislation by way of primary legislation) and a reformed upper chamber may wish to retain such a power. However as the role of the House of Lords in the efforts to equalise the age of consent illustrates (see above), there is no guarantee that the reformed upper chamber would not use its power to frustrate an order seeking to remove an incompatibility, even where the order was not human rights deficient.

Supervising changes to human rights obligations

Given the impact which changes to international human rights obligations, including the ECHR, will have on the functioning of the devolved institutions, it would be expected that the devolved institutions be entitled to some form of consultation on such changes. However international accountability and responsibility for human rights compliance remains the responsibility of the UK government, not the devolved assemblies. Therefore it may be more appropriate that the UK Parliament, rather than the assemblies, be entrusted with a formal role in the process of ratification, denunciation and implementation of international obligations. In this context the House of Lords could provide the forum for the devolved assemblies to be consulted, and to engage in debate and

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[47] *Hansard*, H.L.17 Dec 1998 Column: WA 165.

[48] *ibid* Column WA 186, Lord Williams of Mostyn.

[49] Memorandum of HM Treasury, 14 May 1999, Appendix 2 to the Second Report of the Joint Committee on the Draft Financial Services and Markets Bill.

[50] See for example the White Paper: " The present House of Lords has made a well-regarded contribution in this area [of EU relations], and this scrutiny function is one which the Government thinks could usefully be retained and expanded in the reformed House."

[51] See Constitution Unit, *A Human Rights Committee for Westminster*, p. 18 - 19.

the process surrounding international human rights obligations. This would mean, for example, that treaties for ratification, the government's human rights periodic reports and the response of the human rights bodies to them, would be laid before the upper chamber. For this option to work, the House of Lords would need to take on some form of territorial representation or have close links with the devolved assemblies.

Promoting legislation

As the history of legislation on a Bill of Rights demonstrates, the House of Lords can be a useful forum for the introduction of legislation which would not receive an opportunity for debate in the Commons. Government control of the parliamentary time in the Commons means that the opportunity to have non-government legislation considered is limited. The same need not hold true for the second chamber. Whilst the legislation may ultimately be defeated in the Commons (see the history of the Bill of Rights Bills), the new second chamber could nevertheless be a forum where debate on the legislation can occur and momentum for appropriate government legislation on an issue can be built up. This function could be very valuable in the sphere of proposing legislation which seeks to promote human rights concerns.

Conducting enquiries

The House of Lords has been responsible for the conduct of important enquiries through its select committees, for example, the Select Committee on a Bill of Rights and the Select Committee on Murder and Life Imprisonment. Where members of the House of Lords do not have the burden of constituency duties and there are members who have specific expertise and practical knowledge in a range of relevant issues, a reformed House of Lords could contribute significantly to the human rights culture by taking on the conduct of enquiries into issues which raise human rights concerns.

The implications for composition and powers

If a reformed House of Lords is to be tasked with performing a human rights role then there are a number of characteristics which the chamber should possess in order to be effective. Three clear characteristics which a chamber can be said to require if it is to be an effective watchdog against encroachment on fundamental rights and civil liberties are: independence; expertise; and legitimacy.

Independence

Independence in the defence of human rights is a crucial characteristic, as defence of civil liberties can often mean taking the stance against populist policies and defending minority interests, including unpopular ones.[52] In the passage of the *Firearms Bill* Lord Lytton (CB, H) noted that several Acts (opposed in the Lords) which had later caused problems in their implementation, were

> "...all measures which were introduced on a tide of public opinion fuelled by media interest. I do not say that that is wrong, but I say that it is wrong to go down that road without due consideration." [53]

To act as an effective revising chamber, in particular where the Bill which is subject to scrutiny is one that may be considered politically contentious, the new upper chamber will also need to be able to show independence of government and of party politics. For example in the debates on Michael Howard's Criminal Justice and Public Order Act, the Labour opposition in the Commons were keen not to be too outspoken against the Act for fear of being labelled 'soft' on law and order. The most vocal opposition to the Bill came in the House of Lords.[54]

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[52] In human rights terms a minority interest could include the rights of minority communities as well as groups such as prisoners, psychiatric patients, pedophiles.

[53] *Hansard*, H.L , 20 Feb 1997 : Column 803.

[54] See Klug, Starmer and Weir *op. cit.* p.87.

When the current House of Lords is noted for its independence, it is frequently as a result of the existence of a large section of cross benchers who do not take a party whip. Independence is often measured by reference to the manner of selection of members, the duration of their office, the existence of guarantees against undue influence and whether the body presents the appearance of independence.

Selection methods

Election: The advantages to elected members performing a role of human rights protection, is that they enjoy the democratic mandate to exercise effective opposition to the government where they consider that human rights are at stake. However direct election inevitably means that political parties will dominate the candidates who run for the upper chamber. Elected members would therefore predominantly take the party whip, and are unlikely to operate or be perceived to be sufficiently independent to play an effective scrutinising role. Elected members seeking re-election will also be subject to popular influence. However, the Australian Senate is directly elected and its two scrutinising committees which operate on a bi-partisan basis are considered to be effective in their scrutiny on human rights standards. A proviso is that their task is limited to technical scrutiny rather than an evaluation of the merits of any proposed legislation and there is a tendency that controversial decisions are avoided so as not to split the bi-partisan agreement.

Nominations: Selection of a proportion of the upper chamber by way of appointment could help ensure inclusion in the chamber of human rights experts, legal experts, academics, campaigners, members of underrepresented communities or groups who would not run for election. This depends on the appointments commission being provided with distinctive guidelines indicating the criteria for appointment, which could include expertise or concern for human rights. Although having the advantage of expertise, appointees have the disadvantage of lacking democratic legitimacy. Any appointment system must also ensure that the appointments are not dependent on providing support for any political party as this would negate the independent credentials of the appointed members (see further below).

Duration of office

Security of tenure can help to reinforce independence and would allow members of the upper chamber to be more robust in their defence of human rights. Whilst current Peers hold office for life, this is unusual amongst second chambers. Members of the upper house would be able to act with greater independence, and to provide a more effective check on government, if their period of office is longer than that of the lower chamber.

Guarantees against undue influence

The current House of Lords is subject to less stringent rules regarding the declaration of interests than is the Commons. Whilst one of the strengths of the current House is the fact that many Peers often work closely with voluntary and non-governmental organisations, the more robust the new chamber is and the more powers it will be able to exercise, the more important it is that levels of transparency are improved.

Appearance of independence

This criterion is perhaps most relevant to a chamber in which all or some of the members are appointed. It will be important in practice and for the appearance of legitimacy that the process of appointment is shown to be independent and follows clear and transparent guidelines. Allegations that the current system of appointments is open to abuse and results in the appointment to the House of 'cronies', or that the chamber simply acts as a 'rubber stamp' for government, should be avoided in the reformed chamber. Appointments should not be seen to be the result of political or personal favours, even where after appointment, the members clearly act in an independent fashion.

Position of the Law Lords

The arguments for and against the retention of the Law Lords as members of the legislature have already been set out in the Constitution Unit briefing on *Reforming the Lords: the Role of the Law Lords.* However due to the significant impact which the Human Rights Act will have on the functions of the

Lords, two salient points should be highlighted here. The first concerns their contribution to legislative scrutiny and their expertise on matters of the rule of law. Although the Law Lords have undoubtedly provided a uniquely valuable resource of judicial and legal expertise for the House to draw on, active Law Lords will find themselves more and more curtailed from taking an effective part in this function, if they are to observe the convention of not partaking in politically controversial debates. The important issues which the Human Rights Act is likely to raise in debate on legislation would preclude participation by the Law Lords, as the likelihood is that they would have to adjudicate on the legislation at sometime in the future. The position of retired Law Lords would be different.[55] To this extent the appointment of retired Law Lords as members may be one method by which the upper chamber retains their experience. However the Lords contains many other distinguished lawyers (e.g. Lords Alexander, Goodhart, Lester, Mischon, to name but four prominent in this briefing).

The second issue is whether the role of the Law Lords as members of the legislature and the judiciary is compatible with the ECHR, in particular the preservation of independence and impartiality of the judiciary under Article 6 of the Convention. The implications of a successful challenge to the role of the Bailiff in Guernsey (who sits as a senior judge and member of the legislature) will have to be considered with respect to the Lords.[56]

Expertise

To give effect to a human rights role the upper chamber needs to be able to draw upon a resource of expertise and knowledge in the field of human rights. In part this can come from staff and special advisers but it also needs to be reflected in the House's membership. This may be more easily achieved through appointment than through election.

Democratic Legitimacy

As related on pp. 4 - 5, the lack of democratic legitimacy inhibited the current House of Lords from preventing the passage of legislation which infringes human rights. On the two occasions which the Lords has defied the Commons, the Bills were subject to a free vote (the War Crimes Bill and the Sexual Offences (Amendment) Bill). To be effective the reformed House of Lords must have the legitimacy not just to speak up in protection of human rights, but to take action. Such legitimacy derives most naturally from having some form of democratic connection, normally through election whether direct or indirect. The House is also likely to have greater legitimacy if it is seen as representative - reflecting intake from different communities but also, in the context of devolution, appropriate representation from the regions.

Powers

Power to veto or delay legislation

The current House of Lords currently has power of delay over primary legislation but can veto secondary legislation. The question arises, if the House of Lords is to be effective in protecting human rights, whether the upper chamber should have stronger powers in relation to human rights legislation.

Requiring the consent of the upper chamber to amend the Human Rights Act

The upper chamber could enjoy an absolute veto over amendments to the Human Rights Act. This would mean that in such cases the upper chamber could not be overruled by invoking the

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[55] For example, the White Paper on Lords reform suggests that "Retired Law Lords play a particularly distinguished role in the examination of legislation, especially that with a highly technical or legal content. Most significant is their contribution to debates on the administration of justice, penal policy and civil liberties, where law and politics intersect".

[56] See *McGonnell v United Kingdom*, judgement pending, heard by the European Court of Human Rights on 15 September 1999.

Parliament Act. Alternatively where consent is not forthcoming, the passage of legislation amending the Human Rights Act could be made subject to obtaining a qualified majority in the House of Commons.

Extended delaying powers over constitutional legislation

The House of Lords might not exercise a veto over legislation which seeks to amend the Human Rights Act or other relevant and/or constitutional legislation, but could delay such legislation for a specified period, longer than for ordinary legislation. The Labour Party in 1989 suggested that,

> " ..... the new second chamber should have new delaying powers over measures affecting fundamental rights. It will possess the power to delay repeal of legislation affecting fundamental rights for the whole life of government - thus providing an opportunity for the electorate to determine whether or not the government which proposes such measures should remain in office. The extra delaying powers will apply to all items of legislation specially designated as concerning fundamental rights and all legislation establishing the national and regional assemblies."[57]

Parliamentary procedure

In addition to special powers, consideration might be given to special parliamentary procedures for dealing with bills affecting fundamental human rights.

Powers entrusted to a Parliamentary Committee

The Government has already committed itself to establishing a joint human rights committee. The terms of reference have not yet been finalised, however as indicated by Margaret Beckett to the Commons the terms of reference will include

- the conduct of inquiries into general human rights issues in the United Kingdom,
- the scrutiny of remedial orders,
- the examination of draft legislation where there is doubt about compatibility with the ECHR.[58]

This means that the reformed upper chamber will inherit a system whereby the focus of human rights in parliament operates through the new joint committee. A reformed upper chamber will need to be aware of the following factors:[59]

Membership

The upper chamber will probably going to need to provide at least 8 members to serve on the Committee. Given the nature of the committee, and the need to build up expertise, it will be desirable that those members be in a position to serve on the committee at least for the duration of a parliament. If the upper chamber also has a territorial function, it may also be appropriate that some of the members of the upper house on the committee also represent the territories. Again this would also be in keeping with the important constitutional impact which human rights matters have for the devolved administrations.

Support

An effective joint committee will need support from legal advisers and human rights experts and its own dedicated staff rather than being dependent on part-time staff loaned by both Houses. This will have implications for the other functions and roles which an upper chamber will perform, and how resources are to be allocated to support different and competing functions.

The Committee itself will need to be skilled at prioritising the many tasks and demands it will be entrusted with, and develop a capacity to extend its reach through co-operation with other committees, and imaginative use of staff and outside experts. The upper chamber should also be able to guide the committee into operating in a robust and non-partisan fashion.

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[57] Meet the Challenge, Make the Change: A New Agenda for Britain, Labour Party, 1989, p. 56.

[58] *Hansard* H.C. 14 December 1998, Column 604.

[59] See *A Human Rights Committee for Westminster*, Constitution Unit, July 1999.

Experience of operation of the Joint Committee will indicate whether it would be an appropriate use of resources and reflect the strengths of the chamber, for the upper chamber to establish its own committee - either a human rights committee or a wider constitutional committee. If it was considered that such a committee be established, care would have to be taken to ensure that it did not duplicate the work of the Human Rights Committee or any other committee. Such a committee could provide the following services in addition to the Joint Committee on Human Rights.

Scrutiny of section 19 statements

The committee could exercise a power to scrutinise Bills for human rights compatibility if the Joint Committee does not fulfil that role. When pressed on whether the Joint Committee would be able to examine Bills bearing section 19 statements to enquire into their compatibility with the ECHR, the government has indicated that it does not currently foresee that as one of the joint committee's functions.[60] However scrutiny of these Bills will be important. Early experience has shown that s.19 statements do not lessen the need for human rights scrutiny of legislation. Both the Access to Justice Bill (now the Access to Justice Act) and the Immigration and Asylum Bill bore s. 19 statements declaring their compatibility. However in both, issues of ECHR compliance became a matter of significant debate before the standing committee and during the bills passage through parliament.[61] Limiting the terms of reference of the Joint Committee to examining draft legislation and bills carrying a qualified section 19 statement, would effectively permit the executive to decide which Bills will be subject to scrutiny. A committee of the upper chamber could therefore act as check on the executive's decision. The committee should have the power to call Ministers before it, and to expect the government to provide an explanation as to why it considers the Bill to comply with the ECHR.[62]

Scrutiny for compliance with international human rights obligations

The compliance criteria which the committee would operate could also go beyond the Human Rights Act and include other UK international obligations. This would reflect the constitutional impact which the UK international obligations have on the devolved administrations.

Assist the Joint Committee

A committee in the upper chamber could in effect act as a sub-committee for the Joint Committee carrying out some of the functions which the Joint Committee may not have sufficient time to do.[63] For example it could conduct enquiries or provide supervision of human rights practice and the implementation of the Human Rights Act.

Conclusion

The scheme of the Human Rights Act and devolution, and the manner in which the two are linked has offered a new opportunity and indeed created an obligation to ensure that Parliament has the capacity to provide effective human rights protection. The House of Lords already displays many characteristics and enjoys certain functions which make it an appropriate forum in which to defend human rights. A reformed chamber, with greater democratic legitimacy, offers an even greater opportunity to build on the experience of the House and create a second chamber which is fully equipped to play a pre-eminent role in ensuring that human rights are democratically entrenched in parliament.

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[60] *Hansard* H.L. 26 July 1999, Column WA 145.

[61] Further see *A Human Rights Committee for Westminster*, Constitution Unit, July 1999.

[62] The Delegated Powers and Deregulation Scrutiny Committee receives an explanatory memorandum from the sponsoring government department on the delegated powers in the bill to enable it to conduct its scrutinising functions more effectively.

[63] The Joint Committee is likely to be able to sit for a maximum of 70 to 100 hours a year, *see A Human Rights Committee for Westminster, op. cit.*.