

THE UNITED KINGDOM'S HUMAN RIGHTS ACT OF 1998: WILL THE PARLIAMENT RELINQUISH ITS SOVEREIGNTY TO ENSURE HUMAN RIGHTS PROTECTION IN DOMESTIC COURTS?

*Christina M. Kitterman**

I.	INTRODUCTION	583
II.	THE COUNCIL OF EUROPE AND THE CREATION OF HUMAN RIGHTS IN EUROPE	584
	A. <i>Scope of the European Convention on Human Rights</i>	585
	B. <i>Enforcement of the European Convention on Human Rights</i> ..	585
III.	THE UNITED KINGDOM'S LEGAL FRAMEWORK	586
IV.	THE UNITED KINGDOM'S ENACTMENT OF HUMAN RIGHTS	588
V.	THE HUMAN RIGHTS ACT OF 1998	590
	A. <i>Public Authority</i>	590
	B. <i>Courts' Role Under the Human Rights Act</i>	591
	1. <i>Declarations of Incompatibility</i>	592
	2. <i>Scope of Judicial Remedies</i>	593
	C. <i>The Executive Branch and its Control</i>	594
VI.	CONCLUSION	594

I. INTRODUCTION

The United Kingdom has come into the new millennium with an unprecedented written set of human rights for its citizens. In 1998, the British government passed the Human Rights Act of 1998 (Human Rights Act) to incorporate the European Convention on Human Rights (Convention) into domestic law.¹ It finally became effective on October 2, 2000. The Human Rights Act enables British citizens to bring claims for human rights violations in domestic courts. Traditionally, the lack of human rights forced citizens to bring their human rights complaints to the European Court of Human Rights in Strasbourg, France.

Although the Human Rights Act seems to be a step forward for the British government, there is an important link missing. When Parliament incorporated

* J.D. Candidate, Class of 2002, Nova Southeastern University, Fort Lauderdale, Florida, USA. Special thanks to Professor Michael Dale for giving me the idea for this article while at NSU's International Program in Cambridge, England.

1. THE GOVERNMENT'S WHITE PAPER, RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL (1997).

the Human Rights Act into domestic law, it failed to retain Article 13 of the Convention, which gives national courts the power to provide the injured party with an effective remedy. Therefore, Parliament still forces its citizens to take their human rights complaints to Strasbourg for an effective remedy.

II. THE COUNCIL OF EUROPE AND THE CREATION OF HUMAN RIGHTS IN EUROPE

In 1946, Winston Churchill declared that the European countries needed "a remedy which, as if by miracle, would transform the whole scene and in a few years make all Europe as free and happy as Switzerland is today. We must build a kind of United States of Europe."² The European countries were devastated by five years of World War II and needed to pull together a common agreement to promote human rights throughout the countries. On May 5, 1949, ten countries came together and signed a treaty that established the Council of Europe (the Council).³ The Council opened itself up to any European state, provided the state agreed to accept the same principles of democracy, human rights, and the rule of law.⁴ Since its inception, the Council has thrived. It now includes forty-one member states stretching from the Atlantic to east of Russia.⁵

Throughout the decades, the Council has strived to promote human rights through supervision and protection of fundamental freedoms and rights.⁶ It has also identified new threats to human rights, developed public awareness of its importance, and trained officials through human rights education.⁷ The Council's most significant step toward human rights was the introduction of the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950.⁸ This unprecedented international treaty gave individuals inalienable rights and freedoms. It also obligated states to guarantee these rights

2. *A Short History of the Council of Europe*, at [http://www.coe.int/portal.Asp?L=E&M=\\$v1-1-1-1//portal.asp?L=E&M=\\$v1-0-12-2/02/EMB,1,0,12,2,Hist1.stm](http://www.coe.int/portal.Asp?L=E&M=$v1-1-1-1//portal.asp?L=E&M=$v1-0-12-2/02/EMB,1,0,12,2,Hist1.stm) (last visited Sept. 26, 2000).

3. THE COUNCIL OF EUROPE'S PUBLISHING AND DOCUMENTATION SERVICE, THE COUNCIL OF EUROPE (1999). The original signatories to the treaty included Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom.

4. *Id.*

5. *Id.* The Council is currently made up of Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, and United Kingdom.

6. THE COUNCIL OF EUROPE'S MANAGEMENT OF DOCUMENTATION INFORMATION DIRECTORATE, THE COUNCIL OF EUROPE ACTIVITIES & ACHIEVEMENTS (2000) [hereinafter EUROPE ACTIVITIES & ACHIEVEMENTS].

7. *Id.*

8. JOHN WADHAM & HELEN MOUNTFIELD, BLACKSTONE'S GUIDE TO THE HUMAN RIGHTS ACT 1998, 10 (1999).

to everyone within their jurisdictions.⁹ In 1953, the European Convention on Human Rights came into force.¹⁰

A. *Scope of the European Convention on Human Rights*

The Convention provides citizens with a constantly evolving list of fundamental rights. The Universal Declaration of Human Rights created by the General Assembly of the United Nations in 1948 inspired the creation of the Convention.¹¹ The first article introduced required all states to secure fundamental human rights for citizens.¹² Section one of the Convention lists the fundamental rights and freedoms given to European member states.¹³ The Council consistently updates the Convention with Protocols, which have added more rights to the original Convention, *inter alia*. Protocol 1 gave the right to education and Protocol 6 provided the abolition of the death penalty.¹⁴

B. *Enforcement of the European Convention on Human Rights*

The unique aspect of the Convention was the opportunity for individuals to bring claims against states for human rights violations, as well as allowing state actions against other states.¹⁵ Violations of human right laws were originally reported to the European Commission of Human Rights in Strasbourg (Commission). The Commission determined the admissibility of the claim and attempted to make a peaceful settlement before referring the case to the European Court of Human Rights.¹⁶ However, in 1998, the Council created a

9. EUROPE ACTIVITIES & ACHIEVEMENTS, *supra* note 6.

10. *Id.*

11. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 1, Europ. T.S. No. 5 [hereinafter *The Convention*].

12. *Id.*

13. *Id.* Section one provides for the right to life (Article 2); prohibition of torture (Article 3); prohibition of slavery and forced labour (Article 4); right to liberty and security (Article 5); right to a fair trial (Article 6); no punishment without law (Article 7); right to respect for private life and family (Article 8); freedom of thought, conscience, and religion (Article 9); freedom of expression (Article 10); freedom of assembly and association (Article 11); right to marry (Article 12); right to an effective remedy (Article 13); prohibition of discrimination (Article 14); derogation in time of emergency (Article 15); restrictions on political activities of aliens (Article 16); prohibition on abuse of rights (Article 17); and limitation on use of restrictions on rights (Article 18).

14. *The 50-year European Convention on Human Rights*, at [http://www.coe.int/portal.asp?strScreenType=100&L=E&M=\\$t/1-1-1//portal.asp?L=E&M=\\$t/1-0-11-2/01/CEDH/EMB,1,0,11,2,ECHR.stm](http://www.coe.int/portal.asp?strScreenType=100&L=E&M=$t/1-1-1//portal.asp?L=E&M=$t/1-0-11-2/01/CEDH/EMB,1,0,11,2,ECHR.stm) (last visited Sept. 27, 2000).

15. WADHAM & MOUNTFIELD, *supra* note 8, at 2.

16. *The Council of Europe: An Overview*, at [http://www.coe.int/portal.asp?L=E&M=\\$t/1-1-1//portal.asp?L=E&M=\\$t/1-0-2-2/02/EMB,1,0,2,2,Overview.stm](http://www.coe.int/portal.asp?L=E&M=$t/1-1-1//portal.asp?L=E&M=$t/1-0-2-2/02/EMB,1,0,2,2,Overview.stm) (last visited Sept. 26, 2000).

new European Court of Human Rights that individuals could access directly with complaints of human rights violations.¹⁷

All decisions, whether by the Commission or the European Court of Human Rights, are binding on the respondent states concerned.¹⁸ The Committee of Ministers is responsible for supervising the execution of final judgments in the states.¹⁹ The Committee of Ministers is obligated to verify whether states have taken adequate remedial measures to comply with the specific or general obligations arising out of the European Court of Human Rights' judgments and report back to such Court.²⁰

The Convention has, therefore, provided all of its European citizens a sense of comfort that their lives, beliefs and freedoms will be protected by a larger, more powerful union than their own state. Additionally, almost every member state of the Council has incorporated some variation of the Convention into domestic law. In 1998, the United Kingdom finally committed to its own citizens a set of domestic human right laws.

III. THE UNITED KINGDOM'S LEGAL FRAMEWORK

The United Kingdom has no written constitution or comprehensive bill of rights.²¹ British rights are scattered throughout conventions, customs, and statutes.²² The only Act titled the Bill of Rights 1689 set forth the exercise of the royal prerogative and succession to the Crown to those permitted by Parliament.²³

Traditionally, the British legal system provided some remedies to deal with human right violations. For example, the legal system has been able to provide "habeas corpus," which secures an individual's right to freedom from unlawful detention.²⁴ However, British courts did not always have jurisdiction to hear human rights cases because there were no laws guaranteeing protection against human right infringements. Parliament has the ultimate power to enact any law and change any previous law.²⁵ Courts only have the power to review the law

17. *Id.*

18. *The European Court of Human Rights: Historical Background, Organization and Procedure*, at <http://www.echr.coe.int/eng/INFORMATION%20NOTES/infodoc%20revised%202.htm#>, The European Convention on Human Rights of 1950 (last visited Sept. 24, 2000).

19. *Id.*

20. *Id.*

21. *United Kingdom's "Constitution,"* at http://www.uni-wuerzburg.de/law/uk00000_.html (last visited Jan. 19, 2001).

22. *Id.*

23. *Id.*; see also WADHAM & MOUNTFIELD, *supra* note 8, at 4.

24. *The United Kingdom's "Constitution," supra* note 21.

25. *Id.*

and make rulings consistent with such laws.²⁶ Previously under British law, citizens could bring proceedings against the government or a local government authority to protect their legal rights and to obtain a remedy for any injury suffered.²⁷ Generally, Britain has not codified its law, but the courts have adopted a relatively strict and literal approach to the interpretation of statutes.²⁸

On an international level, the United Kingdom's ratification of a treaty or international convention does not automatically make the agreement part of its domestic law.²⁹ However, when it is necessary, the government amends domestic law to bring it in line with the Convention.³⁰ When there is a conflict between British law and the Convention, the Convention overrides national law.³¹ The European Court of Human Rights hears an abundant amount of cases of Convention violations arising in the United Kingdom. Subsequently, the Court frequently finds the United Kingdom has violated its citizens' Convention rights. The major issue for British courts is the requirement that they apply British law as if it were created with the Convention in mind.

While interpreting any provision in domestic legislation which was ambiguous, the British courts would presume that Parliament intended to legislate in conformity with the Convention and not in conflict with it.³² The court can only review administrative discretion in accordance with conventional principles of judicial review, which did not include a test of proportionality.³³

The test of proportionality is a principle of review that the European Court of Human Rights has used to determine whether the interference is "necessary in a democratic society."³⁴ The essence of this principle is to decide whether a particular limitation on a right is proportionate to the aim being pursued.³⁵ "If the minister has used a sledgehammer to crack a nut, when a set of nutcrackers . . . were [sic] available, without any pressing social need, he cannot satisfy the test of proportionality."³⁶ With the introduction of the Human Rights Act in October, British courts are now required to apply the proportionality test to Parliament's acts and British public officials to determine whether they are within the scope of their powers. "The more substantial the interference with

26. *Id.*

27. *Id.*

28. *Id.*

29. *The United Kingdom's "Constitution," supra* note 21.

30. *Id.*

31. *Id.*

32. *Regina v. Secretary of State for the Home Department, Ex parte Brind and Others*, [1990] 2 W.L.R. 787, [1991] 1 C.A. 696.

33. *Id.*

34. *WADHAM & MOUNTFIELD, supra* note 8, at 13.

35. *Handyside v. United Kingdom*, 1 Eur. H.R. Rep. 737 (1976).

36. *See Regina v. Secretary of State for the Home Department, ex parte Brind and Others*, 2 W.L.R. at 797.

human rights, the more the court would require by way of jurisdiction before it was satisfied that the decision was reasonable."³⁷

IV. THE UNITED KINGDOM'S ENACTMENT OF HUMAN RIGHTS

The United Kingdom was among one of the first signatories on the Convention in 1951.³⁸ In 1966, the United Kingdom granted the right of petition for its citizens to seek redress for human right violations in the European Court of Human Rights provided there were no effective remedies in domestic courts.³⁹ However, the British government did not, until recently, feel it was necessary to make the Convention part of its domestic law. The government felt that there was no need to incorporate human rights into domestic law because its citizens already enjoyed those rights that flowed from British Common Law.⁴⁰ "The rights and the freedoms of the Convention have not been expressly incorporated by statute into domestic law, because it has been considered unnecessary to do so, successive governments correctly assuming that the existing arrangements within the domestic legal system comply with its [sic] obligations pursuant to the Convention."⁴¹

The British political and constitutional tradition of freedom was a large reason for the delay in enacting the Convention into law.⁴² The government customarily operated on its Common Law idea of "negative" freedom, which was the freedom from government interference. It created negative rights by giving its citizens absolute freedom unless otherwise taken away by statute.⁴³ According to the Nineteenth-century Diceyan theory, "[w]e are free to do everything except that which we are forbidden to do by law."⁴⁴

It is important to note that the legislature has used the Act as an aid in deciding ambiguous cases.⁴⁵ However, public authorities have no duty to exercise administrative discretion in a manner that compiles with the Convention,⁴⁶ unless the administrative body has expressly stated it would act in conformance with the Convention.⁴⁷

37. R. Ministry of Defence, *ex parte* Smith, [1996] Q.B. 517.

38. WADHAM & MOUNTFIELD, *supra* note 8, at 4.

39. *Id.* at 10.

40. *Id.* at 10.

41. *See* Regina v. Secretary of State for the Home Department, *ex parte* Brind and Others, 2 W.L.R. at 795.

42. WADHAM & MOUNTFIELD, *supra* note 8, at 4.

43. *Id.*

44. *Id.*

45. *See* Regina v. Secretary of State for the Home Department, *ex parte* Brind and Others, 2 W.L.R. at 798.

46. *Id.*

47. WADHAM & MOUNTFIELD, *supra* note 8, at 2; *see, e.g.*, Britton v. Secretary of State for the Environment, [1997] JPL 617.

The British government has also used the Convention to provide the judiciary with the amount of discretion to use in determining cases for human right violations. Prior to the Convention, the test for challenging actions of public authorities by way of judicial review was that they must be unlawful or else irrational.⁴⁸ Lord Diplock explained that this irrational test is judged by “a decision, which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”⁴⁹ Finally, the British government used the Convention to establish the scope of common law.⁵⁰

In 1997, the Labour Government, in its election manifesto, pledged to increase individual rights by incorporating the Convention into domestic law.⁵¹ The success of the party brought the Human Rights Act Royal Assent on November 9, 1998.⁵² The Labour Government’s White Paper “Rights Brought Home” set forth important principles that are reiterated consistently in British publications.⁵³ The government wants to make it easier for individuals to enforce their rights under the Convention without the cost and delay of going to the European Court at Strausbourg.⁵⁴ In addition, it wants to increase awareness of human rights in society, particularly among young people, to form part of the government’s commitment to constitutional reforms, and to provide British based remedies for human rights breaches.⁵⁵

An advertisement that the United Kingdom Government created to inform people of the introduction of the Human Rights Act stated, “You’ll probably never need it, but it’s nice to know it’s there.”⁵⁶ The advertisement also listed some of the new fundamental rights.⁵⁷

48. WADHAM & MOUNTFIELD, *supra* note 8, at 12.

49. WADHAM & MOUNTFIELD, *supra* note 8, at 1; *see, e.g.*, Council of Civil Service Unions and others v. Minister for the Civil Service, [1984] 3 W.L.R. 1174, [1985] 1 C.A. 374, 410.

50. WADHAM & MOUNTFIELD, *supra* note 8, at 1; *see, e.g.*, Derbyshire County Council v. Times Newspapers Ltd., [1992] Q.B. 770, 812.

51. Sarah McMurchie, *The European Convention on Human Rights: The Incorporation of the ECHR into UK Law*, at <http://www.britcoun.org/governance/jusrig/human/echr/index.htm> (last visited Sept. 25, 2000).

52. *Id.*

53. *Id.*

54. *Id.*

55. *See* McMurchie, *supra* note 51; *see also* THE GOVERNMENT’S WHITE PAPER, *supra* note 1.

56. *Id.*

57. *The Home Office News Releases*, at <http://www.homeoffice.gov.uk/hract/hrad1.pdf> (last visited Jan. 19, 2000).

V. THE HUMAN RIGHTS ACT OF 1998

The United Kingdom, through the incorporation of the Convention into domestic law, has selected certain articles from the Convention. In addition to Articles 2-12 and 14 from the Convention, the United Kingdom is ratifying Article 1, peaceful enjoyment of possessions; Article 2, right to education; and Article 3, the right to take part in elections by secret ballot from the first Protocol.⁵⁸ The Act also adopted Article 1, prohibition of imprisonment for debt; Article 2, freedom of movement within the territory of a state; and Article 3, prohibition of expulsion of nationals from the Fourth Protocol.⁵⁹ Finally, in Article 1, the government endorses the abolition of the death penalty and Article 2, the exception in times of war from the Sixth Protocol.⁶⁰

The Human Rights Act incorporates these articles into domestic law and determines how the new rights will be enforceable in British law. The most significant aspect of the Human Rights Act is the development of holding a public official accountable for his or her acts that are not compatible with the Convention.

A. *Public Authority*

The Human Rights Act gives a very broad definition of people acting with public authority. A person acting in public authority includes any "court or tribunal, and any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament."⁶¹ However, the House of Lords is not considered a public official when working in its judicial capacity.⁶² Parliament kept its name out of the definition of public authority to keep its sovereignty.⁶³

The Human Rights Act also provides that when a public authority acts in compliance with primary or subordinate legislation which prevents it from acting in conformity with the Convention, the rule creating him or her a public authority will be set aside.⁶⁴ In such circumstances, the higher court may give a declaration of incompatibility.⁶⁵ The courts are, nonetheless, to presume that

58. THE GOVERNMENT'S WHITE PAPER, *supra* note 1.

59. *Id.*

60. *Id.*

61. Human Rights Act, 1998, c. 42, § 6(3) (Eng.).

62. *Id.* at § 6(4).

63. WADHAM & MOUNTFIELD, *supra* note 8, at 34.

64. *Id.*

65. *Id.*

the act of the public authority, intended by legislation, is compatible with the Convention.⁶⁶

When a public authority has acted inconsistently with the Convention, the injured party may use the Human Rights Act as a ground for judicial review based on illegality.⁶⁷ Also, the injured party may bring a private lawsuit against the public authority for breach of statutory duty, or use the public authority's illegal action as a defense.⁶⁸

In general, it is not possible to make a claim for damages against a court or tribunal that has breached the Convention rights, although it is a public authority.⁶⁹ The courts are not accountable for damages because an injured party can always take the bad decision in his or her case up on appeal. However, there is a provision that allows damages against the Crown where any judicial body has been guilty of a breach of the Convention rights.⁷⁰

There is no violation when an act or failure to act by the Parliament causes the breach of the Convention. Parliament is free to establish, change and abolish laws as it sees fit. Parliament is not accountable for acting inconsistently with the Convention.

B. Courts' Role Under the Human Rights Act

The essential mechanism of the Human Rights Act is that it reserves Parliament's sovereignty.⁷¹ Although it alters the way that the judiciary can scrutinize legislation and the ways in which judges can interpret common law, courts still cannot overturn any legislation created by the Parliament.

The Human Rights Act, like the Convention, is a "living instrument which must be interpreted in the light of present day conditions."⁷² Previous interpretations are not binding on court decisions. They are able to build a new body of case law, taking into account Convention rights and case law.⁷³ The House of Lords has accepted that in order to interpret legislation, the courts need to consider authorities from other jurisdictions to build its case law.⁷⁴ However, decisions from the European Court of Human Rights are only persuasive and not binding.

66. *Id.* at 35.

67. Human Rights Act, *supra* note 61, § 7.

68. WADHAM & MOUNTFIELD, *supra* note 8, at 34.

69. *Id.* at 46.

70. Human Rights Act, *supra* note 61, § 9.

71. WADHAM & MOUNTFIELD, *supra* note 8, at 10.

72. *Tyrer v. United Kingdom*, 2 Eur. H.R. Rep. 1 (1978).

73. THE GOVERNMENT'S WHITE PAPER, *supra* note 1.

74. WADHAM & MOUNTFIELD, *supra* note 8, at 27.

Courts are required to read primary and subordinate legislation as compatible with Convention rights.⁷⁵ The courts can not strike down any primary legislation; they can only make a "Declaration of Incompatibility."⁷⁶ This ensures Parliament's sovereignty.⁷⁷

1. Declarations of Incompatibility

When the courts are not convinced that the legislation is compatible with Convention rights, they can make a declaration of incompatibility. The power to make declarations of incompatibility is only available in the high British courts.⁷⁸ If a lower court cannot make a decision compatible with the Convention, then it is required to follow the statute and not the Convention.⁷⁹ Courts and tribunals of limited jurisdiction are not able to award such a remedy if it is outside their statutory power to do so.⁸⁰ If the court finds the legislation incompatible with the Convention, it makes a declaration of incompatibility and reports it to the Parliament.⁸¹

The purpose of a declaration of incompatibility is to create public interest and put pressure on the government to change such law.⁸² However, the courts are unlikely to want to make a declaration of incompatibility. Instead, courts strive to find meanings for statutory provisions to conform to the Convention.⁸³

A declaration of incompatibility does not, however, "affect the validity, continuing operation or enforcement of the provision in respect of which it is given, and it is not binding on the parties to the proceedings in which it is made."⁸⁴ Although a higher court can make a declaration of incompatibility, it will not be able to set aside a statute.⁸⁵ Consequently, when a statute is incompatible with the Convention, the Parliament must attempt to amend the legislation. Even following a declaration of incompatibility, the government is not bound to act either by way of primary or subordinate legislation.⁸⁶ In order to introduce the incompatibility before the Parliament, the Minister of the

75. Human Rights Act, *supra* note 61, § 3(1).

76. *Id.*

77. THE GOVERNMENT'S WHITE PAPER, *supra* note 1.

78. WADHAM & MOUNTFIELD, *supra* note 8, at 48.

79. *Id.*

80. *Id.* at 46.

81. Human Rights Act, *supra* note 61, § 4(2).

82. WADHAM & MOUNTFIELD, *supra* note 8, at 47.

83. *Id.*

84. Human Rights Act, *supra* note 61, § 4(a), (b).

85. WADHAM & MOUNTFIELD, *supra* note 8, at 48.

86. *Id.* at 51.

Crown may make amendments to the legislation, as he considers necessary, to remove the incompatibility.⁸⁷

The declaration of incompatibility goes before Parliament as a document that contains a draft of the proposed change in legislation and the "required information."⁸⁸ The required information includes an explanation of the incompatibility that the proposed order seeks to remove, including particulars of the court decision that prompted the Minister to propose a remedial order.⁸⁹ In addition, the Minister must provide Parliament with a statement of the reasons for the order according to the Act.⁹⁰

2. Scope of Judicial Remedies

The main Article missing from the Human Rights Act is Article 13 which states: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."⁹¹ However, the British government thought the inclusion of this article would be redundant to the remedy section of the Human Rights Act.⁹² The Parliament only wants the court to apply remedies which they think are "sufficient and clear" and does not permit courts to fashion their own remedies.⁹³

Without the power for courts to award an effective remedy, citizens may be forced to take their complaints to the European Court of Human Rights who can in turn apply an effective remedy. Parliament wanted to keep the decision-making power out of the hands of the judiciary. It wanted to keep the power to make laws away from the unelected and the unaccountable judiciary.⁹⁴ Therefore, courts and tribunals of limited jurisdiction will not be able to award a remedy if it is not in their statutory power to do so.⁹⁵

Scholastic and informed commentators pressed for the inclusion of Article 13 in order to insure effective protection of Convention rights.⁹⁶ However, the government felt that inclusion of such an act would put a "wild card" in the

87. Human Rights Act, *supra* note 61, § 10(2).

88. WADHAM & MOUNTFIELD, *supra* note 8, at 50.

89. *Id.*

90. *Id.*

91. The Convention, *supra* note 12, at art. 13.

92. *E.g.*, 475 PARL. DEB., H.L. (5th ser.) (1997) 475; section 8 of the Parliamentary debate, which provides remedies the courts can utilize for violations of human rights. *Id.*

93. *Id.*

94. WADHAM & MOUNTFIELD, *supra* note 8, at 11.

95. *Id.* at 46.

96. *Id.* at 52.

hands of the judiciary.⁹⁷ The Parliament also felt that the judiciary, through precedent of the European Court of Human Rights, could somewhat apply Article 13.⁹⁸

Given Parliament's failure to incorporate Article 13, it is not clear how the Human Rights Act intends "just satisfaction" to be afforded in cases where the breach of the Convention is a consequence of a statutory provision.⁹⁹ The only hope is for the government to take steps to act in compliance with the Convention to avoid a declaration of incompatibility. Otherwise, the applicant must go to the European Court of Human Rights to obtain an effective remedy.¹⁰⁰

C. The Executive Branch and its Control

Originally, the Human Rights Act provided that the executive branch could make corrections to Parliament's breaches of human rights.¹⁰¹ However, Parliament amended this section in order to keep absolute sovereignty. It wanted to avoid the excessive use of provisions King Henry VIII created, which empowered the executive branch to legislate without reference to the Parliament.¹⁰² Under such acts, the executive branch has the power to repeal acts of Parliament.¹⁰³

The consequence of this amendment is that a declaration of incompatibility may go by unnoticed and unchanged for a long period of time in the Parliament.¹⁰⁴ The questionable statute might also go untouched if it relates to an unpopular group or a controversial cause.¹⁰⁵ Therefore, the amendment has the hidden effect of weakening the structure of the Human Rights Act by making it less likely that people will bring actions for violations of human rights seeking a declaration of incompatibility. It is precisely this domination of majority over minority's interests that the Human Rights Act is designed to prevent.

VI. CONCLUSION

The Human Rights Act has been a long-awaited and cautiously anticipated action from the Parliament. There are many pros and cons to the enactment of

97. WADHAM & MOUNTFIELD, *supra* note 8, at 52.

98. *Id.*

99. WADHAM & MOUNTFIELD, *supra* note 8, at 47.

100. *Id.*

101. WADHAM & MOUNTFIELD, *supra* note 8, at 48.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

a written human rights act. Some citizens have been eagerly awaiting the arrival of their new guaranteed rights.¹⁰⁶ However, some citizens criticize that a written form of fundamental rights is not necessary because the written document will not change and evolve like unwritten laws.¹⁰⁷

The overall concern, however, is that although Parliament has taken this unprecedented step in incorporating human rights into domestic law, it has kept its sovereignty. It will not give the British courts the power to use its judicial discretion, and it therefore denies citizens an effective remedy when the courts consider a statute is simply "incompatible with the Convention." The end result is that if a citizen is looking to have a declaration of incompatibility, then there is no need to waste time in the domestic courts. Taking the case to Strasbourg would better serve the injured party.

Since October, the Human Rights Act only effected 45 of the 87 cases tried in the British courts.¹⁰⁸ Additionally, 67 of the 87 cases received no remedy from the British court.¹⁰⁹

The European Court of Human Rights offers more beneficial remedies than the remedies offered by the Human Rights Act. In particular, it offers claims for damages if the government has failed to properly give effect to European law. In contrast, the Human Rights Act expressly excludes the possibility of damages for failure to legislate.

The solution to providing an effective Human Rights Act in the United Kingdom is twofold. First, Parliament must relinquish some control over statutes that the British courts find incompatible with the Convention. Second, the Parliament and citizens must have some faith in the judiciary and allow it to provide the effective remedies as set forth by the Convention in domestic courts. When there is a compromise, there will truly be human rights in the United Kingdom.

106. STOTT AND FELIX, *PRINCIPLES OF ADMINISTRATIVE LAW* (photo. reprint 2000).

107. *Id.*

108. King's College London: The Human Rights Act Research Unit Monitoring the Human Rights Act, at <http://www.kcl.ac.uk/depsta/law/research/hraru/research/stats/tofeb01.pdf> (last visited Mar. 17, 2001).

109. *Id.*