

Parliaments and Human Rights

Redressing the democratic deficit



Murray Hunt, Hayley
Hooper and Paul Yowell

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Report of research findings

This Report summarises the main research findings of the AHRC-funded research project *Parliaments and Human Rights*. It is intended to provide the background to a 2 day conference organised by the AHRC in London on 17th and 18th April 2012 on **Redressing the Democratic Deficit in Human Rights**.

The overarching purpose of the conference is to provide a forum for practitioners and scholars to discuss how to redress the democratic deficit in human rights by:

1. identifying practical ways in which parliaments can play a more active role in the protection and realisation of human rights; and
2. considering how courts, in turn, could respond to such an enhanced role for parliaments.

To that end, the conference has the following more specific objectives:

- To take stock of the UK Parliament's current role in relation to human rights, and of the courts' current approach to Parliament's role, by presenting research findings about parliaments and human rights
- To connect current practice in parliaments and courts with relevant current debates in legal and political theory
- To inform discussions about the role of national parliaments at the High Level Conference on the Future of the European Court of Human Rights at Brighton on 19 and 20 April 2012 and debate about the content of the Brighton Declaration
- To discuss a draft set of Principles and Guidelines on the Role of Parliaments in the Protection and Realisation of Human Rights
- To initiate a process leading to the adoption of an internationally agreed set of Principles and Guidelines on the Role of Parliaments in the Protection and Realisation of Human Rights
- To consider some concrete recommendations about how the UK Parliament can enhance its role in the protection and realisation of human rights and how courts in turn could respond.

This paper provides the necessary background for the first of these objectives: taking stock of the role the UK Parliament already plays in relation to human rights, and of the courts' approach to that role. It is intended only to be a summary of the principal findings. Sections two and three of the paper are substantially the work of Paul Yowell and Hayley Hooper respectively. More detailed papers, going beyond this summary of research findings, will be presented by the authors at the conference itself.

Contents

Executive Summary	6
I. Introduction	9
<i>The Democratic Deficit in Human Rights</i>	9
<i>Parliament's Obligations and Responsibilities in Relation to Human Rights</i>	13
<i>The Place of This research in the Academic Literature</i>	14
<i>Research Objectives and Methodology</i>	17
II. Parliamentary References to JCHR reports	19
<i>Defining and quantifying substantive references</i>	19
<i>The increase in substantive references in 2005-2010</i>	22
<i>Who uses JCHR reports in Parliament and how?</i>	24
<i>Comparison of users of JCHR reports by House</i>	25
<i>Comparison of use of JCHR reports by political party</i>	27
<i>What uses are made of JCHR reports in Parliament?</i>	30
<i>In which contexts are JCHR reports referred to?</i>	31
<i>The range of conceptions of human rights</i>	32
<i>Modes of Argumentation in JCHR References</i>	34
<i>Representation of Marginal Groups and Vulnerable People</i>	34
<i>Evaluating the effect of JCHR Reports on the Quality of Parliamentary Debate on Human Rights</i>	37
1. Use of human rights sources	37
2. Use of proportionality	40
3. Has the work of the JCHR framed, stimulated or influenced debate in Parliament?	41
4. Has the work of the JCHR led to more informed debate in Parliament?	42

5. Has the work of the JCHR led the Government to provide more detailed justification for laws and policies affecting human rights?	42
<i>Amendments and Related Impact</i>	43
III. Judicial References to JCHR Reports	45
<i>Introduction</i>	45
<i>Methodology</i>	46
<i>Quantitative Findings</i>	46
<i>Constitutional propriety of judicial references to JCHR reports</i>	49
<i>Types of reference to/use of JCHR Reports by Courts</i>	50
1. Reference to JCHR Report as Part of "Background Information"	50
2. Reference to JCHR's views as being potentially persuasive	52
3. Reference to JCHR reports as evidence of parliamentary consideration (or lack of consideration) of human rights compatibility issues	54
Appendix	59

Executive Summary

Human rights today suffer from a democratic deficit. Debates about whether human rights are inherently undemocratic are nothing new, but in the UK they have reached a new intensity in recent times. Criticisms of court decisions on human rights for being profoundly undemocratic and calls for repeal of the Human Rights Act reflect concerns that democracy is being subverted by unaccountable judges who are sidelining Parliament.

Yet paradoxically there appears to be a new consensus, not only about the value of human rights, but about the importance of giving them legal protection through some form of legal instrument. Critics of the European Court of Human Rights and of the Human Rights Act are often in favour of the European Convention on Human Rights and of a UK Bill of Rights. The choice between the Courts and Parliament as the guardians of human rights is increasingly rejected. In place of that old dichotomy there is now widespread agreement that all branches of the State – Parliament, the Executive and the Judiciary – have a shared responsibility for the protection and realisation of human rights. What explains the paradox that this emerging consensus about the shared responsibility for protecting legally recognised human rights is accompanied by new levels of dissensus about who has the final say?

One explanation may be that the institutional machinery for the protection and realisation of human rights has not caught up with the new consensus: it still depends almost exclusively on legal mechanisms which involve judges giving individuals remedies against democratically elected decision-makers. This institutional focus on legal remedies, and corresponding neglect of the institutional forms of parliamentary protection of human rights, encourages a distracting focus on the question of ultimate authority: “who decides?” Persistent disagreement about the answer to that fundamental question threatens the new consensus about the worth of human rights and of giving them legal form. It diverts attention from the much more pressing question: what changes to our institutional mechanisms are necessary in order to give effect to the new consensus about the shared responsibility for protecting and realising legally recognised human rights in a way that is compatible with our tradition of parliamentary democracy.

This report summarises the main findings of a research project which has sought to provide the resources to begin to address that urgent question. Since 2000 the UK

Parliament's Joint Committee on Human Rights ("JCHR") has tried to enhance the role of Parliament in protecting and realising human rights. The research considered both parliamentary materials and court judgments referring to the work of the JCHR with two broad aims in mind:

- To assess how, if at all, debate about human rights in Parliament changed between 2000 and 2010; and
- To assess whether and, if so, to what extent courts have considered parliamentary debates about human rights when deciding human rights compatibility issues previously considered by Parliament.

The research of parliamentary materials found that in the 2005-10 Parliament, there were 1,006 substantive references to the work of the JCHR, compared to just 23 such references between 2000 and 2005. Most of these references involved legislative scrutiny of various kinds, including specific proposals for amendments to bills; broad recommendations for change in law or policy; and consideration of the UK's compliance with its international human rights obligations. A significant number of members of both Houses made reference to the work of the JCHR (241 in total), but the references were concentrated among 7 members who accounted for 35% of all references (6 of these 7 were JCHR members), and another 36 members who accounted for 32%. The remaining 33% of references were spread among 198 members.

References to JCHR reports were more common in the House of Lords (which accounted for 66% of the total) than the House of Commons (34% of the total). Most of the members who made frequent use of JCHR reports were in the House of Lords, and this led to more detailed scrutiny and sustained debate regarding many of the issues raised in JCHR reports in the House of Lords than in the House of Commons. The most common contexts in which JCHR reports were referred to were counter-terrorism and criminal justice and procedure, accounting for around one third of the total.

Members who referred to JCHR reports engaged in a variety of modes of argumentation in addition to discussion of the analysis and conclusions of the JCHR report itself. These included citation of various human rights instruments and decisions of the UK courts and the European Court of Human Rights, and argumentation based on aspects of the proportionality inquiry: necessity, less restrictive alternatives, and balancing of interests. Evidence generated by the JCHR was frequently referred to by both members and non-members of the JCHR. The JCHR ensured that attention was paid in the legislative process to the rights of a large range of vulnerable persons and marginal and minority groups. A

majority of all JCHR references involved discussion of the rights of one or other vulnerable or marginal groups.

References to JCHR reports often drew substantive responses by Government ministers and representatives, and resulted in sustained dialogue about the justification for legislative measures and whether or not bills or existing law should be changed or amended, in which reasons and evidence were offered on both sides of an issue. In at least 16 references to work of the JCHR, the Government amended or agreed to amend a bill on the basis of recommendations by the JCHR, and in other references the Government agreed to issue guidance about the interpretation or application of law in response to JCHR concerns.

The research of court judgments found that the JCHR or its work has to date been cited in 72 cases, including 11 cases in the Court of Appeal, 12 cases in the House of Lords and 2 in the Supreme Court. The scale of the reference to and use of JCHR reports by courts suggests that judges do not generally consider it to be constitutionally problematic to refer to such materials. However, there is a lack of rigour by courts in defining the precise purposes for which a report or material in a report is being referred to. Three broad types of reference were identified: reference to JCHR reports as “background information”; reference to the JCHR’s views as being potentially persuasive on a substantive human rights question; and reference to reports as evidence of parliamentary consideration (or lack of consideration) of human rights compatibility issues, as a reason for deferring (or not deferring) to Parliament’s view of compatibility.

I. Introduction

The Democratic Deficit in Human Rights

The idea of “human rights” has a problem. It is not a new problem. Ever since the language of human rights entered the public discourse, controversy has raged about the proper relationship between the idea of human rights and the idea of democracy. Everyone has a view, not just about what counts as a “human right”, or whose rights should prevail when they come into conflict, but about who, in a democracy, are the legitimate guardians of human rights. Some people think it should be the courts; some people think it should be the representatives of the people in the elected legislature. Debate about whether the idea of human rights is undemocratic is as old as the idea of human rights itself.

Today in the UK, however, it is a debate which is being played out with a new ferocity. Decisions of the European Court of Human Rights and of our own courts under the Human Rights Act are widely criticised, by both commentators in the media and elected politicians, for being profoundly undemocratic.¹ Government ministers at the highest level join in the criticism.² Experienced lawyers call on the Government to ignore decisions of the European Court of Human Rights.³ There are calls to withdraw from the European

¹ See in particular the criticisms of the decisions of the European Court of Human Rights in the Abu Qatada case, *Othman v UK* (Application no. 8139/09, 17 January 2012) in which deportation of the radical preacher to Jordan was prevented because of the risk that he would be tried there using evidence obtained by torture; of *Hirst v UK* (No. 2) [2005] ECHR 681 concerning prisoner voting; and of the decision of the UK Supreme Court concerning the lack of an opportunity for independent review of the indefinite requirement to be on the sex offenders' register in *R (on the application of F) and Thompson v Secretary of State for the Home Department* [2010] UKSC 17.

² See e.g. the comments of the Prime Minister on the prisoner voting case, *Hirst v UK* (“It makes me physically ill even to contemplate having to give the vote to anyone who is in prison”, HC Deb 3 November 2010 col 921) and the Prime Minister's and Home Secretary's comments on the Supreme Court decision in the sex offenders' register case, *F and Thompson* (“how completely offensive it is, once again, to have a ruling by a court that flies in the face of common sense” and “The Government is appalled by the ruling. ... It is time to assert that it is Parliament that makes our laws, not the courts; that the rights of the public come before the rights of criminals; and, above all, that we have a legal framework that brings sanity to cases such as these”: HC Deb 16 February 2011 cols 955 and 959)

³ See e.g. the backbench motion proposed by, amongst others, Rt Hon Jack Straw MP and Dominic Raab MP inviting the House of Commons to maintain the statutory prohibition on prisoners voting notwithstanding the decision of the Grand Chamber of the European Court of Human Rights in *Hirst v UK*.

Convention on Human Rights, whether temporarily⁴ or permanently,⁵ and to renegotiate its terms.⁶ Some call for a “democratic override” whereby Parliament can vote to ignore a decision of the European Court of Human Rights.⁷ There are calls to repeal the Human Rights Act, again with sympathetic backers at the top of Government.⁸ The Government has established a Commission on a Bill of Rights, one of the tasks of which is to investigate the creation of a UK Bill of Rights. The thread which runs through this critique is that democracy is being subverted: unelected, unaccountable judges are thwarting the will of Parliament, which is therefore being sidelined by the courts.

Yet paradoxically, there is today a new consensus about, not only the importance of human rights, but the importance of the legal protection of human rights. Until fairly recent times, human rights and democracy were often considered to be in opposition to each other. The legal protection of human rights was considered by many to be undemocratic, because of the power it gave to unelected judges to interfere with the laws of democratic parliaments. Things have changed. There appears to be an emerging consensus that human rights are a good idea and that their legal protection is also a good idea. Many critics of the European Court of Human Rights are wholly in favour of the European Convention on Human Rights.⁹ Many opponents of the Human Rights Act are in favour of a UK Bill of Rights, with a significant role for the courts.¹⁰ It is no longer seen as the preserve of the judiciary to protect human rights against the other two branches: there is widespread agreement that all branches of the State – Parliament, the Executive

⁴ *Withdraw from human rights law to deport Qatada, say Tory MPs*, The Telegraph, 22 February 2012; and see Peter Bone MP’s Private Members Bill, European Convention on Human Rights (Temporary Withdrawal) Bill.

⁵ European Convention on Human Rights (Withdrawal) Bill.

⁶ *Bringing Rights Back Home: Making Human Rights compatible with Parliamentary Democracy in the UK* (Policy Exchange, Michael Pinto-Duschinsky, February 2011).

⁷ See e.g. the side-letter dated 28 July 2011 to the Deputy Prime Minister and Lord Chancellor from the Chair of the Commission on a Bill of Rights concerning Reform of the European Court of Human Rights; Michael Howard, *Parliament must redefine human rights*, The Telegraph, 23 November 2011; Michael Pinto-Duschinsky article in the Guardian on resigning from the Commission, *Commission must not compromise by recommending Bill identical to HRA*, The Guardian, 13 March 2012; and the suggestion of Dominic Raab MP that “rulings such as that on Abu Qatada, which create new law, should be subject to free votes in Parliament”: *The Strasbourg Court is still a cranks’ paradise*, The Telegraph, 24 January 2012.

⁸ Speech of the Home Secretary, Rt Hon Theresa May MP to the Conservative Party conference, September 2011.

⁹ Dominic Raab MP, for example, says that “few question the list of fundamental freedoms in the European Convention”: *The Strasbourg Court is still a cranks’ paradise*, The Telegraph, 24 January 2012. See, to similar effect, Jonathan Fisher QC, arguing that the UK should not withdraw from the ECHR in *Rescuing Human Rights* (Henry Jackson Society, March 2012); Michael Pinto-Duschinsky, “It is not my desire – nor that of any Commission members – to attempt to abandon the rights set out under the ECHR. A British Bill of Rights would be ECHR-plus”: *Commission must not compromise by recommending Bill identical to HRA*, The Guardian, 13 March 2012.

¹⁰ In some cases, opponents of the Human Rights Act favour a British Bill of Rights under which UK courts would have stronger powers, including the power to strike down legislation which is incompatible with the Bill of Rights: see e.g. Dominic Raab MP in debate with Shami Chakrabarti, Director of Liberty, *The conversation: Judging rights from wrong*, The Guardian, 8 October 2011.

and the judiciary – have a shared responsibility for the protection and realisation of human rights. Increasing numbers of commentators and practitioners reject as false the choice between courts and parliament. As the Lord Chancellor, the Rt Hon Kenneth Clark MP recently said in evidence to the Joint Committee on Human Rights, “It is not just a question of who rules – Parliament or the courts. Any liberal democracy needs both.”¹¹ Academic advocates of “political constitutionalism” appear to welcome a role for courts as part of the appropriate institutional machinery for rights-protection, at least under certain conditions.¹² Yet this emerging consensus in favour of human rights and the desirability of their protection by legal instruments is accompanied by new levels of dissensus about who has the final say, courts or Parliament. What explains this paradox?

One possible explanation is that the institutional machinery for the protection and realisation of human rights has not caught up with the new consensus. The critique from democracy is not without foundation. Democracies throughout the world profess their commitment to human rights, but in most of those democracies the institutional machinery for realising that commitment is profoundly undemocratic: it depends primarily on unelected judges providing legal remedies for individuals whose rights have been violated, usually, by elected decision-makers. As a result, there is a genuine and profoundly felt impression that elected decision-makers are not taken sufficiently seriously by courts, and human rights discourse is everywhere bedevilled by a permanent crisis of democratic legitimacy.

The problem, then, for the idea of human rights is not the mere fact of disagreement about their content, or about which rights should prevail when they come into conflict, or about the justifications for interfering with or derogating from them. Disagreement about such matters is not only inevitable, but is a good thing, something positively to be wished for in a functioning democracy. The problem is the persistence of fundamental disagreement about the answer to the ultimate question: “who decides?” Such persistent disagreement threatens the fragile new consensus about the worth of human rights and of giving them legal form. To always ask “Who should have the final word on human rights?” can be an unhelpful distraction from the task which, it seems, everyone agrees is urgent: more effective implementation of human rights. There is consensus, it seems, not just about the rights in the ECHR being fundamental, but about there being a “shared responsibility” for protecting and implementing

¹¹ Oral evidence, 20 December 2011, Q 11 (HC 1726-i).

¹² See e.g. Richard Bellamy, “Political Constitutionalism and the Human Rights Act” (2011) 9 *International Journal of Constitutional Law* 86; Jeremy Waldron, “The Core of the Case Against Judicial Review” (2006) 115 *Yale Law Journal* 1346.

those rights. The real issue is the institutional forms for giving effect to that shared responsibility.¹³

This research has therefore been undertaken in the conviction that much more pressing than the “who decides” question is the question about the detail of the institutional mechanisms for the effective implementation of human rights. Abstract debates about ultimate decision-making authority can get in the way of much more urgent debates about how best to protect and realise rights that all agree are fundamental. Democratic considerations are extremely important in designing and operating those mechanisms, but approaching every human rights question through the prism of “who decides” can paradoxically prevent proper engagement with those democratic considerations. In the UK at least, with its strong tradition of parliamentary democracy, there is agreement about the answer to that question at the level of ultimate authority: Parliament can decide, if it wishes, to withdraw from the European Convention on Human Rights or to repeal the Human Rights Act. So long, however, as it remains a signatory to the Convention, debating the question of who has ultimate authority, Parliament or the European Court of Human Rights, is an obstacle to the much more pressing question of how to ensure practical and effective realisation of the rights in the Convention in a way which is compatible with the UK’s tradition of parliamentary democracy.

For some, the current air of crisis has been manufactured by “rights sceptics” who are opposed to the very idea of human rights. For others, there is a profound sense of disconnect between their genuinely held convictions about human rights and the current institutional arrangements for their protection and realisation.¹⁴ Perception, misperception or fact, something needs to be done to redress the debilitating democratic deficit that afflicts human rights. If the emerging consensus about the shared responsibility of courts and Parliament for the protection and promotion of human rights is to survive, there must be a constructive and imaginative response to the powerful critique from democracy. That response must be at every level, theoretical and practical. Moreover, the theory must be informed by the practice, and the practice informed by the theory.

¹³ Michael Pinto-Duschinsky, for example, writing about his resignation from the UK Commission on a Bill of Rights, said “There is broad agreement about rights themselves but deep division about how those rights are to be adjudicated”: *Commission must not compromise by recommending Bill identical to HRA*, The Guardian, 13 March 2012.

¹⁴ In a fascinating exchange on the Today Programme on BBC Radio 4 on 29 February 2012, for example, the Director of Liberty, Shami Chakrabarti, described Dominic Raab MP as “a well known rights sceptic”, to which Mr. Raab responded that in fact he has been one of the strongest libertarian voices in the current Parliament.

Parliament's Obligations and Responsibilities in Relation to Human Rights

Since 2000 the UK's parliamentary human rights committee, the Joint Committee on Human Rights ("the JCHR"), has sought to confront the democratic deficit in human rights discourse by enhancing the role of Parliament in protecting and realising human rights.

As part of the State, Parliament shares with all the other organs of the State (including the Executive and Judiciary) the obligations to respect, protect and fulfil the human rights to which the State has bound itself by international treaty to respect and protect. Parliament is therefore obliged to protect and promote human rights. It must respect human rights itself, by refraining from unjustifiably interfering with human rights, for example by passing legislation which itself violates human rights or which confers a power on others which is likely to be exercised in a way which violates human rights. But this does not discharge its obligations in relation to human rights. It must also protect human rights against unjustifiable interference by the Executive and by third parties, and it must seek to fulfil human rights where there is an obligation on the State to take action to give effect to a human right and that action can be taken or initiated by the legislature. Parliament's obligations and responsibilities in relation to human rights therefore have both negative and positive dimensions. Parliament's unique responsibility for the State's legal framework make it the best-placed institution of the State to realise human rights in the sense of making the necessary adjustments to the legal framework to ensure that human rights are adequately protected and fulfilled.

The JCHR has sought to assist Parliament to perform this task in a variety of ways¹⁵ It scrutinises for human rights compatibility all the legislation which the Government brings before Parliament. It also seeks to facilitate parliamentary scrutiny of the Executive's record on human rights generally, in relation to all policy, not just draft legislation. It helps Parliament to scrutinise the adequacy of the Government's response to court judgments finding a violation of human rights. It scrutinises the UK's compliance with the main UN human rights treaties and seeks to increase Parliament's role in the implementation of the obligations contained in those treaties, as well as in the scrutiny of new treaties with human rights implications prior to their ratification. It has conducted thematic inquiries into issues where there is cause for concern about the UK's record on human rights, and

¹⁵ For a fuller account of the work of the JCHR, and of the different forms of parliamentary engagement with human rights that the JCHR has sought to encourage, see M. Hunt, "The Impact of the Human Rights Act on the Legislature: A Diminution of Democracy or a New Voice for Parliament?" (2010) EHRLR 601.

it has sought to ensure ongoing parliamentary involvement in the monitoring of the institutional machinery for the protection and fulfilment of human rights.

In 2006 an important review of the work of the JCHR was conducted by Professor Francesca Klug and Helen Wildbore of the LSE, and the Committee adopted a number of significant changes to its working practices in the light of the findings and recommendations of that report.¹⁶ Since that date, however, there has been no systematic attempt to assess whether the existence of this particular institutional mechanism has had any effect on the amount and quality of debate about human rights in Parliament. Nor has there been any systematic attempt to ascertain whether the debate about human rights taking place in Parliament has influenced in any way the approach or decisions of courts when considering human rights questions arising under legislation passed since 2000.

The Place of This research in the Academic Literature

Traditionally, most of the academic literature about human rights has been court-centred: it focuses principally on legal decisions by courts adjudicating in human rights disputes, rather than the role of legislatures in relation to human rights. In the last two decades, however, there has been growing academic interest in parliamentary as opposed to judicial models of human rights protection, in which the role of scrutinising laws and policies for compatibility with human rights is carried out by the legislature rather than the courts. The earliest sustained account of a parliamentary model of human rights protection was given by a UK lawyer, David Kinley in 1993, in his path-breaking book *The European Convention on Human Rights: Compliance without Incorporation*, in which he proposed a system of pre-legislative scrutiny of all legislation for compliance with the Convention.¹⁷ Since then, the legislative model has gained ground throughout the common law world. In the US, for example, Mark Tushnet has argued for the Constitution to be taken away from the Courts,¹⁸ and Jeremy Waldron has mounted a sustained critique of judicial review,¹⁹ arguing that human rights are better protected through legislatures than courts. In Canada, Janet Hiebert has argued for recognition of a

¹⁶ See annex to *The Committee's Future Working Practices*, HL Paper 239, HC 1575 (Twenty-third Report of Session 2005-06).

¹⁷ D. Kinley, *The European Convention on Human Rights: Compliance without Incorporation* (Dartmouth, 1993).

¹⁸ M. Tushnet, *Taking the Constitution Away from the Courts* (1999).

¹⁹ J. Waldron, "The Core of the Case Against Judicial Review" (2006) Yale Law Journal 115; *Law and Disagreement* (Oxford University Press, 1999).

distinctive “parliamentary model of rights protection”,²⁰ while in Australia, Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone have also argued consistently in favour of the protection of human rights through the development of institutions and processes not involving courts.²¹

In *Law and Disagreement* (1999) Jeremy Waldron observed that legal theorists had neglected the study of legislatures.²² One reason he offered for this is that they tend to view the legislative process as dominated by bargaining and compromise among self-interested groups; or, worse, corrupted by the media hype, campaign contributions, and base populism that can influence electoral politics.²³ Thus legal theorists are drawn to the study of courts, case law, and the adjudicative process, which they see as a model of calm, reflective reason in comparison to the partisan bickering of the legislature; and as a result tend to leave the study of legislatures to political scientists.²⁴ Waldron urged study of the structures and processes of legislative reasoning with the analytical precision given to the study of adjudication and cases.²⁵ In recent years a wide range of work by legal scholars has appeared which goes in this scholarly direction, from works that focus on the practical issues of legislatures addressing human rights, through works addressing the general role of legislatures within a constitutional polity,²⁶ to those of a more general theoretical nature about legislative structure and reasoning and deliberative processes.²⁷ The title of

²⁰ J. Hiebert, “Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?” (2006) 4 International Journal of Constitutional Law 1; “Parliamentary Bills of Rights: An Alternative Model?” (2006) 29 MLR 7; “New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance when Interpreting Rights?” (2004) 82 Texas Law Review 1963; “Interpreting a Bill of Rights: The Importance of Legislative Rights Review” (2004) 35 British Journal of Political Science 235.

²¹ Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights* (Ashgate, 2006) and *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003).

²² J Waldron, *Law and Disagreement* (Oxford University Press, 1999) 9-10.

²³ Ibid. 8-10, 28-32.

²⁴ Ibid.

²⁵ Ibid. 32-33.

²⁶ E.g., R Bauman and T Kahana, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press, 2006); K Ziegler, D Baranger, et al., *Constitutionalism and the Role of Parliaments* (Hart, 2007); C Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge University Press, 2007); GCN Webber, *The Negotiable Constitution: On the Limitations of Rights* (Cambridge University Press, 2009); N Devins and L Fisher, *The Democratic Constitution* (Oxford University Press, 2004); N Devins and K Whittington, *Congress and the Constitution* (Duke University Press, 2005); R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionalism of Democracy* (Cambridge University Press, 2007); A Tomkins, ‘The Role of the Courts in the Political Constitution’ (2010) 60 University of Toronto Law Journal 1

²⁷ E.g., WR McKay and C Johnson, *Parliament and Congress: Representation and Scrutiny in the Twenty-First Century* (Oxford University Press, 2010); R Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) (forthcoming).

one of these works, *The Least Examined Branch*, gives an indication of how some scholars still view the general understanding of legislatures by legal theorists.²⁸

Some of the recent literature about parliamentary models of human rights protection advocates parliamentary scrutiny of law and policy for human rights compatibility as an *alternative* to judicial review for such compatibility: it argues that consideration of human rights questions should be kept in the only democratically legitimate forum of the legislature and out of the necessarily undemocratic and therefore illegitimate forum of the courts. For some of these writers, this is desirable, because, as Evans and Evans observe, there is persistent and inevitable conflict both over what rights are and how they should apply in particular circumstances, and there are both institutional and democratic reasons for preferring that these decisions are made by legislators.²⁹ This is an understandable temptation, given the historic dominance of constitutional models in which courts are indeed supreme over both governments and parliaments in matters of human rights. However, it underestimates the extent to which the effective protection and fulfilment of human rights requires *both* courts and legislatures to play a significant role in the implementation of human rights norms.

The premise of this research project, by contrast, is that the effective protection and fulfilment of human rights in a modern democracy requires *both* courts and legislatures to play a significant role in the implementation of human rights norms. It proceeds within the conceptual framework provided by recent work in legal theory conceiving of a democratic legal order which includes human rights as a “culture of justification”: that is, a culture in which all exercises of power, or failures to exercise power, which affect human rights must be justified by reference to publicly available reasons which must be open to independent scrutiny for compatibility with society’s fundamental commitments.³⁰ On this approach, human rights scrutiny by parliaments should complement, not replace, the different scrutiny to which courts also subject public justifications for interfering with or failing to protect human rights.

²⁸ R Bauman and T Kahana, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press, 2006).

²⁹ Carolyn Evans and Simon Evans, “Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights” [2006] PL 785.

³⁰ The idea of a “culture of justification” was first explored by Etienne Mureinik, see e.g. “A Bridge to Where? Introducing the Interim Bill of Rights”, *South African Journal on Human Rights* 10 (1994) 31, and has been taken forward by others, most notably by David Dyzenhaus, see e.g. “Proportionality and Deference in a Culture of Justification” (forthcoming) and “Dignity in Administrative Law: Judicial Deference in a Culture of Justification” (forthcoming in *Constitutional Studies*). See also M. Hunt, “Reshaping Constitutionalism” in J. Morison, K. McEvoy and G. Anthony (ed.s), *Judges, Transition and Human Rights* (Oxford: Oxford University Press, 2007) and “Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of ‘Due Deference’” in N. Bamforth and P. Leyland (ed.s), *Public Law in a Multi-layered Constitution* (Oxford: Hart Publishing, 2003), and the literature referred to therein.

This normative framework determined the research questions for the more empirical analysis of the relevant parliamentary and legal materials. It raises a number of interesting questions which have begun to be explored in the academic literature,³¹ but without the benefit of a systematic study of what has been taking place in Parliament and the courts over the last decade. Has the legal framework of the Human Rights Act empowered Parliament to demand justifications from the Executive in relation to laws, policies and action or inaction affecting human rights? Do human rights and associated concepts such as necessity and proportionality increasingly frame the debate which takes place in Parliament about laws and policies affecting human rights? Does parliamentary debate about such measures more closely resemble the structures of justification which characterize human rights adjudication by courts and, if so, does this amount to an undesirable legalisation or judicialisation of political debate which constrains parliamentarians and distorts the issues, or has it enhanced Parliament's ability to hold the Executive to account? Is Parliament's consideration of human rights compatibility questions treated by courts as relevant to their subsequent determination of the same compatibility issues, and, if so, how do they consider it to be relevant? What use is being made of parliamentary material evidencing Parliament's consideration of the human rights issues in subsequent court proceedings? Should courts ever defer to parliamentary determinations of compatibility questions and what does Parliament need to do to earn such deference?

Research Objectives and Methodology

The overarching aims of this research project, therefore, were twofold:

- to arrive at a preliminary assessment of how, if at all, debate about human rights in Parliament changed during the decade between the coming into existence of the JCHR in 2000 and the end of the Parliament in May 2010; and
- to assess whether and, if so, to what extent courts have considered parliamentary debates about human rights when deciding human rights compatibility issues which have previously been considered by Parliament.

The research work therefore fell into two distinct parts: that concerning parliamentary references to human rights³² ("the Parliament project") and that concerning judicial

³¹ See e.g. David Dyzenhaus, "Are legislatures good at morality? Or better at it than the courts?" (2009) 7 *International Journal of Constitutional Law* 46.

³² Paul Yowell worked on the 2006-07, 2007-08 and 2008-09 sessions of the 2005-10 Parliament and Hayley Hooper on the 2000-2005 Parliament and the 2005-06 and 2009-10 sessions of the 2005-10 Parliament.

reference to parliamentary material about human rights (“the Court project”).³³ The structure of this Report reflects that fact. Some of the more interesting implications of this research, however, concern the interaction between these two types of review for human rights compatibility, in both Parliament and the Courts.

For the Parliament part of the project, a methodology was devised for identifying, logging and evaluating the most relevant parliamentary references to human rights between 2000 when the JCHR came into being and the end of the 2005-10 Parliament in May 2010. In order to capture what are likely to be the most relevant parliamentary proceedings it was decided to search for references to the JCHR. Relevance criteria were developed (explained below) and applied to each reference and those crossing the relevance threshold were systematically logged in a database. This work has generated 23 entries for the period 2000 to the end of the 2001-05 Parliament, and 1006 entries for the 2005-10 Parliament.

For the Courts part of the project, a methodology was devised for identifying, logging and evaluating relevant judicial references to parliamentary material concerning human rights between 2000 when the JCHR came into being and today.³⁴ Again in order to identify what are likely to be the most relevant judicial references it was decided to search for judicial references to the JCHR. Relevance criteria were developed and all judicial references to the JCHR crossing the substantive relevance threshold were systematically logged in a database.

The database entries that our research have generated are available on the project’s website.³⁵ We hope that we have created a useful research resource which will facilitate further evaluative research of the many interesting questions that are thrown up by this material. There remains considerable work to be done in working out, both in theoretical and practical terms, the relationship between these two types of human rights review, legislative and judicial. We hope that this report makes a useful start to that project, by identifying some of the most relevant questions, making available a searchable resource in the form of tables of the relevant materials, and offering some preliminary findings based on our own initial evaluation of those materials.

³³ Hayley Hooper conducted all of the research of judicial references to parliamentary material on human rights.

³⁴ Since this part of the project involved consideration of a smaller amount of material it was decided that it should be brought as up to date as possible rather than stop at the end of the 2010 Parliament like the Parliament Project.

³⁵ www.ahrc.ac.uk/About/Policy/Pages/Policypublications.aspx

II. Parliamentary References to JCHR reports

Defining and quantifying substantive references

Our research aimed to identify all the instances in which a member of Parliament relied on a JCHR report in parliamentary proceedings or otherwise specifically represented or discussed the views or work of the JCHR. We call such instances “substantive references to JCHR reports” (or in short form, “JCHR references”).³⁶

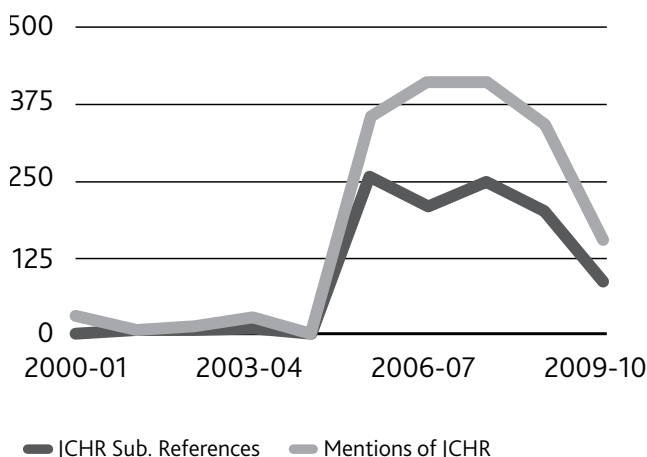
To identify them we first searched an electronic database for all mentions of the JCHR from the time of its coming into being in 2000 until the end of the 2005-10 Parliament. We then selected “substantive references” according to relevance criteria, as a subset of total “mentions”. The mentions of the JCHR that do not count as substantive references by our criteria are not entirely irrelevant to understanding the role of the JCHR in Parliament during this period, but their relevance is marginal to this project. For purposes of analysis, classification, and evaluation, we thought it best to focus on the instances of core relevance, that is, the “substantive references”. Our method of search and selection is described in the text box below. The total number of substantive references to JCHR reports by parliamentary session is represented in Table 1 and Figure 1.

Table 1

Parliamentary Session	JCHR Sub. References	Mentions of JCHR
2000-01	0	31
2001-02	6	10
2002-03	5	14
2003-04	8	25
2004-05	4	6
2005-06	258	353
2006-07	210	408
2007-08	246	411
2008-09	204	342
2009-10	88	154
Total	1029	1754

³⁶ In a large majority of “substantive references”, a JCHR report is either cited or informs the content of the discussion; however, we use the term to encompass discussions of the work or views of the JCHR outside the context of a particular report.

Figure 1–JCHR Sub. References and Mentions, 2000-10



Methodology

To find mentions of the JCHR we searched the JUSTIS Parliament database maintained by the Justis Publishing Ltd., London with the following terms using Boolean logic: "joint committee on human rights" or JCHR or ("joint committee" within 1 "human rights"). We define substantive references to JCHR reports as the subset of total mentions of the JCHR that meet one or more of the following relevance criteria:

1. specific reference to the content of a JCHR report
2. reference to specific views or positions of the JCHR on particular issues, including members of the committee speaking explicitly or implicitly on behalf of the JCHR
3. commendation of a JCHR report
4. discussion of particular influence of JCHR on an issue
5. discussion of oral evidence given to the JCHR or written evidence gathered by the JCHR
6. reference to the JCHR's conclusion that a particular bill is or is not compatible with human rights, as well as references to the JCHR's silence on a bill to support an inference that the JCHR considers the bill to be compatible with human rights

7. discussion of amendments moved by or directly influenced by the JCHR or JCHR members substantive Government responses to JCHR proposals including discussion of action taken or that will be taken and promises to scrutinise a bill in the light of JCHR analysis.

By our relevance criteria a “substantive reference” to a JCHR report does not include the following:

1. mere acknowledgment of a someone as a member of the JCHR including a declaration of interest arising from such membership (however, identification of someone as a member of the JCHR that contextually implies a claim to speak on behalf or with the authority of the JCHR is counted as a substantive reference)
2. general praise for or commendation of the work of the JCHR as a whole or of someone’s participation in the JCHR (as opposed to discussion of the particular influence of the JCHR)
3. indications that scrutiny of a bill by the JCHR will occur in the future
4. mere acknowledgment by the Government that a JCHR report will be considered as part of routine parliamentary procedure (however, specific promises of serious scrutiny in response to particular JCHR claims are counted as substantive references)
5. mention of JCHR as only one of a number of committees or other organisations who support a claim or conclusion or hold a view (however, if the JCHR is providing leadership among other groups, this is counted as a substantive reference)
6. instances in which a JCHR report was tagged as relevant to proceeding in Parliament but was not specifically discussed during that proceeding.

Although there is not always a bright line between a substantive reference and a mere mention, the criteria we have employed are designed to identify the most relevant uses made of JCHR reports in parliamentary proceedings between 2000 and the end of the 2005-2010 Parliament.

The increase in substantive references in 2005-2010

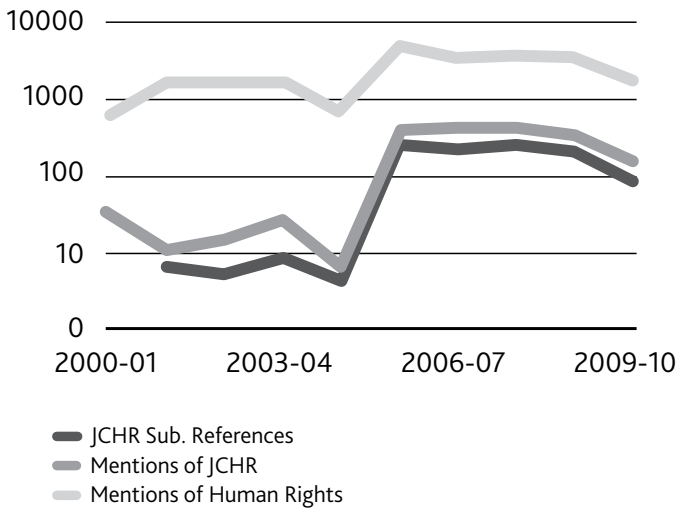
Figure 1 and Table 1 above illustrate a dramatic increase in substantive references to JCHR reports in the 2005-10 Parliament over the 2000-05 Parliament. Particularly striking is that the number of substantive references remained in single figures during each session of the 2000-05 Parliament, but increased to over 200 references per session for the first four sessions of the 2005-10 Parliament. There are a number of possible factors that could explain this significant increase. The Committee produced more reports in the 2005-10 Parliament (129 compared to 90 in the 2000-05 Parliament), partly because for at least some of the 2005-10 Parliament it was better resourced than in the previous Parliament. The Committee changed its working practices in 2006, partly in an attempt to make its work of more relevance to debate in Parliament, and in the Commons in particular.³⁷ One of the changes was the adoption of a deliberate strategy of recommending amendments to Bills to give effect to the Committee's recommendations, and those amendments were often moved by some particularly active members of the Committee, resulting in more debate of the Committee's reports on the floor of both Houses. Following the London bombings in July 2005 there was also a significant increase in parliamentary debate about counter-terrorism measures, the subject matter of which inevitably raises human rights issues.

Counting total mentions of the term "human rights" also shows a significant increase between 2000-05 and 2005-10, as shown by Table 2 and Figure 2. A large percentage of mentions of "human rights", however, relate to human rights conditions in other countries, and for this reason and others little can be inferred for present purposes from the number of instances of use of the term. Nonetheless, in searching for explanations of the significant increase in substantive references to JCHR reports in the 2005-10 Parliament, it is interesting that the increase appears to correspond to a general increase in references to human rights in parliamentary proceedings overall. Whatever the cause of the increase, the relative abundance of JCHR references in 2005-10 compared to the paucity between 2000-05 led us to a decision to focus our further quantitative and qualitative analysis on the 2005-10 Parliament. It should be noted with regard to the above tables and figures that the parliamentary sessions of 2004-05 and 2009-10 were short sessions compared to the others, with only about half the number of days in session.

³⁷ 23rd Report of 2005/06, The Committee's Future Working Practices, HL 239/HC 1575

Table 2

Parliamentary Session	JCHR Sub. References	Mentions of JCHR	Mentions of Human Rights
2000-01	0	31	636
2001-02	6	10	1613
2002-03	5	14	1426
2003-04	8	25	1584
2004-05	4	6	691
2005-06	258	353	4952
2006-07	210	408	3491
2007-08	246	411	3666
2008-09	204	342	3436
2009-10	88	154	1833
Total	1029	1754	23328

Figure 2 – Human Rights Activity, 2000-10

Who uses JCHR reports in Parliament and how?

In 2005-10 there were a total of 1006 substantive references to JCHR reports in parliamentary proceedings. 241 members of Parliament made at least one substantive reference, although two thirds of substantive reference were by 43 members who made at least 5 such references.

The great majority of substantive references supported or reflected the position of the JCHR, but, not surprisingly, some references were opposed to the position of the JCHR. In either case it is clear that the work of the JCHR has provoked debate in Parliament about human rights.

Responses by Government representatives to the JCHR were counted in our research as substantive references. Such responses include indications that the Government has or will amend a bill or take other action, promises to scrutinise a bill in the light of specific JCHR concerns, and statements disagreeing with the JCHR.

There were seven “high-frequency users” of JCHR reports (30 or more references). Two were members of the House of Commons: Andrew Dismore, Member of Parliament for Hendon and Chair of the JCHR for the 2005-10 Parliament; and Dr. Evan Harris, Member of Parliament for Oxford West and Abingdon and member of the JCHR from 2005 to 2010. The remaining five were all members of the House of Lords: Lord Lester of Herne Hill; Lord Judd; Baroness Stern; Lord Avebury; and the Earl of Onslow. Six of the seven high-frequency users of JCHR reports were members of the JCHR: only Lord Avebury was not.

There were 36 medium-frequency users (between 5 and 29 references; see Table 4 in Appendix). High-frequency users contributed 352 references and medium-frequency users 317 (see Table 3 and Figure 3). Together high-frequency and medium-frequency users accounted for 669 of the 1006 total references to JCHR reports, or 67%. The relatively small number of members who are responsible for most of the references to JCHR reports is striking, as is the obvious importance of active members to force debates about the Committee’s work in the chamber.

High-frequency users are those with 30 or more substantive JCHR references.

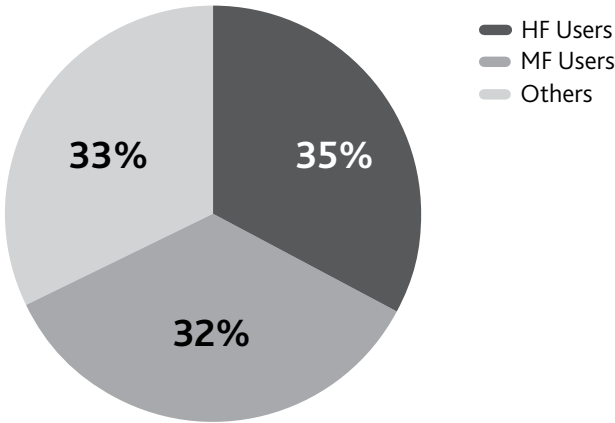
Medium-frequency users are those with 5-29 substantive references.

The abbreviations **HF** and **MF** are used in the tables below to indicate high- and medium-frequency users respectively.

Table 3 – HF Users

Member	Refs.
Andrew Dismore	80
Lord Lester of Herne Hill	66
Lord Judd	48
Evan Harris	47
Baroness Stern	45
Lord Avebury	36
Earl of Onslow	30
Total	352

Figure 3 – References by Category of User



Comparison of users of JCHR reports by House

References to JCHR reports were significantly more frequent in the House of Lords than in the House of Commons. The Lords contributed 667 references or 66% of the total, while the Commons contributed 339 references or 34%. Of the total of 241 members of Parliament who made at least one reference, 133 of these were from the House of Lords and 108 from the House of Commons.

Of the references in the Commons, 128 of 339 (38%) were by the two high-frequency users, Andrew Dismore MP (with 80) and Dr. Evan Harris MP (with 48). There were eight medium-frequency users contributing another 14% of the total, and together the 10

high- and medium-frequency users accounted for about half (51%) of all references in the House of Commons.

The House of Lords had significantly more high- and medium-frequency users than the House of Commons. As seen in Table 3 above, there were 5 high-frequency users in the House of Lords (compared to two in the Commons). They contributed 224 references, or 34% of the total of 667. There were 28 medium-frequency users in the House of Lords (see Appendix, Table 4) who contributed another 271 references, or 41% of the total. Combined the high- and medium-frequency users in the House of Lords contributed 74% of the total references. The comparable figure in the House of Commons of 51% for high- and medium-frequency users shows that JCHR references in the Commons were more widely distributed.

The sizable contingent of 33 high- and medium-frequency users in the House of Lords contributed to a distinctive kind of engagement with JCHR reports and debate about human rights. The substantive references involving these users were generally longer and more detailed than references in the House of Commons (save for the references by the two high-frequency users there). Debates in the House of Lords often involved two, three or more members successively making a number of points based on JCHR reports and entering into dialogue with Government representatives and other members about human rights issues. This kind of sustained debate on human rights occurred less frequently in the House of Commons.

Figure 4 – Total References in each House



Comparison of use of JCHR reports by political party

Table 5 provides information on numbers of references to JCHR reports by political affiliation of the member concerned. To calculate party strength relative to Parliament as a whole we used the sum of (1) seats that parties took in the 2005 election and (2) number of seats the parties hold in the House of Lords in January 2012. The latter is used as a proxy for party strength in the House of Lords from 2005-10, which would be difficult to quantify exactly due to the changing membership of the House of Lords. Accounting for party strength in this way allowed us to calculate, in addition to gross totals of substantive references, what percentage of members of a given party made use of JCHR reports and how frequently that occurred relative to the party's number of seats in Parliament. The distribution of references across the three major parties, and cross-benchers in Lords, is as follows: Labour 413, Liberal Democrats 296, Conservatives 183, and cross-benchers 101.

The Liberal Democrats had substantially more members who made references as a percentage of the party (30%) than Labour (17%) or the Conservatives (15%). The Liberal Democrats also had substantially more references per party seat (1.93) than Labour (0.70) or the Conservatives (0.44). However, 50% of all Liberal Democrat references were by just 3 members: Dr. Evan Harris, Lord Lester, and Lord Avebury. And 80% of all Liberal Democrat references were by their 3 high-frequency and 8 medium-frequency users. The distribution of references is broader for Labour (64% of party's references by high- and medium-frequency users) and the Conservatives (52% of party's references by high- and medium-frequency users). Figures 5 to 7 below depict total references by party and the distribution within the party of high- and medium-frequency users and others, for the House of Lords, House of Commons, and both together. Table 6 provides the data in Figure 5 – 7 in more detailed form.

Table 5

Party	Number of Seats	References	Party Members making refs.	Members making refs. as % of Party	Number of refs. per Party Seat
Labour	594	413	103	17	0.70
Conservative	416	183	63	15	0.44
Liberal Democrat	153	296	46	30	1.93
Cross Bench	186	101	23	12	0.54
Bishop	25	9	4	16	0.36
Plaid Cymru	4	3	1	25	0.75
Independent	1	1	1	100	1.00

Figure 5 – Refs. by Party, showing MF and HF Users – Commons

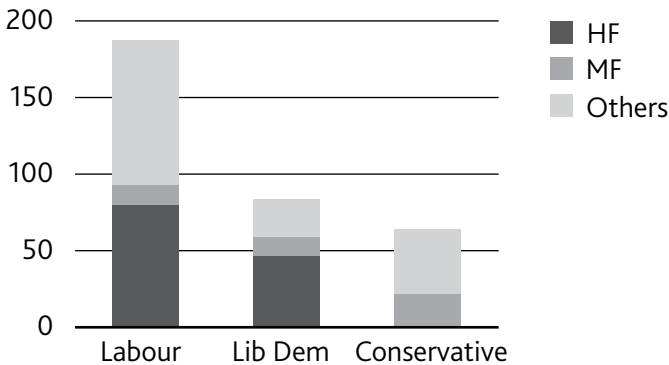


Figure 6 – Refs. by Party, showing MF and HF Users – Lords

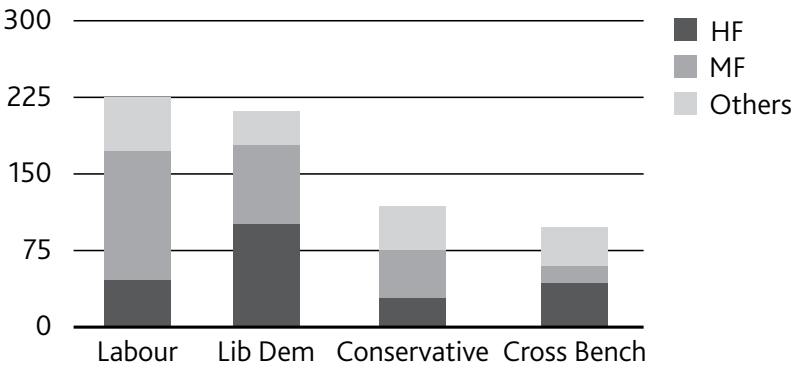


Figure 7 – References by Party, showing MF and HF Users – Lords and Commons

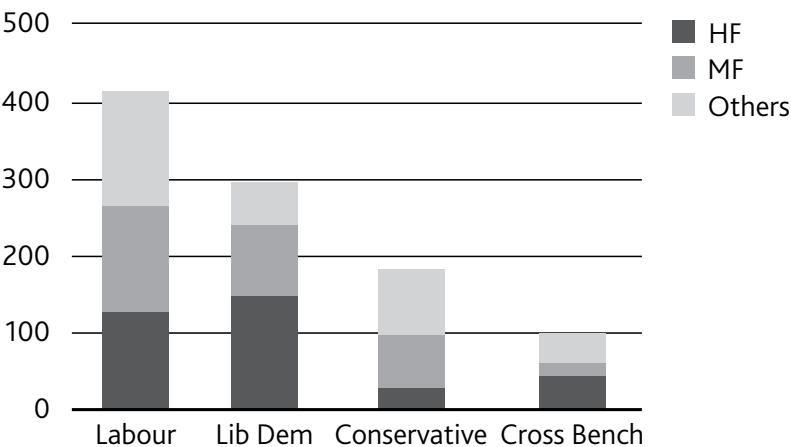


Table 6

Party	References	HF Users	Refs. by HF Users	HF Users as % of Party	MF Users	Refs. by MF Users	MF Users as % of Party	HF+MF Users as % of Party
Labour	413	2	128	31	16	138	33	64
Conservative	183	1	30	16	8	66	36	52
Liberal Democrat	296	3	149	50	8	90	30	81
Cross Bench	101	1	45	45	3	17	17	61
Bishop	9	–	–	–	1	6	5	67

In comparing references by the Labour Party to other parties, it should be noted that Labour’s total was increased by the fact that responses to the JCHR, which we have counted as substantive references, were by Labour Government representatives. This suggests that Labour and the Conservatives are closer to parity in terms of references per party seat when accounting for references specifically owing to the fact that there was a Labour Government in 2005-10; and as indicated above, Labour and the Conservatives are near parity in percentage of party members making use of JCHR reports. The Liberal Democrats substantially exceed the two larger parties on these measures, owing primarily to the activity of their 3 high-frequency and 8 medium-frequency users.

What uses are made of JCHR reports in Parliament?

We have classified the 1006 substantive references to JCHR reports in 2005-10 according to seven types of use indicated in Figure 8. The primary activity of the JCHR is **legislative scrutiny**. Every Government bill is reviewed by the JCHR for human rights compatibility,³⁸ and the JCHR produced 129 reports in the 2005-10 session, most of them involving detailed review of bills. About 60% of substantive references to JCHR reports involve legislative scrutiny of various kinds, including proposing (i) amendments to bills or existing law, (ii) the rejection of provisions in bills (in the absence of revision), and, occasionally, (iii) the repeal of existing law.

In addition to legislative scrutiny, the JCHR conducts general studies of areas where there are concerns about human rights abuses, as reflected, for example, in reports on Deaths in Custody,³⁹ Human Trafficking⁴⁰ and The Human Rights of Older People in Care Homes.⁴¹ These and similar reports include recommendations regarding **broad changes in policy and law**, or adoption of new policies or laws. About 10% of references to JCHR reports are in this category.

Another 5% of references concern the **international dimension of human rights obligations**, such as an argument that the UK should do more to implement a human rights treaty or should ratify a treaty. About 15% of references involve **responses by ministers or other Government representatives to JCHR concerns**, and another 5% involve **queries to Government representatives** in which JCHR report or concerns are mentioned (typically using the procedural form of a written or oral question).

In about 5% of cases, someone discusses **disagreement with the JCHR**. Most of these instances are in Government responses (accounting for roughly one third of Government responses), and when this occurs disagreement overlaps with that category. Only about 1% of references concern disagreement expressed outside of a Government response (the chart above depicts disagreement only when it occurs outside a Government response.) Finally, about 4% of references involve points about the **nature and function of parliamentary scrutiny** for human rights compatibility, including matters such as the time available for debating bills, the role and aims of the JCHR, and the general institutional framework in which scrutiny occurs.

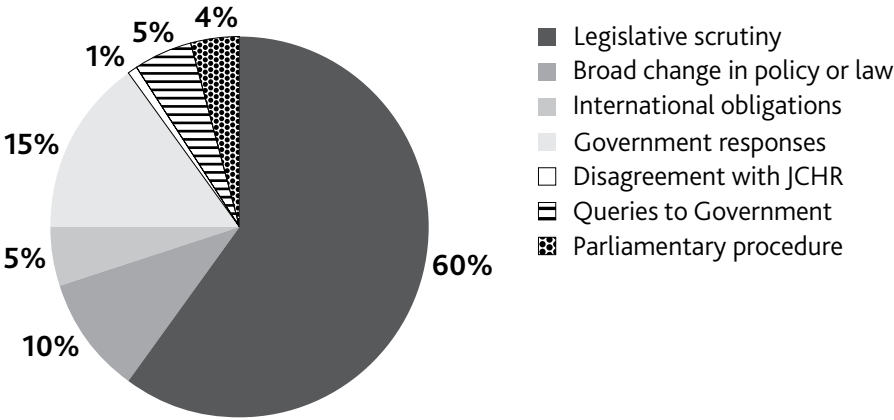
³⁸ Statement of Andrew Dismore, 7 Dec 2006.

³⁹ 3rd Report of 2004/05, Deaths in Custody, HL 15-I/HC 137-I, HL 15-II/HC 137-II.

⁴⁰ 26th Report of 2005/06, Human Trafficking, HL 245/HC 1127-I,II.

⁴¹ 18th Report of 2006/07, The Human Rights of Older People in Healthcare, HL 156-I,II/HC 378-I,II.

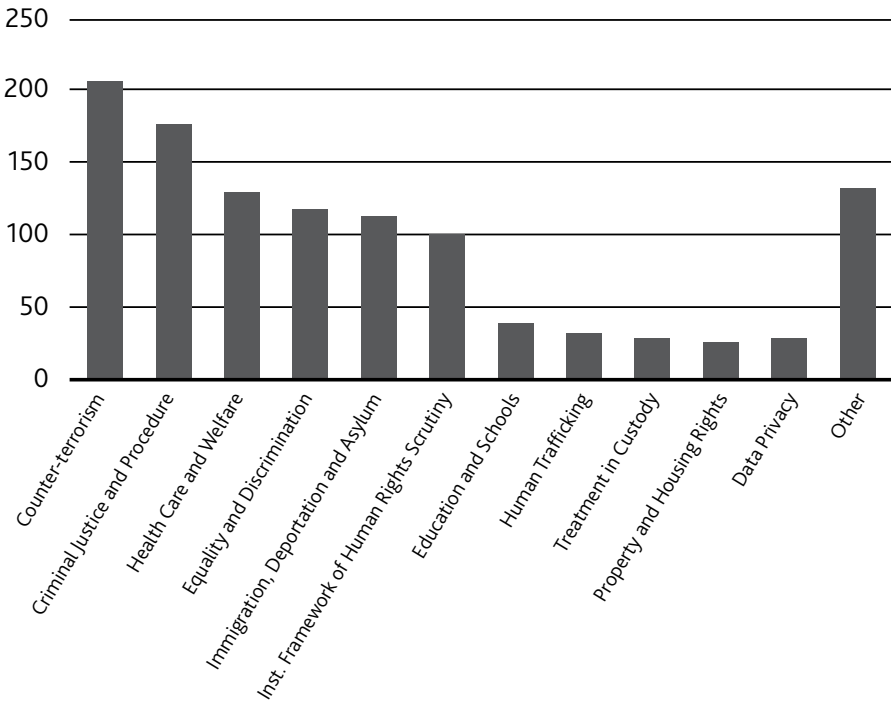
Figure 8 – Type of Reference



In which contexts are JCHR reports referred to?

Figure 9 below provides a count of the contexts in which JCHR reports are most frequently referred to. (The numbers are greater than the actual number of references because some references involve more than one context.) The most common contexts are (1) counter-terrorism and (2) criminal justice and procedure. The other most common subject areas are (3) health care and welfare; (4) equality and discrimination; (5) immigration, deportation, and asylum; and (6) the institutional framework of human rights scrutiny (this topic corresponds to the similar category above). Each of these is involved in 100 or more references. Other subject areas in which JCHR references occur with some frequency are (7) education and schools; (8) human trafficking; (9) treatment in custody; (10) property and housing rights; and (11) data privacy. The “Other” entry in the table includes the following: identity cards; labour and employment; protests and free speech; financial regulation; local government; prohibition of smoking; elections and voting; family law; charities and trusts; business, commerce, and licensing; euthanasia and assisted suicide; planning and environment; and tax and revenue.

Figure 9 – References to JCHR Reports by Topic



The range of conceptions of human rights

The JCHR has, since its inception, embraced the idea that human rights entail both negative and positive obligations on the state. A majority of JCHR references could be classified in the first category, particularly in the areas of counter-terrorism and criminal justice and procedure, because they concern arguments on such matter as limitations on the legitimate sphere of state action and the procedures that must be followed before depriving someone of liberty or imposing punishment or liability in the context of criminal or civil justice.

A large minority of references, however, make claims regarding the state's positive duties. It is difficult to provide an exact quantification of this, both because the boundary between a positive and negative duty is not always clear, and because some human rights span both categories. The right to equality, for example, can involve both negative

duties on the state not to discriminate and positive duties to improve access to services and opportunities for disadvantaged groups. The JCHR's commitment to this positive dimension of human rights is seen not only in the hundreds of substantive references to JCHR reports in areas such as health care and welfare, equality, education and schools, human trafficking, and housing and property rights (see Figure 9), but also in several statements by JCHR representatives and in reports that overtly reflect this understanding of rights. For example, the JCHR's report on corporate manslaughter and homicide⁴² notes the wording of Article 2(1) ECHR, which provides, "Everyone's right to life shall be protected by law," and endorses the European Court of Human Rights' interpretation of this as laying down a "positive obligation on states to take appropriate steps to safeguard the lives of those within its jurisdiction".⁴³ This positive obligation is emphasised at several places in the report, and in the JCHR's view it includes a duty "to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person," which should be backed up by effective law enforcement.⁴⁴ The positive obligation includes an obligation to protect individuals against threats to their life not only from the State, but from the actions of other private individuals.⁴⁵ This part of the JCHR report was discussed by two members of the House of Lords in the relevant debate.⁴⁶ In the context of scrutiny of counter-terrorism legislation, Andrew Dismore frequently framed his contributions to the debates by stating that the starting point was the state's positive obligation to protect its citizens and the whole community arising from the right to life.⁴⁷ He stated that the JCHR's 10 reports on counter-terrorism policy in the 2007-08 Parliament "all start from the same basic premise in human rights law: the state's positive obligation to protect us all from terrorism and violence, and the state's duty to prosecute those who are guilty and to make that prosecution more effective."⁴⁸ References to JCHR reports have also addressed the state's positive human rights obligations in a variety of other contexts such as human trafficking⁴⁹ and protection of children in immigration.⁵⁰

⁴² 27th Report of 2005/06, *Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill*, HL 246/HC 1625

⁴³ *Ibid.* p. 7. (citing *L.C.B. v UK* (1998) 27 EHRR 212, at para. 36; *Paul and Audrey Edwards v UK* (2002) 35 EHRR 19.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Statement of Lord Judd, 19 Dec 2006; Statement of RtHonLord Hunt (of Wirral), 15 Jan 2007.

⁴⁷ E.g., Statements of Andrew Dismore on 21 Feb 2008, 11 Jun 2008, and 1 Mar 2010.

⁴⁸ Statement of Andrew Dismore, 1 Apr 2008. His statement on 11 Jun 2008 makes the same point.

⁴⁹ Statement of the Earl of Onslow, 1 Jul 2009

⁵⁰ Statement of Damian Green, 1 Jul 2009, which quotes reference to the state's positive obligations to children in the JCHR's 19th Report of 2003/04, *Children Bill*, HL 161/HC 537.

Modes of Argumentation in JCHR References

There are a number of modes of argumentation when JCHR reports are referred to in parliamentary debates. Often the JCHR report is used to identify the main human rights issue raised by a particular Bill, including the rights which are most directly affected by the proposed legislation. Some arguments engage directly with the justifications for a provision in a bill, offering critical analysis of its substance and potential effects, in a way that resembles legislative scrutiny in other contexts. Many references cite the European Convention on Human Rights or other human rights sources, and many others refer to individual rights without citing any specific textual sources. Some references employ argumentation based explicitly on case law. A number of references discuss evidence that was received by the JCHR during committee meetings or investigation. Many references employ elements of the standard proportionality inquiry either explicitly or implicitly as part of the critical analysis of a bill: they consider what evidence there is of the claimed necessity to interfere with the affected right, discuss the extent of the Bill's interference with the right and analyse whether the justifications offered by the Government for that interference are good enough to command Parliament's support.⁵¹ The role played by the JCHR report is often to frame this debate, and also to inform it by not only identifying the appropriate questions to ask from a human rights perspective, but analysing the adequacy of the Government's response to those questions.

The extent to which JCHR Reports are referred to in such debates ranges widely from brief, general references to extensive, detailed discussion of proposed amendments and the reasons for those amendments. Below we discuss the use of legal sources and other modes of argumentation in more detail, as part of a more general evaluative assessment of references to JCHR reports and the contextual parliamentary debate.

Representation of Marginal Groups and Vulnerable People

About 60% of JCHR references concern the rights of members of minority or marginalised groups in society, or people who are vulnerable, weak, or less well-off. The Chair of the JCHR during the 2001-05 Parliament, Andrew Dismore MP, drew a distinction between (1) "unpopular minority groups" or "people on the fringes of society for whom public sympathy is low or non-existent" and (2) "vulnerable persons in the mainstream".⁵² This was in the context of introducing the JCHR's report on the human rights of older people

⁵¹ Using language commonly employed by the European Court of Human Rights, the JCHR often speaks of legislative measures interfering with rights and considers whether such interference can be justified according to the proportionality inquiry. This approach is not without controversy. See, e.g., GCN Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, 2009) 116–45.

⁵² Statement of Andrew Dismore, 7 Dec 2006.

in health care,⁵³ which he gave as an example of the second category. These distinctions should not be taken as mutually exclusive or all-encompassing; not all minority groups are unpopular, and certain vulnerabilities are related to group characteristics. Nonetheless, the two categories can be used to classify a range of JCHR references, and they provide some insight into how the JCHR understood its role between 2000 and 2010 and how it was perceived in Parliament. Baroness Stern, for example, describes concern for the “vulnerable and powerless” as a motivation for the JCHR.⁵⁴ Ivan Lewis, a Government minister at the time, spoke of the need for “championing unfashionable causes”,⁵⁵ and Andrew Dismore has stated that the JCHR “embraces the universality of human rights by examining and reporting on popular and unpopular causes alike”.⁵⁶

The “vulnerable people in the mainstream” on whose behalf the JCHR has spoken include the elderly, residents of care homes and public housing, children, welfare recipients, teenage mothers, and those with addictions. The minority and marginal groups for whom the JCHR has provided representation include asylum seekers, immigrants and people in various stages of immigration proceedings (including deportation), the Gypsy and traveller communities, refugees, victims of human trafficking, criminal suspects and criminals, suspected terrorists, suspected members of youth gangs, young offenders, HIV/AIDS sufferers, members of minority religions, and various national and ethnic minorities.

The characteristic that seems to be most distinctive of the use of JCHR reports in Parliament is providing representation for a wide range of minorities, marginal groups, and vulnerable persons. Hanna Pitkin has distinguished “standing for” representation, wherein a representative shares characteristics of the represented group (such as ethnicity, class, gender, religion, age, etc.) from “acting for” representation, wherein a representative speaks and acts on behalf of the interests of the represented group.⁵⁷ In this latter sense of representation, the JCHR provided an active voice in the 2005-10 Parliament for many kinds of minority groups, as shown in the description above. The wide range bears out Andrew Dismore’s description of the JCHR as being “prepared to stand up for less popular, often demonised, groups who do not have the ear of the media or general public sympathy”,⁵⁸ and the extensive use made of JCHR reports shows that Parliament as a whole was receptive to being informed in this way.

⁵³ 18th Report of 2006/07, *The Human Rights of Older People in Healthcare*, HL 156-I,II/HC 378-I,II.

⁵⁴ Statement of Baroness Stern, 29 Apr 2008.

⁵⁵ Statement of Ivan Lewis, 13 Mar 2008.

⁵⁶ Statement of Andrew Dismore, 13 Mar 2008. See also Andrew Dismore, statement of 1 Jul 2009 (“It is often said that human rights are all about unpopular causes.”)

⁵⁷ H Pitkin, *The Concept of Representation* (University of California Press, 1967) 144.

⁵⁸ Statement by Andrew Dismore, 19 Feb 2007

There were around 600 total references that involved discussion of the interests of minorities and vulnerable persons. This finding – and the debates in which these references occur – should be of interest to scholars of legislative activity as well as to those who study political institutions more generally, judicial review of legislation, and the theory of democracy. Further study will need to be done to gauge the overall impact and effectiveness of the activity of the JCHR and the use of its reports in Parliament in the area of minority interests, but, as shown below, the present study concludes that this activity achieved a number of discrete results in the 2005-10 Parliament in terms of amendment of legislation. Aside from measurable impact, the fact that the JCHR was able to provide representation for many different minority and marginal groups, and to make substantial contributions to parliamentary debate, challenges the assumptions and conclusions of some theorists about the nature of legislative decision-making and of democratically elected bodies.

A longstanding concern in constitutional and political theory is that electoral systems and legislatures are structured to give effect to preferences or interests of the majority, to the neglect of minority groups. Ronald Dworkin has argued that legislatures are systematically biased against minority interests because representatives must, in order to be re-elected, side with the majority “in any serious argument about the rights of a minority against it”.⁵⁹ Dworkin argues that courts should have power to review – and strike down – legislation because judges do not face electoral pressures and are thus better situated to protect minority interests.⁶⁰ Some have gone further, claiming that due to the political incentives facing legislatures, they are not well-positioned institutionally to engage in principled decision making or to make disinterested judgments,⁶¹ or to give reasons for their decisions.⁶² Others have come to defence of legislatures with regard to their capacity for reasoned debate and ability to give due regard to minority interests, and the legitimacy of majority voting as a way to resolve disagreement.⁶³ The debate has

⁵⁹ R Dworkin, *Law's Empire* (Harvard University Press, 1986) 375.

⁶⁰ *Ibid.*

⁶¹ E.g., RC Den Otter, *Judicial Review in an Age of Moral Pluralism* (Cambridge University Press, 2011) 19-20, 310-11; O Fiss, “Between Supremacy and Exclusivity” in R Bauman and T Kahana (eds) *The Least Examined Branch* (Cambridge University Press, 2006) 452, 464. Fiss states the legislatures are charged either with enacting the will of electors or “promoting some public policy”, using policy in the sense that Dworkin did when he distinguished it from principle. Dworkin states that judicial review of legislation is needed to insure that “the most fundamental issues of political morality will finally be set out and debated as issues of principle and not political power alone, a transformation that cannot succeed, in any case not fully, within the legislature itself”. *A Matter of Principle* (Harvard University Press, 1985) 70.

⁶² See Den Otter, *ibid.*, 310.

⁶³ E.g., J Waldron, *Law and Disagreement* (Oxford University Press, 1999); “A Rights-based Critique of Constitutional Rights” (1993) 13 OJLS 18; “The Core of the Case Against Judicial Review” (2006) 115 Yale LJ 1346; R Bellamy, *Political Constitutionalism* (Cambridge University Press, 2007) 241 (“[M]ost legislation is not the product of a homogeneous majority imposing its will upon a constituent minority, but of a series of compromises brokered by winning coalitions of different minorities.”).

carried on, with one recent entrant arguing that the problem with legislatures is not so much one of systematic bias against minorities as one of oversight, which may be due to lack of time and rushed decisions.⁶⁴ A common thread to many criticisms of the legislature is to assume that its perceived failures need to be remedied by an outside force, with the most eligible institution being that of courts. The JCHR's demonstrated capacity to bring issues about minority rights to the attention of Parliament, and the time that members of the House of Lords in particular have been able to devote to sustained, detailed scrutiny of bills, suggest that if there are deficiencies in the legislative process regarding minority protection, there are means of addressing them by internal measures and structures rather than only seeking to check legislative power with that of courts. Moreover, as mentioned above and discussed in more detail below, the JCHR's arguments regarding minority rights (and other issues) often draw the Government into dialogue in which both sides gives reasons for their decisions. This does not entail that judicial consideration of human rights questions is not needed, but it does suggest that some criticisms of the legislative process as intrinsically ill-suited for principled debate are exaggerated.

Evaluating the effect of JCHR Reports on the Quality of Parliamentary Debate on Human Rights

One of the objectives of the project was to evaluate parliamentary deliberation with respect to arguments referring to JCHR reports and the effect of the work of the JCHR on parliamentary debate about human rights. We relied on an evaluative framework comprising five main considerations:

1. What use was made, explicitly or implicitly, of human rights sources in the debate?
2. What use was made, explicitly or implicitly, of the concept of proportionality?
3. Has the work of the JCHR led the Government to provide more detailed justification for laws and policies affecting human rights?
4. Has the work of the JCHR framed, stimulated or influenced debate in Parliament?
5. Has the work of the JCHR led to more informed debate in Parliament?

1. Use of human rights sources

The use of legal sources relates in particular to the JCHR's task of advising Parliament regarding its legal obligations to comply with human rights instruments in both domestic and international law, as well as with judgments of the European Court of Human Rights.

⁶⁴ See R Dixon, "A Democratic Theory of Constitutional Comparison" (2008) 56 Am J Comp L 947, 967.

Beyond this, the JCHR has sought to bring attention to human rights as providing a general framework for legislative and governmental activity and of promoting certain values and interests that might otherwise be overlooked. The Universal Declaration of Human Rights states that every organ of society should strive “to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance”.⁶⁵ In keeping with this, several members have referred to concepts such as a “human rights culture”, a “human rights ethos”⁶⁶ or a “human rights-based approach”,⁶⁷ and Baroness Stern has said that the “human rights framework has considerable importance in structuring the ethos of public life in this country”.⁶⁸ Baroness Wilkins echoed these views, adding that the core principles of human rights are autonomy, dignity, and equality.⁶⁹

About 20% of parliamentary references to JCHR reports include express citation of at least one human rights instrument, with several citing more than one. The great majority of these citations are to the European Convention on Human Rights or the Human Rights Act 1998. There are several citations of the UN Convention on the Rights of the Child (17) and the UN Convention against Torture (9). Beyond these, the frequency of citation of other instruments tails off, but a number of other human rights sources are cited on occasion, including the Universal Declaration on Human Rights 1948, the UN Convention on the Rights of Persons with Disabilities, the UN Convention and Protocol Relating to the Status of Refugees, the European Convention on Action Against Trafficking in Human Beings, the European Convention for the Prevention of Torture, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁷⁰

Citations of these sources are generally used to frame a debate or to indicate a particular value or values at stake, in many cases preliminary to evidence-based argument or application of the principle of proportionality. Human rights instruments are not typically used in rule-like fashion to contend directly for a particular conclusion without further argument based in law, policy, or evidence.

About 100 of the JCHR references included citation to a court judgment. In a number of these, the JCHR proposed amendments to bills or existing law to comply with rulings

⁶⁵ United Nations Universal Declaration of Human Rights, Preamble.

⁶⁶ Statement of Lord Darzi, 21 April 2008.

⁶⁷ Statement of Sandra Gidley, 18 Feb 2008.

⁶⁸ Statement of Baroness Stern, 29 April 2008.

⁶⁹ Statement of Baroness Wilkins, 29 April 2008.

⁷⁰ When parliamentary records as a whole in 2005-10 are searched for use of international human rights instruments, it can be seen that a number of instruments besides the ECHR and Human Rights Act are cited in parliamentary debates, but with relatively low frequency. See Appendix, Table 10.

against the United Kingdom in the European Court of Human Rights or declarations of incompatibility by a UK court under section 4 of the Human Rights Act. Parliamentary debates on counter-terrorism measures frequently included JCHR references, and several of these cited the Belmarsh decision in the House of Lords and other cases on the compatibility of such measures with human rights.⁷¹ The citations to judgments by the Strasbourg court against the UK covered a range of topics.⁷² In another category, JCHR references cited cases as authority for a general position regarding how a right should be interpreted or a conclusion on a particular issue regarding human rights.⁷³ Finally, some references involved citation of a case where the JCHR disagreed with the court's interpretation of the law on an issue related to human rights protection, and sought legislative reform in order to counter the effect of the judgment in question.⁷⁴

Some have questioned the effectiveness and propriety of legalistic argument in parliamentary debate. One author has criticised the JCHR's contributions to the debate over control orders, for example, as being too legalistic, and contends that such arguments bring about "democratic debilitation" by limiting access to debates about human rights to those who have legal expertise.⁷⁵ Bridget Prentice, Member of Parliament for Lewisham East at the time, took a different view of the effect of JCHR contributions. She observed that "[h]uman rights matters are sometimes perceived as arguments that are best left to lawyers and judges" and are dealt with more commonly in the House of Lords, but added that amendments proposed by JCHR members in the Commons "put human rights on the agenda of the elected House – where they belong, at the heart of our democratic process".⁷⁶

JCHR reports generally combine legal argumentation with other kinds of argument, and on the whole were well received by both houses of Parliament. Many of the references to

⁷¹ *A v Home Secretary (Belmarsh)* [2004] UKHL 56; *Home Secretary v AF (No. 3)* [2009] UKHL 28, *A v United Kingdom* [2009] ECHR 301

⁷² *S and Marper v United Kingdom* (2009) 48 EHRR 50 (retention of DNA samples); *Aslef v The United Kingdom*, App. no. 11002/05, (27 May 2007) (the power of labour unions to expel members); *Connors v United Kingdom* (2005) 40 EHRR 9 (rights of Gypsy and Traveller communities); *Grievous v United Kingdom* (2004) 39 EHRR 8 (court martial). A debate in the House of Lords on the Government's response to adverse human rights judgments in general included references to *Hirst v. United Kingdom* (2006) 42 EHRR 41 (blanket prohibition on prisoner voting ruled inconsistent with principle of free elections) and *Dickson v United Kingdom* (2006) 46 EHRR 419 (right of prisoner and spouse to artificial insemination facilities).

⁷³ E.g., *DH and Others v Czech Republic* (2008) 47 EHRR 3, cited for the proposition that the need for the state to take positive action is a necessary element in the right to equality. See Statement of Lord Lester, 9 Feb 2010.

⁷⁴ An example of such a case is *YL v Birmingham City Council* [2007] UKHL 27. The JCHR sought to broaden the definition of public authority beyond the interpretation adopted by the House of Lords in that case.

⁷⁵ Joo-Cheong Tham, "Parliamentary Deliberation and the National Security Executive: The Case of Control Orders" [2010] Public Law 79, 101.

⁷⁶ Statement of Bridget Prentice, 3 July 2009.

JCHR reports show that what the report has done is to provide a framework within which parliamentary debate about human rights can take place, advising, for example, about the evidential questions it is necessary to settle, rather than purporting to prescribe particular outcomes or rule out particular options. We observed many instances of commendation of and appreciation for JCHR reports by non-JCHR members, and only isolated expressions of criticism of the JCHR.

We think further study is warranted of questions about the effectiveness of legal argumentation in parliamentary debate, and about the proper framework and modes for introducing such argument.

2. Use of proportionality

The proportionality inquiry is often associated with adjudication in human rights cases in the UK, but if law and policy are to withstand legal challenge on human rights grounds it is important that the principle of proportionality is fully taken into account in the process of law and policy making. Evaluating Government bills by reference to proportionality standards has been regarded as a continual responsibility of the JCHR, according to Andrew Dismore.⁷⁷ In the parliamentary references to JCHR reports, there are numerous explicit mentions of proportionality, as well as to “necessity” and “balancing” as components of the proportionality inquiry. Apart from such explicit mentions there are many implicit uses of proportionality-style reasoning, for example when Members probe Government ministers about alternatives to proposed measures that would have a lesser burden on the right in question, or when members engage in evaluative argument that involves weighing the value of legislative proposals against their effects on rights-protected interests. Examples of proposed measures that were objected to in debate on grounds of their disproportionality include provisions in the Identity Cards Bill 2005 that could result in disclosure of private information in a way that disproportionately interferes with the right to private life,⁷⁸ a strict liability offence for paying for a prostitute in the Policing and Crime Bill 2009,⁷⁹ and the crime of glorification of terrorism in the Terrorism Bill 2005.⁸⁰

⁷⁷ Statement of Andrew Dismore, 7 Dec 2006.

⁷⁸ Statement of Earl of Northesk, 14 Dec 2005.

⁷⁹ Statement of Evan Harris, 19 May 2009.

⁸⁰ Statement of Lord Lester, 5 Dec 2005.

3. Has the work of the JCHR framed, stimulated or influenced debate in Parliament?

The extent to which the work of the JCHR has stimulated debate in Parliament can be gauged partly by the number of substantive references to JCHR reports (1,006) identified by our study. It seems clear to us that on the whole these references, and the arguments based on them, are taken seriously in Parliament. There are many instances in which Government ministers and non-members of the JCHR commend JCHR reports for their quality and for making important contributions to the debate. In many references, non-members of the JCHR urge other members to read a particular report.

There were several debates in the 2005-10 Parliament that included extensive discussion of a JCHR report. These include most prominently debates over various bills relating to counter-terrorism measures, touching on topics including the period of pre-charge detention for terrorism suspects, control orders, deportation that could result in torture of the suspect, and the use of evidence obtained by torture. Other bills in which JCHR reports figured prominently in debate are the Identity Cards Bill, the Criminal Justice and Immigration Bill, the UK Borders Bill, and the Health and Social Bill. JCHR reports were also used extensively in discussions and debates in Parliament outside of proposed bills regarding areas of concern about human rights, including human trafficking, the treatment of the elderly and others in nursing and care homes, and the problems facing adults with learning disabilities. Table 7 is a list of 10 frequently cited JCHR reports.

Table 7

10 Frequently Cited JCHR Reports

- 3rd Report of 2004/05, Deaths in Custody
- 5th Report of 2004/05, Identity Cards Bill
- 3rd Report of 2005/06, Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters
- 26th Report of 2005/2006, Human Trafficking
- 10th Report of 2006/07, The Treatment of Asylum Seekers
- 13th Report of 2006/07, Legislative Scrutiny: Sixth Progress Report
- 18th Report of 2006/07, The Human Rights of Older People in Healthcare
- 5th Report of 2007/08, Legislative Scrutiny: Criminal Justice and Immigration Bill
- 7th Report of 2007/08, A Life Like Any Other? Human Rights of Adults with Learning Disabilities
- 26th Report of 2008/2009, Legislative Scrutiny: Equality Bill

The selection is just some of the more prominent cases. Over 100 different JCHR reports were referred to in the 2005-10 Parliament; this includes most of the 129 reports the JCHR produced in 2005-10 (and some reports produced during the prior Parliament).

4. Has the work of the JCHR led to more informed debate in Parliament?

The JCHR receives a great deal of evidence on human rights issues from government officials, lawmakers, academics, and others, and gathers other evidence of various kinds. The JCHR makes much of this information publicly available by publishing oral and written evidence on its website, as well as by including highlights and summaries of evidence in its reports. About 150 of the JCHR references identified in the study discuss evidence generated by the JCHR, and around half of these references are by non-members of the JCHR, suggesting that the efforts of the JCHR in this area are having some influence on parliamentarians who are not members of the Committee. Most of the discussions of evidence generated by the JCHR occurs in references we have classified as legislative scrutiny, proposals for broad change in law or policy, or points about the UK's international human rights obligations. About 20% of all such references involve argument based specifically on evidence produced through JCHR efforts.

5. Has the work of the JCHR led the Government to provide more detailed justification for laws and policies affecting human rights?

When arguments based on JCHR reports are made in Parliament, this very frequently results in a Government minister or representative providing a substantive response. Indeed about 15% of all JCHR references identified in our study involve the Government responding to an issue raised by the JCHR. Another 5% of references are those in which use has been made of the procedural mechanism of oral or written questions to elicit a response from the Government involving a point raised by the JCHR. While there is certainly room for improvement, with regard both to references to JCHR reports and responses, the debate is often carried out at a level that evidences that both sides are taking seriously the potential consequences of legislation and the way in which it will affect human rights. When the Government expresses disagreement with the JCHR, which occurs in roughly one third of its references, it often explains its reasons in detail and often provides information to support its conclusion. This kind of exchange, however, occurs more frequently in the House of Lords than in the House of Commons.

The Government often agrees with points raised by the JCHR, at least in part. The next section discusses those instances in which references indicate that the Government has agreed to amend a bill or to issue guidance regarding interpretation or application of the law as the result of a JCHR recommendation. In some cases the Government indicates

a measure of agreement with a JCHR point but explains why it does not agree with a proposed amendment.⁸¹ In other cases the Government promises to consider a JCHR recommendation or criticism and give further scrutiny to a bill. It can sometimes be difficult to distinguish between a serious promise and mere politeness, but there are several instances which suggest that the Government give weight to JCHR reports. An example is this statement by Lord West, which is representative of several others in the references and which promises scrutiny related to a JCHR report on counter-terrorism policy.

*The first thing that I should say on the Joint Committee on Human Rights is how welcome is the huge amount of very valuable work that it does. I am not saying that the Government agree with every single thing in the report, but it raises the right sort of issues that we need to look at. We will look in detail at a number of those and come back when we have done so with a response to the various points.*⁸²

As Baroness Ashton put it, the JCHR gives advice which is not always welcome to the Government, but is none the less important.⁸³

Amendments and Related Impact

Apart from the JCHR's effect on shaping deliberation as described in the last section, our study identified more discrete impacts of the JCHR's legislative scrutiny. With respect to at least 16 of the JCHR references identified in our study, it can be seen that the Government offered amendments to a bill or agreed to do so, which are based on recommendations in JCHR reports. (On most of these occasions the JCHR recommendation is described as the sole influence, but on a few the JCHR recommendation is described prominently among other influences.) The Government's response on some of these occasions included more than one amendment. It is likely that the total number of amendments influenced by the JCHR during the 2005-10 Parliament is significantly higher than what we found evidenced in debates, because the scope of our study did not include identifying all amendments proposed in any stage of parliamentary proceeding as the result of JCHR recommendations, or attempt to trace what eventually transpired with regard to all of the hundreds of amendments proposed in the JCHR references we identified (which would involve the task of analysing, among

⁸¹ E.g., Statement of Baroness Scotland, 13 July 2005. Here Baroness Scotland expressed agreement with the JCHR that the wording in a section of the Equality Bill was too wide but said that the Government did not agree with the JCHR's amendment. She added that "we will continue to give thought to the matter [and] try to come back with something that meets our joint purpose".

⁸² Statement of Lord West, 27 Feb 2008, referring to JCHR, 10th Report of 2007/08, Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill, HL 50/HC 199

⁸³ Statement of Baroness Ashton, 18 Feb 2008.

other things, the causal effect of JCHR recommendations in relation to other influences on the legislative process). The scope of our study on this point of impact was limited to the JCHR references found in our search methodology, and to oral evidence of a member of Parliament that an amendment resulted from JCHR recommendations.

In 15 out of these 16 occasions, the Government's response is indicated in proceedings in the House of Lords. The bills amended include the Charities Bill 2005, to ensure there is no discrimination between religious and non-religious charities;⁸⁴ the Terrorism Bill 2005, to remove terrorism against property from the offence of glorification of terrorism;⁸⁵ and the Police and Justice Bill, to ensure conformity with UN Convention on the Rights of the child;⁸⁶ the Education and Inspections Bill;⁸⁷ the Safeguarding Vulnerable Groups Bill;⁸⁸ the Criminal Justice and Immigration Bill;⁸⁹ the Financial Services Bill;⁹⁰ the Digital Economy Bill;⁹¹ and the Equality Bill.⁹²

In addition to amendments to bills, there are at least 7 instances in which the references show that Government issued guidance on the basis of recommendation in JCHR reports (or agreed to do so) to administrative and law enforcement officials on how certain terms in the law should be interpreted and on criteria for applying laws and other kinds of decision-making. As with amendment, the actual number of instances of guidance issued in 2005-10 could be significantly higher due to the same methodological issue mentioned above.

In some of the above cases the Government took up part but not all of the JCHR's recommendations in agreeing to amendments or issuing guidance. Some of the JCHR references involve criticisms of the Government for not going far enough and continuing debate over what is required to comply with the requirements of human rights law.

⁸⁴ Statement of Baroness Whitaker, 12 Oct 2005.

⁸⁵ Statement of Lord Goodhart, 7 Dec 2005.

⁸⁶ Statement of Baroness Stern, 6 Jul 2006.

⁸⁷ Statement of Lord Avebury, 17 Oct 2006.

⁸⁸ Statement of Lord Adonis, 1 Nov 2006.

⁸⁹ Statement of Lord West, 23 Apr 2008.

⁹⁰ Statement of Ian Pearson, 25 Jan 2010.

⁹¹ Statement of Lord Young, 1 Mar 2010.

⁹² Statement of Baroness Scotland, 19 Oct 2005; Statement of Lord Lester, 13 Feb 2006.

III. Judicial References to JCHR Reports

Introduction

In a democracy, courts must always pay respectful attention to the reasons given by democratically accountable decision-makers, including parliaments. It is particularly important that they take elected politicians seriously and conscientiously engage with the reasons and motivations which underpin a particular law or policy when they are judicially scrutinising it for compatibility with human rights standards. One might therefore expect, in democracies, to find routine judicial reference to parliamentary consideration of human rights questions in the course of human rights adjudication by courts, especially when the issue before the court is the human rights compatibility of legislation. The overarching objective of this part of our research was to ascertain the extent and type of use of parliamentary material by courts when they are considering human rights compatibility issues which have previously been considered by Parliament. To identify what are likely to be the most relevant judicial references it was decided to search for judicial references to the JCHR.

The more specific aim of this part of the project was therefore to find out on what sort of scale courts make use of JCHR reports in their judgments and what sort of uses they make of them. The primary function of reports of the Joint Committee on Human Rights – in fact of all Select Committee reports – is of course to assist and inform parliamentarians in the exercise of their functions of legislation and oversight. However, it has become increasingly apparent that JCHR reports reach a wider audience than the parliamentarians to whom they are primarily addressed. One such increasingly interested audience is the courts, including the European Court of Human Rights, and the European Court of Justice. We therefore set out to find out more about the uses to which JCHR reports have been put by courts.

We found that since the inception of the JCHR in 2000 through to March 2012 a total of seventy-two cases have occurred in which the JCHR itself has been mentioned (in the domestic and both European courts), or a JCHR Report has been referred to, or the work of the JCHR has been mentioned. On the face of it, this sounds like a surprisingly large number of judicial references to the reports of a parliamentary committee the task of which is to advise and inform Parliament. However, since 2001 across the same spectrum

of courts, there has been a staggering 23,343 references to human rights in general terms according to a Boolean search on the British and Irish Legal Information Institute (BAILII) database. Seen in context, therefore, references to JCHR Reports are but a drop in a very, very large ocean. Of course, numerical data alone cannot capture much of what is interesting about the nature and extent of institutional dialogue between the courts and the United Kingdom Parliament on matters of human rights, and we therefore also sought to evaluate the nature of the references to JCHR reports that our research identified.

Methodology

To find mentions of the JCHR in reported case-law we carried out a Boolean search for the exact phrase “Joint Committee on Human Rights” in the Case Law section of the British and Irish Legal Information Institute (BAILII) website. There were no parameters on the type of court or tribunal which could be included, so the search was conducted as widely as possible to include courts and tribunals across the whole United Kingdom, plus the European Union Judicature (the Court of First Instance, the General Court, Opinions of the Advocate General, and the Court of Justice) and the European Court of Human Rights. No filter was applied as to the date, given that the JCHR only came into being in 2000.

Quantitative Findings

During the decade from the first judicial reference to a JCHR report in March 2002 to February 2012 there have been seventy-two instances of judicial references to JCHR Reports, spanning both domestic and supranational courts. The distribution of references by year can be found in Table 8.

Table 8

Year	No. of Cases Citing JCHR Report
2002	3
2003	2
2004	5
2005	2
2006	10
2007	11
2008	14
2009	8
2010	4
2011	9
2012 (to 02/12)	4
Total	72

In short, we found that JCHR reports are not frequently referred to by courts in human rights adjudication, when considered in the overall context of the amount of such adjudication. The frequency with which they are referred to by courts increased between 2006 and 2008, but then reverted to levels a little higher, but not significantly higher, than in the years immediately after the JCHR was established.

The Administrative Division of the High Court of England and Wales made the most use of JCHR Reports, accounting for twenty-six of the seventy-two citations (around 36 per cent). Both the Northern Ireland High Court and the Northern Ireland Court of Appeal have made use of JCHR Reports, but, interestingly, no Scottish Court as yet has made use of a JCHR Report. It had been suggested that Scottish courts were in fact *more hostile* to human rights arguments prior to the incorporation of the Convention into domestic law than other courts in the United Kingdom.⁹³ The last major empirical study conducted on the use of human rights law by Scottish courts was undertaken in 2004.⁹⁴

It should be remembered that Scotland has additional measures for human rights protection in terms of section 29(2) of the Scotland Act 1998, which mandates that the Scottish Parliament is prohibited from legislating contrary to the European Convention on Human Rights, and section 57(2), which prohibits any Scottish Minister from making subordinate legislation or acting in a manner that is incompatible with the Convention. The Scotland Act came into force earlier than the Human Rights Act 1998 on 20 May 1999, whilst the Human Rights Act 1998 itself came into force on 2 October 2000. The absence of consideration of JCHR Reports in the Scottish courts cannot be explained by the fact that most litigation challenged Scottish parliamentary legislation. In fact, no primary legislation of the Scottish Parliament was invalidated in the period between May 1999 and August 2003, the period which the last major empirical study considered. The most common reason for granting a remedy in the period studied was that a public authority had acted incompatibly with a Convention right (contra section 6 of the Human Rights Act 1998) and the most common policy areas in which litigation occurred were in relation to procedural fairness in criminal trials (i.e. Article 6 ECHR challenges). In civil cases, the most frequently litigated policy areas were in relation to prison conditions (slopping out) and immigration control.

In total thirteen different types of court made use of JCHR Reports, or made reference to the work of the JCHR. The distribution of courts using JCHR Reports (most to least

⁹³ T Mullen *et al*, "Human Rights in the Scottish Courts" 32(1) (2005) *Journal of Law and Society* 146-168, p. 149.

⁹⁴ T Mullen *et al*, "The use of human rights legislation in the Scottish courts", Scottish Executive Social Research (Edinburgh, 2004).

frequent) is as follows: High Court (Administrative Division) 25, House of Lords 12, Court of Appeal (Civil Division) 11, European Court of Human Rights 8, High Court (Northern Ireland) 5, Court of Appeal (Northern Ireland) 3, UK Asylum and Immigration Tribunal 3, United Kingdom Supreme Court 2, Court of Appeal (Criminal Division) 1, High Court (Commercial Court) 1, Information Tribunal 1, and Upper Tribunal (Immigration and Asylum Chamber) 1. Although the High Court (Administrative Division) is the court of first instance for judicial review actions, there is no general correlation between high use of JCHR Reports and courts of first instance or “lower” courts in general. Only three tribunals each made one use of JCHR Reports, whereas the House of Lords made twelve references to JCHR Reports between 2000 and 2010. The most common procedure in which reference to JCHR Reports was made was during judicial review proceedings. Reference to JCHR Reports by European Union Courts and the European Court of Human Rights suggests that the JCHR is regarded as a positive model of parliamentary consideration of human rights by international institutions.

The Judge who made the most references to JCHR Report was Lord Bingham of Cornhill, with seven instances, closely followed by Baroness Hale of Richmond with five references.

In terms of the subject matter of cases in which there was judicial reference to JCHR reports, courts made most use of JCHR Reports in the fields of counter-terrorism (eighteen of seventy-two references) and immigration and asylum (fourteen of seventy-two references). The full breakdown of subject matter areas can be consulted in Table 9.

Table 9

Subject Area	Percentage of Total
Counter-terrorism	25
Immigration, Deportation, Asylum	21
Criminal Justice and Procedure	10
Data Retention and Sharing	7
Administration	7
Treatment in Custody	6
Family Law	6
Protest and Free Speech	4
Elections and Voting	3
Health Care and Welfare	2
Equality and Discrimination	1
Labour and Employment	1
Other	7
Total	100

The most frequently cited JCHR Report related to the renewal of control orders in 2006⁹⁵ which was cited by Courts on six separate occasions. There were six instances where courts mentioned the work of the JCHR but did not refer to a specific report.

The Convention right in the context of which a JCHR Report was most frequently referred to was Article 6 ECHR, the right to a fair trial (cited fourteen times alone), and ten of these cases occurred in the subject area of counter-terrorism. The next most frequent context for judicial reference to the JCHR was Article 8 ECHR (alone in seven cases and in combination with other rights in sixteen other instances). When considered alone, Article 8 ECHR was relied upon in relation to the subject matter of counter-terrorism, youth criminal justice, DNA retention, immigration and asylum, and the smoking ban. Other rights regularly referred to were Article 2 ECHR (five cases) and Article 10 ECHR (four cases).

Constitutional propriety of judicial references to JCHR reports

Our research has found that, although the extent to which courts can consider Select Committee reports like those of the JCHR is by no means settled constitutional territory, courts do not in general appear to feel constitutionally constrained from referring to them.

In recent years there has been quite a lot of litigation concerning the question of whether a court which is considering the human rights compatibility of legislation should regard the reports of and evidence obtained by parliamentary committees such as the JCHR, and subsequent parliamentary debates about compatibility, as being of any relevance to the issues it has to determine. The argument of the parliamentary authorities has been that it is a breach of parliamentary privilege for courts to have any regard to such parliamentary material,⁹⁶ prohibited by Article IX of the Bill of Rights.

The view that any regard to parliamentary material by courts is a breach of parliamentary privilege and therefore constitutionally inappropriate enjoyed a degree of success in a number of cases in which the Speaker intervened, including *Office of Government Commerce v Information Commissioner* in which Stanley Burnton J concluded that it would be wrong for a party to litigation, or a court or tribunal, to rely on an opinion of a parliamentary committee, because this would involve it passing judgment on the opinion of the committee which would be a breach of parliamentary privilege.

⁹⁵ "12th Report of 2005-2006: Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006" HL 122/HC 915.

⁹⁶ Other than in the two situations envisaged in *Pepper v Hart* [1992] AC 593, which are to be very narrowly construed.

However, the Speaker's intervention was less successful in the recent *Age UK* case, which concerned a challenge to the compatibility of the Employment Equality (Age) Regs 2006 with the underlying Directive. *Age UK*, the Secretary of State and the EHRC all sought to make extensive use of parliamentary material between 2003 and 2006, including evidence to and recommendations from parliamentary committees. The Speaker intervened to argue that such material was inadmissible because of Article IX and could not be legitimately used, other than for very narrow purposes, without breaching parliamentary privilege. In other words, that it is constitutionally improper for the court to receive the record of evidence given by a witness to a parliamentary committee and the views of the committee itself. Blake J. rejected this argument, holding that there was no constitutional impediment to the court receiving that material: see para. 50. It is a matter of the court informing itself on matters which it has a constitutional duty to determine. In so doing it is not adjudicating on whether anyone else who has expressed a view is right or wrong as a matter of law. He went back to *Pepper v Hart* and the subsequent report of the Joint Committee on Parliamentary Privilege (1999) before concluding that he would allow in all the parliamentary material "for the purpose of giving assistance as to the background to the legislation and to examine whether there is any information of relevance and utility to the function that the court faces arising from it." (para. 59).

Our research has found that on the whole courts consider reference to and use of published JCHR reports to be constitutionally appropriate. The scale of the reference to JCHR reports by courts, including the highest courts, suggests that judges do not regard such reference to parliamentary material to be constitutionally problematic. At the same time, however, there is very little evidence of clear or rigorous judicial thinking about the different purposes for which reference can legitimately be made to such reports and there is clearly very considerable scope for developing a more rigorous approach by courts to their use of such reports, as the following summary of our main findings suggests.

Types of reference to/use of JCHR Reports by Courts

We found three main types of reference to JCHR reports.

1. Reference to JCHR Report as Part of "Background Information"

First, JCHR reports were often referred to as part of the "background information" or historical narrative, either of the issue being adjudicated or of the particular piece of legislation the human rights compatibility of which is being determined by the court. There were sixteen recorded instances of this, making it the most common type of use of JCHR reports by courts. When courts refer to JCHR Reports in this way, the use being

made of the reports can range from being background evidence on the legislative history of a statutory provision, or statistics on rights violations in related areas, to information which, although regarded as “background” to the decision, has a heavier impact on the decision-making process of the court. Some examples of the use of information as relevant background include *Re P (a Child)*⁹⁷ in which Kerr LCJ referred to a JCHR report⁹⁸ for the sole purpose of illuminating the legislative history of the Adoption (Northern Ireland) Order 1987.⁹⁹ The same type of use of a JCHR report¹⁰⁰ was made in *Arthurs’ (Brian and Paula) Application*¹⁰¹, a case concerning the legality of ‘Diplock’ trials (trials without jury for terrorism defendants). In this instance the JCHR report was used to illuminate the legislative history of the provision which empowered courts to dismiss a jury.¹⁰²

Other similar examples of statistical references include *AA and Others*¹⁰³ where a JCHR report¹⁰⁴ was used to provide information on the operation of the immigration points system for highly skilled migrant workers. Similarly, in the context of an asylum claim by a Zimbabwean national currently receiving medical treatment in the United Kingdom for HIV¹⁰⁵ the work of the JCHR¹⁰⁶ was cited alongside a significant amount of social science evidence in relation to the issue of whether issues of access to AIDS medication and food in Zimbabwe was significant enough to show a ‘real risk’ of discrimination so that deportation may amount to a violation of Article 14 ECHR and section 21 of the Disability Discrimination Act 1995. The Upper Tribunal in this instance dismissed claims for violation of Articles 3, 8, and 14 ECHR and the Disability Discrimination Act concluding that there was not a “real risk” of discrimination against HIV and/or AIDS sufferers in Zimbabwe. The JCHR Report was referred to in a general discussion of the UN Convention on the Rights of Persons with Disabilities. The Upper Tribunal acknowledged that the British government had entered a reservation to this Convention with respect to immigration and that despite criticism from *inter alia* the JCHR the reservation had not been withdrawn.

There are other instances where reference to JCHR reports in an informational manner by the courts clearly has more significant impact upon the decision making process than is

⁹⁷ [2007] NICA 20.

⁹⁸ “24th Report of 2001-2002: Adoption and Children Bill: As Amended by the House of Lords on Report” HL 177/HC 979.
⁹⁹ SI No. 2203/1987.

¹⁰⁰ “5th Report of 2006-2007: Legislative Scrutiny: Third Progress Report” HL 46/HC 303.

¹⁰¹ [2010] NIQB 75.

¹⁰² Justice and Security (Northern Ireland) Act 2007.

¹⁰³ *AA and Others* (Highly skilled migrants: legitimate expectation) Pakistan [2008] UKAIT 00003.

¹⁰⁴ “20th Report of 2006-2007: Highly Skilled Migrants: Changes to the Immigration Rules” HL 173/HC 993.

¹⁰⁵ *RS and Others* (Zimbabwe – AIDS) Zimbabwe CG [2010] UKUT 363 (IAC).

¹⁰⁶ “1st Report of 2008-2009: The UN Convention on the Rights of Persons with Disabilities” HL 9/HC 93.

first apparent. Two cases which fall into this category are *Children's Rights Alliance*¹⁰⁷ and *PR, SS, TC v Home Secretary*.¹⁰⁸ The *Children's Rights* case was a judicial review of a decision of the Secretary of State for Justice to decline to provide information to children in Secure Training Centres (and/or their carers) on the unlawful nature of the legal status of restraint techniques used in STCs and their consequential legal rights. Mr Justice Foskett dismissed the Children's Rights Alliance's application for an order compelling the Justice Secretary to provide such information. The core of the applicant's argument, which was rejected by the court following the decision in *Ullah*,¹⁰⁹ was that the scope of Articles 3 and 8 ECHR could be construed to include positive obligations on the state to provide such information. The work of the JCHR¹¹⁰ was cited by Foskett J in respect of the Committee's conclusion that restraint for the purposes of "good order and discipline" of "vulnerable children and young people in detention can rarely be acceptable and risks breaching international human rights standards."¹¹¹ The judgment made another reference to the same JCHR report in the context of a timeline of events relating to responses to deaths of young people as a result of restraint in secure training centres. The final reference to the JCHR report came in the context of a hypothetical issue regarding whether various reports including the report of the JCHR would have met the "parasitic" positive obligation arising from Article 2 ECHR to hold a public enquiry.

2. Reference to JCHR's views as being potentially persuasive

A second distinct type of reference to JCHR reports by courts treats the Committee's views on human rights issues as being of potential relevance or interest to the court in reaching its own view on a relevant issue before the Court. In a significant number of cases the courts referred to the work of the JCHR and appeared to regard the content of reports as persuasive on the issue that fell to be decided. This accounted for eleven of the seventy-three total. In total this category of use of JCHR reports accounted for sixteen per cent of recorded cases. In total there were fourteen instances (nineteen per cent of cases) where the majority of the court agreed with the reasoning of the JCHR. There was one instance (one per cent of cases) where the views of the JCHR were regarded as persuasive by a dissenting judge.¹¹²

¹⁰⁷ *Children's Rights Alliance for England v Justice Secretary* [2012] EWHC 8 (Admin)

¹⁰⁸ [2011] EWCA Civ 988.

¹⁰⁹ *R(Ullah) v Special Adjudicator* [2004] UKHL 26.

¹¹⁰ "11th Report of 2007-2008: The Use of Restraint in Secure Training Centres" HL 65/HC 378.

¹¹¹ *Children's Rights Alliance for England v Justice Secretary* [2012] EWHC 8 (Admin), Foskett J [29] "11th Report: The Use of Restraint in Secure Training Centres" 2007-2008 HL 65/HC 378 [42].

¹¹² *R v Durham Constabulary*, ex parte R, Baroness Hale and "12th Report: Scrutiny of Bills Further Progress Report" 2002-2003 HL 119 / HC 765.

The judgments which considered the reasoning of the JCHR persuasive occurred across a wide range of policy areas including counter-terrorism (three instances, twenty per cent)¹¹³, immigration and asylum (three instances, twenty per cent)¹¹⁴, public order, mental health, the smoking ban, criminal justice, police powers, and prisoner's right to vote.

There are several examples where courts make extensive and in-depth use of JCHR reports in adjudication. The most interesting of these examples are when courts refer to the work of the JCHR for guidance on the proportionality of legislation which restricts rights, or where there is a lack of other guidance in the form of legal precedent or academic commentary. However, it is often difficult to assess, even in cases of direct agreement with the JCH, how much influence the views of the JCHR have on the outcome of the judgment overall. For example, in an Article 8 ECHR and Article 14 ECHR challenge to the smoking ban before the Court of Appeal¹¹⁵ reference was made to the work of the JCHR¹¹⁶ to determine whether or not the prohibition residential mental health patients smoking¹¹⁷ was a proportionate one. The patients at a residential mental health facility claimed that the ban on smoking in the workplace violated their right to private life and discriminated against them in virtue of their "other status" (per Article 14 ECHR) as residential mental patients. In the course of the judgment the Court of Appeal considered the view of the JCHR that "In view of the evidence relied on in support of the proposed prohibition, the fact that it does not extend to a person's home, and that provision is made to exempt places which are peoples' de facto homes, the interference with the private life of smokers is in our view likely to be upheld as being proportionate."¹¹⁸ This JCHR report was cited by Lord Clarke¹¹⁹ comparatively early in his judgment. He also referred to several other select committee reports which, in one form or another, all pointed to the proportionality of a blanket ban on smoking in work places for health reasons. In view of this assessing the influence of the JCHR report on the outcome of the judgment is difficult. In spite of the obvious correlation between the views expressed in the JCHR report and the outcome of the judgment this remains an impossible task.

¹¹³ Home Secretary v JJ [2007] UKHL 45, A v United Kingdom [2009] ECHR 301, Al Rawi and others (Respondents) v The Security Service and others (Appellants) [2011] UKSC 34.

¹¹⁴ Q,D,F,B v Home Secretary [2003] EWHC 195 Admin, IH (s. 72 particularly serious crime) Eritrea [2009] UKAIT 00012, R(HSMP Forum) v Home Secretary [2009] EWHC 711 (Admin).

¹¹⁵ R(N) v Health Secretary and Nottingham Healthcare NHS Trust [2009] EWCA Civ 795.

¹¹⁶ "6th Report of 2005-2006: Legislative Scrutiny: Third Progress Report" HL 96/HC 787.

¹¹⁷ Smoke-free (Exemption & Vehicles) Regulations 2007 (SI 2007/765), s. 10(3).

¹¹⁸ "6th Report of 2005-2006: Legislative Scrutiny: Third Progress Report" HL 96/HC 787 [1.37].

¹¹⁹ R(N) v Health Secretary and Nottingham Healthcare NHS Trust [2009] EWCA Civ 795, Lord Clarke [19].

The same problem arises in analysis of the *Limbuela* case. In *Limbuela*¹²⁰ the House of Lords found that section 55(5)(a) of the Nationality, Immigration, and Asylum Act 2002 was in violation of Article 3 ECHR because it empowered the Home Secretary to deny any form of welfare support to asylum seekers who did not register their claim immediately on arrival in the United Kingdom. Lord Hope gave the leading speech and in doing so he agreed with the views of the JCHR stating that “The Joint Committee on Human Rights said [that] they found it difficult to imagine a case where a person could be destitute as defined by what is now section 44(6) of the 2002 Act without giving rise to a threat of a violation of articles 3 and/or 8 of the Convention.”¹²¹ His Lordship went on to conduct his own analysis of both relevant case law and the circumstances which the respondents were subjected to as a result of section 55(5)(a) concluding that there had been a violation of Article 3 ECHR. The extent of the JCHR’s influence in this decision is unclear, as is the case in many decisions where the court appears to agree with the content of a report.

The Court of Appeal in *Al-Rawi* referred to the JCHR’s recent report on Control Orders as “reinforcing” the argument that a closed procedure involving special advocates should not be adopted.¹²² The Court appeared to place some reliance on the JCHR’s conclusion, that the control order regime cannot be guaranteed to ensure procedural justice, as “another reason why the common law should refuse to adopt such a regime.” This case shows that courts may grow to respect the work of parliamentary bodies over time, such that they attach some weight to its conclusions on substantive questions.

3. Reference to JCHR reports as evidence of parliamentary consideration (or lack of consideration) of human rights compatibility issues

The European Court of Human Rights frequently considers the quality of the reasoning relied on in support of a legislative measure when deciding compatibility questions, and whether there was a democratic debate about those justifications prior to the measure’s enactment. In *Hirst v UK*, for example, the European Court of Human Rights considered the compatibility of the UK’s blanket disenfranchisement of convicted prisoners with the right to vote guaranteed by Article 3 of Protocol 1 ECHR.¹²³ The UK Government argued that a wide margin of appreciation was to be allowed to Contracting States in determining the conditions under which the right to vote was exercised, and that the policy of a

¹²⁰ R v Home Secretary (Appellant), ex p Limbuela et al (Respondents) [2005] UKHL 66.

¹²¹ R v Home Secretary (Appellant), ex p Limbuela et al (Respondents) [2005] UKHL 66, Lord Hope [40].

¹²² Para. 57.

¹²³ App. no. 74025/01 (judgment of 6 October 2005).

blanket ban on convicted prisoners had been adhered to over many years with the explicit approval of Parliament. The Court rejected this argument:

79. As to the weight to be attached to the position adopted by the legislature ... in the United Kingdom, there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. ... It may perhaps be said that, by voting the way they did to exempt unconvicted prisoners from the restriction on voting, Parliament implicitly affirmed the need for continued restrictions on the voting rights of convicted prisoners. Nonetheless it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote.

In cases such as *Hirst* it was the absence of parliamentary debate about the proportionality of the blanket ban on prisoner voting that the Strasbourg Court took into account in deciding that the blanket ban was disproportionate. In other cases, however, it is the fact that there has been such a parliamentary debate, and the quality of it, that has been taken into account by the Strasbourg Court in deciding that there are no grounds for finding the law to be incompatible with the Convention. Indeed, the UK Government made precisely this argument when it has sought to persuade the Court not to interfere with legislative determinations of compatibility.

In the Countryside Alliance's challenge to the Convention compatibility of the hunting ban, for example, the domestic courts rejected the argument that the ban was incompatible with Articles 8, 11 and 1 of Protocol 1 ECHR on the ground, amongst others, that respect had to be paid to the recent and closely considered judgment of Parliament. The European Court of Human Rights rejected the challenge on much the same grounds.¹²⁴ In relation to the Article 11 challenge it said:

*50. ... As to the question of the necessity and proportionality of the measures, the Court recalls that, by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those moral and ethical requirements as well as on the "necessity" of a "restriction" intended to meet them. Furthermore, a wider margin of appreciation must be accorded to State authorities in regulating a particular assembly the further that assembly moves from one of a political character to one of a purely social character. **The Court***

¹²⁴ *Friend v UK* Application no. 16072/06 (24 November 2009).

notes that the legislative measures in question in the present case were very recently introduced after extensive debate by the democratically-elected representatives of the State on the social and ethical issues raised by the method of hunting in question. Having regard to the nature and limited scope of any interference with the rights guaranteed by Article 11, the Court finds that the measures may be regarded as falling within the margin of appreciation enjoyed by the State and as being proportionate to the legitimate aim served thereby.

In relation to the Article 1 Protocol 1 challenge it said:

56. *The Court recalls that in Jahn and Others v. Germany [GC], nos. 46720/99, 72203/01 and 72552/01, § 91, ECHR 2005-VI, it stated that “the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one [and the Court] will respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment is manifestly without reasonable foundation” (see also J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom [GC], no. 44302/02, § 71, ECHR 2007...). It also observes that the 2004 Act was preceded by extensive public debate, including the hearings conducted by the Burns Committee. **It was enacted by the House of Commons after equally extensive debate in Parliament where various proposals were considered before an outright ban was accepted.** In those circumstances, the Court is unable to accept that the House of Commons was not entitled to legislate as it did or that the refusal of the Burns Report to draw any conclusions as to the suffering of animals during hunting substantially undermined the reasons for the 2004 Act. The judgment that it was in the public interest to ban hunting was, as Lord Hope observed in context of the proportionality of the hunting ban in Scotland, pre-eminently one for the House of Commons to make.*

It is of particular interest that the European Court of Human Rights expressly referred to the fact that various proposals were considered in the course of extensive parliamentary debates preceding the adoption of the ban. This was central to the Court’s decision, in essence, to defer to the legislature’s determination of compatibility, but it could not have reached that view without looking at the parliamentary materials to ascertain how extensive was the debate and what other options were considered by the legislature.

Our research has found surprisingly few examples of such references to JCHR reports by UK courts. The best examples are both from relatively early in the JCHR’s life. *Animal Defenders International*¹²⁵ (on which the judgment of the ECtHR is awaited) concerned a

¹²⁵ [2008] UKHL 15.

challenge to the blanket ban on “political advertising” contained in section 321(2) of the Communications Act 2003 based upon the right to freedom of expression in Article 10 ECHR. The House of Lords held unanimously that the provision did not violate Article 10 ECHR and refused to grant a section 4 “declaration of incompatibility” pursuant to the Human Rights Act 1998. In his Speech Lord Bingham cited two relevant JCHR reports¹²⁶ during judicial evaluation of the proportionality of the blanket ban on political advertising vis-à-vis Article 10 ECHR. The Communications Bill had been considered several times by the JCHR paying close attention to the reasoning in the Committee’s Reports, and noting that it was a joint committee of Parliament. Lord Bingham accepted the JCHR’s concerns that a blanket ban on political advertising stood a strong chance of being declared incompatible with Article 10 ECHR by the European Court of Human Rights, but noted the concern of the JCHR whose report “urged caution in moving from the current position in the UK, referring (para 63) to the fear mentioned in *VgT* of the annexation of the democratic process by the rich and powerful. [The JCHR] recognised the difficulty of devising a more circumscribed ban, and concluded (para 64) that a total ban was likely to be held incompatible.”¹²⁷ His Lordship then went on to note that “despite an express request by the Joint Human Rights Committee to consider compromise solutions, the government judged that no fair and workable compromise solution could be found which would address the problem, a judgment which Parliament accepted. I see no reason to challenge that judgment.”¹²⁸ In this context Lord Bingham appeared to be reaffirming ideas about the limits of judicial competence in complex policy areas as a reason for deference to the legislature on this issue,¹²⁹ and seems to have been influenced to defer by the consideration which was given to the compatibility issue during the course of the Bill’s passage through Parliament. Amongst the reasons Lord Bingham gave for deferring to parliament “*in the present context*”¹³⁰ were that

Our democratically-elected politicians will be peculiarly sensitive to the measures necessary to safeguard the integrity of our democracy; and

Parliament has resolved, since the 1998 Act came into force, that the prohibition of political advertising on television and radio may possibly, although improbably, infringe article 10 but has nonetheless resolved to proceed under section 19(1)(b) of

¹²⁶ the 19th Report: Draft Communications Bill 2001-2002 HL 149/HC 1102, and the 4th Report of 2002-03, Scrutiny of Bills: Further Progress Report, HL Paper 50/HC 397

¹²⁷ *Animal Defenders International* [2008] UKHL 15, Lord Bingham [14].

¹²⁸ *Animal Defenders International* [2008] UKHL 15 [32].

¹²⁹ A Kavanagh, ‘Defending deference in public law and constitutional theory’ (2010) (126) *Law Quarterly Review* 222.

¹³⁰ *Animal Defenders International* [2008] UKHL 15 [33], emphasis added.

the Act. It has done so because of the importance which it attaches to maintenance of this prohibition.

The best example of a judicial reference to a JCHR Report¹³¹ as evidence of the lack of parliamentary consideration of a human rights issue is the *Belmarsh* case¹³² in which secondary legislation¹³³, which derogated from the right to liberty in Article 5 ECHR, authorising the indefinite detention without trial of foreign terrorist suspects was struck down for being in violation of Article 14 EHCR. Article 15 ECHR allows derogation from certain Convention rights in the event of a “public emergency threatening the life of the nation”. The appellants had relied on a series of JCHR reports in which the Joint Committee had expressed repeated concerns that the government had shown neither the Committee nor Parliament sufficient evidence to justify the existence of a public emergency, and further concerns that the Home Secretary had not presented any evidence to justify the derogation before them as evidence. This was, in effect, an invitation to the Court to use the JCHR report as evidence of a proper lack of parliamentary consideration of whether there really was a “public emergency threatening the life of the nation” and, implicitly, an argument that the decision was not worthy of the Court’s deference.

Lord Bingham did not accede to this argument, but significantly he did not consider it to be improperly made. He made reference to the “the continuing anxiety of the Joint Committee on Human Rights, as well as His Lordship’s own ‘misgiving (fortified by reading the opinion of my noble and learned friend Lord Hoffmann)’”¹³⁴ before finding in favour of the government on the existence of a public emergency for three reasons. The first reason was that SIAC (the only tribunal to see the Home Secretary’s evidence) had not misdirected itself in law.¹³⁵ Secondly, Lord Bingham concluded that ECtHR precedent demonstrated that national governments were given a wide margin of appreciation to respond to public emergencies.¹³⁶ Finally, his Lordship characterised the existence of such an emergency as a ‘pre-eminently political question’ and thus accorded strong weight to the judgment of the Home Secretary, notwithstanding the anxieties expressed in Parliament about the evidential basis for that judgment.¹³⁷

¹³¹ “18th Report of 2003-2004: Review of Counter Terrorism Powers” HL 158/ HC 713.

¹³² *A v Home Secretary* (No. 1) (*Belmarsh*) [2004] UKHL 56.

¹³³ Human Rights Act (Designated Derogation) Order 2001 (SI 2001/3644).

¹³⁴ *A v Home Secretary* (No. 1) (*Belmarsh*) [2004] UKHL 56, Lord Bingham [26].

¹³⁵ *A v Home Secretary* (No. 1) (*Belmarsh*) [2004] UKHL 56, Lord Bingham [27].

¹³⁶ *A v Home Secretary* (No. 1) (*Belmarsh*) [2004] UKHL 56, Lord Bingham [28].

¹³⁷ *A v Home Secretary* (No. 1) (*Belmarsh*) [2004] UKHL 56, Lord Bingham [29].

Appendix

Table 4 – Medium-frequency Users of JCHR Reports

Member	References
Scotland, Baroness (of Asthal)	18
Goodhart, Lord	17
Thomas, Lord (of Gresford)	17
West, Lord (of Spithead)	17
Dholakia, Lord	16
Dubs, Lord	14
Kingsland, RtHonLord	14
Walmsley, Baroness	13
Miller, Baroness (of Chilthorne Domer)	12
Neville-Jones, Baroness	12
Ashton, Baroness (of Upholland)	10
Hamwee, Baroness	9
Hunt, Lord (of Kings Heath)	9
Bach, Lord	8
Bassam, Lord (of Brighton)	8
Clarke, Charles	8
McKenzie, Lord (of Luton)	8
Bridgeman, Viscount	7
Huhne, Chris	7
Hylton, Lord	7
Adonis, Lord	6
Andrews, Baroness	6
Bishop of Winchester	6
Cash, William	6
Thomas, Baroness (of Winchester)	6
Tunncliffe, Lord	6
Burstow, Paul	5
Darzi, Lord (of Denham)	5
Grieve, Dominic	5
Hogg, Douglas	5
Lloyd, RtHonLord (of Berwick)	5
Morris, Lord (of Handsworth)	5
O'Brien, Stephen	5
Ramsbotham, Lord	5
Straw, Jack	5
Thornton, Baroness	5
Total	317

Table 10 – Total Citations to Main Human Rights Instruments in 2005-10 Parliament

Treaty/Convention	2005-06	2006-07	2007-08	2008-09	2009-10
European Convention on Human Rights	559	358	387	385	177
ECHR	178	126	140	136	72
International Covenant on Civil and Political Rights	56	31	53	44	15
International Covenant on Economic Social and Cultural Rights	7	2	9	8	0
Convention on the Rights of Persons with Disabilities	6	34	26	95	13
Convention Against Torture	98	19	31	19	7
International Convention on the Elimination of all forms of Racial Discrimination	3	6	4	2	2
Convention on the Rights of the Child	161	127	141	87	41
Convention on the Elimination of Discrimination against Women	1	10	3	4	0



Arts & Humanities
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