Parliamentary Sovereignty

Secretariat summary
of a discussion at a Seminar held under Chatham House Rules

co-hosted by All Souls College
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1. The Chair of the Commission welcomed participants to the seminar. He outlined the seminar’s programme for the day.

2. In introductory remarks it was suggested that, given the scale of the task set out in the Commission’s terms of reference the Commission should restrict its inquiry to an analysis of whether there was a benefit in bringing together under one instrument a description of at least the principal rights enjoyed under domestic law.

3. The view was expressed that the efficacy of the machinery for giving practical effect to rights was at least as important as the expression of the rights, no matter how elegantly or forcefully the rights were expressed.

4. It was argued that Parliamentary sovereignty had not been infringed at least in so far as the UK had been able to recognise rights beyond those that were recognised under the European Convention on Human Rights, and had for a long time implemented law deriving from non-domestic sources. For example, the old Statutes of Praemunire which forbade the giving of effect to, in particular, orders issued by the Papal courts, had all been repealed and many rights for individuals now derived from EU law.

5. It was suggested that one question was whether the UK Government could reserve the right, irrespective of the operation of the Convention, to take all such steps as might be necessary for the protection of national security. If such steps would be inconsistent with the terms of the Convention, perhaps they ought to be sanctioned or ratified by a resolution of the House of Commons. This would ensure that the Government was answerable to Parliament and hence to the electorate and not to the Strasbourg Court on issues that concerned national security. In subsequent discussion, others expressed disagreement with this proposition.
Session 1: What should be the respective roles of the courts and legislatures? How have the respective roles of Parliament and the courts developed since the Bill of Rights 1689? Is there a case for changing the respective roles?

6. The Chair of the session made some introductory remarks. The purpose of this session was to explore the respective roles of courts and legislatures and their evolution; and to consider the extent to which the ECHR and the HRA had affected Parliamentary sovereignty, if at all, and the process of domestic adjudication. A substantial discussion followed.

7. It was argued that it might be preferable to maintain the current constitutional arrangements notwithstanding their imperfections on the basis that any proposed alternative might be worse.

8. It was further argued that the constitutional balance of powers in the UK was a remarkable historical artefact that was none the worse for not having been preserved in a written constitution. There was considerable merit in the flexibility of our unwritten constitution. Under this system Parliament decided what the law was to be; courts determined what the law was; and the executive governed within the law. This balance had been achieved through an organic coherent evolution.

9. Views were alternately expressed that rights stemmed from natural law or from positive law as set out by legislatures and courts, that there should be universal minimum standards, or that they could vary geographically (whether for instance across Europe or across the UK).

10. It was noted that Parliamentary privilege required that proceedings in Parliament could not be questioned by the courts and prevented Parliamentary proceedings from violating court orders. Concern was expressed at the recent waiving of Parliamentary privilege by two parliamentarians on the grounds that this trend constituted a threat to the inviolability of Parliamentary debates.

11. It was suggested that Parliamentary sovereignty was not tantamount to ‘tyranny of the majority’. The abolition of the death penalty was cited as an example where Parliament had taken action contrary to the views of the majority. The East African Asians case was cited to support the opposite view.

12. It was argued that there had been a failure to sufficiently involve Parliament in the issue of treaties and their implementation. There was no committee in the Westminster Parliament equivalent to the US Senate Select Committee on Foreign Relations. The creation of a Select Committee on Treaties in the UK Parliament could, it was argued, provide a platform for debate on proposed treaties and on the extent to which current treaties had been implemented in the manner intended.

13. It was argued that resentment existed within the current political class towards the way politics had become more supra-national. This sentiment extended beyond the Strasbourg Court and included the EU and other treaties to which the

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1 Article 9 of the Bill of Rights Act 1689
UK was a party. The notion of Westphalian sovereignty, it was argued, no longer existed in the modern world.

14. It was further argued that public opinion was driven by the media’s focus on a limited number of controversial cases. It was a considerable challenge for MPs to support the implementation of decisions of the Strasbourg Court in the face of such public criticism. There was a need to bring MPs into the centre of the debate e.g. through the Parliamentary Assembly of the Council of Europe, which should debate judgments of the Strasbourg Court. While such a debate could not change a decision of the Court, it would start a dialogue that might influence future judicial decisions.

15. It was suggested that Parliamentary sovereignty was really about the sovereignty of the executive branch. Parliament was quite weak in comparison.

16. It was argued that Parliament should be the primary actor in the implementation of rights. However, since a large proportion of domestic law involved the implementation of international legal obligations, many statutes were drafted in open-ended ways that often gave courts a more substantial role than Parliament. The HRA was an example. It was a statute that had not really added to the existing corpus of law, but rather had afforded a large role to the courts.

17. It was argued that legal authority derived fundamentally either from the people or from God. The concept of Parliamentary sovereignty derived from the proposition that authority derived from the people. The Strasbourg Court therefore lacked democratic legitimacy. The ambiguity of human rights provisions meant that courts were primarily responsible for their interpretation. There was scope for reasonable people to differ on the proper interpretation of rights and this had led many to question the role of the Strasbourg Court.

18. It was argued that the views of the public were unclear on what the appropriate balance of power was between the courts and Parliament. The Commission was urged to do more to determine the views of the public. The last government had done polling on this and the results had been more complex than might have been thought. In related discussion, it was stated that public opposition to the HRA arose partly from the view that the Act protected the rights of those considered ‘undeserving’. In response it was asserted that even those seen as ‘undeserving’ had human rights worthy of protection. It was further argued that the views of the public on human rights matters became more nuanced once there was an explanation of the full facts of a case.

19. It was further argued that Parliamentary and public debates had an impact on judicial thinking. Judges had already responded to the debate on the respective roles of the courts and Parliament by, more recently, showing greater restraint in their judgments. This process of adjustment occurred by virtue of the inherent dialogue between legislators and courts. There was therefore no need for legislation to clarify their respective roles.

20. It was stated that the origins of the doctrine of Parliamentary sovereignty were to be found in the common law’s recognition of Parliamentary supremacy.
21. It was suggested that the balance of power had shifted in favour of the courts for two principal reasons:

- firstly, under the HRA, courts were required to give effect to rights that were expressed in broad terms. While there was of course legitimate room for democratic debate on the scope and interpretation of rights, this role had in practice been largely given to the courts, meaning that there was less of a role for Parliament in determining the scope of rights;

- secondly the status quo had resulted in a form of de facto entrenchment in so far as the linkage between the HRA and the Strasbourg Court had made any non-compliance by Parliament with a declaration of incompatibility (issued by a court under section 4 of the HRA) difficult to sustain in the light of practical politics and the requirements of international law. In response it was argued that the HRA was not formally entrenched and, in any event, such political difficulties were preferable to its frequent revision;

22. It was asked whether, if the courts’ role continued in this way, and if media and public criticism of court judgments continued to mount, the UK might witness a politicisation of the judiciary akin to that found in the US. The fact that our courts were increasingly making decisions that were arguably more properly ones for the political process to resolve was creating a risk of politicisation of the judiciary here.

23. In response it was argued that any assertion that the democratic process was excluded once rights had been defined was, in fact, a mis-characterisation. Courts did not interpret in a vacuum. Even though rights might be broadly expressed, courts interpreted them based on precedent, other statutory authorities and international authorities. Parliament also had a crucial role in ensuring that legislation was compliant with any earlier judicial interpretation of rights or in passing legislation to change the law. For example, following the Court’s decision in YL\(^3\), Parliament had passed legislation to change the result of that decision.\(^4\) All of this was the democratic process in action. It was also Parliament that had enacted the HRA. There was a need to avoid confusion between the ‘democratic process’ and the ‘legislative process’.

24. There were two directions in which the respective roles of Parliament and the court might be adjusted, leading either to greater parliamentary intervention or to greater judicial control. It would be necessary for either shift to take place within the paradigm of Parliamentary supremacy. In that context it was asked whether parliamentary supremacy was itself problematic. In response it was suggested that any move to invest sovereignty in a written instrument instead of Parliament would represent a major shift in the constitutional balance of powers.

25. It was suggested that one way to better define the relationship between the courts and Parliament would be to codify the respective functions of the branches of Government.

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\(^3\) YL (by her litigation friend the Official Solicitor) (FC) (Appellant) v. Birmingham City Council and others (Respondents) [2007] UKHL 27.

\(^4\) Health and Social Care Act 2008. s145.
26. It was argued that there were a number of mechanisms that already existed that could be put to use to re-calibrate the distribution of power between the courts and Parliament, such as:

   a. ‘judicial minimalism’ whereby courts did not interfere with the balance struck by Parliament in certain areas where rights had been broadly defined;

   b. the insistence by courts that Parliament provide better justifications or evidence of how its legislative measures met its aims and struck a particular balance between competing interests – the case of Quila and Bibi\(^5\) was an example; and

   c. greater creativity in the use by courts of existing mechanisms in the HRA. For example, it might be open to courts to define the scope of a particular right more clearly prior to issuing a declaration of incompatibility under section 4 HRA.

27. It was questioned whether it was the courts’ role to seek justification from Parliament for any particular measure; it was suggested that the courts’ primary role was simply to determine lawfulness.

Session 2: Has the operation of the European Convention on Human Rights and the Human Rights Act impacted on the adjudication of cases by UK courts? What has been the impact of the ECHR and the HRA on the operation of Parliamentary sovereignty in the UK?

28. The Chair of the session opened the discussion by setting out the aims of the session and noting the paper that had been circulated ahead of the session (see annex A).

What has been the impact of the Convention and the HRA on the operation of Parliamentary sovereignty in the UK?

29. It was argued that contrary to Dicey’s original thesis that all statutes were equal, the HRA had a special status as it was not subject to the doctrine of implied repeal. The model adopted under the HRA whereby courts had the power to issue a declaration of incompatibility but not strike down legislation judged incompatible with Convention rights, was described as a ‘clever compromise’.

30. It was asserted that since courts did not have a strike-down power under the HRA, judicial power in the UK was comparatively weak when one considered that many other democratic countries had given their courts strike-down powers in respect of fundamental rights.

31. It was important to acknowledge that the HRA shared power and thus the responsibility for human rights protection among all three branches of Government. For example section 19 of the HRA placed a requirement on the executive to formally consider human rights issues in introducing legislation. The executive was, in turn, accountable to Parliament.

\(^5\) R (on the application of Quila and another) (FC) (Respondents) v Secretary of State for the Home Department (Appellant); R (on the application of Bibi and another) (FC) (Respondents) v Secretary of State for the Home Department (Appellant) [2011] UKSC 45.
32. Against that background it was suggested that arguments suggesting that the HRA had affected the principle of Parliamentary sovereignty were unsubstantiated.

33. On the other hand it was argued that sections 3 and 4 of the HRA had changed the relationship between the courts and Parliament. The interpretative approach in section 3 was not one that the courts had taken prior to the HRA. It was further argued that section 4 of the HRA had only formally preserved Parliamentary sovereignty as Parliament inevitably responded to any declaration of incompatibility by enacting amending legislation. Against that background, a declaration of incompatibility had a similar effect to the judicial strike-down of legislation in other countries such as the United States; the only significant difference being the immediacy of the impact.

34. It was argued that the HRA had affected Parliamentary sovereignty because the Act had changed the shape of the dualist system. Prior to the HRA, the Convention had been considered binding only on the UK as a state; now it was considered binding on courts and public authorities.

35. Against this it was argued that any intrusion on Parliamentary sovereignty as a result of the HRA did not prevent Parliament from amending the HRA whenever it wished.

36. It was suggested that the devolution settlements had to a degree shifted the balance in the Parliamentary sovereignty debate, since under the devolution statutes the courts had a strike-down power in relation to laws enacted by the devolved Parliaments. The Commission was urged to consider the views of those outside Westminster on the issue of Parliamentary sovereignty. It was suggested that Northern Ireland, Scotland and Wales appeared content with the model whereby their respective courts had a strike-down power i.e. a power to declare that legislation incompatible with Convention rights was ultra vires the respective devolved legislature and therefore of no effect.

37. A number of general observations were made in respect of the Strasbourg Court, including the following:

- the Strasbourg Court had created a form of common law of Europe. Any attempt to untangle the delicate balance that it had struck would be difficult;

- the Court had arguably 'overreached' itself in its adjudication of a number of the cases to have come before it;

- on the other hand the focus on a small number of politically high profile Strasbourg cases overlooked the fact that there were as many or more with which there had been little argument; in practice no court ever received universal praise for all of its judgments;

- it was necessary to determine whether the Strasbourg Court might be considered a 'longstop' measure or a mechanism for ensuring consistency across Member States;

- the protection of human rights should involve the definition of fundamental objectives together with a wide margin of manoeuvre for
States in respect of their implementation. The legitimacy of many fundamental human rights had been based on their endorsement by democratic legislatures in earlier generations. The views of subsequent legislatures on such rights was bound to evolve;

- it was, however, asked whether an evolutive approach to interpretation was appropriate in the adjudication of international treaties, including the ECHR. It was suggested that such an approach was contrary to the Vienna Convention and should be deployed only by domestic judges whose proximity to the national jurisdiction equipped them with a better sense of evolving national standards.

Has the operation of the ECHR and the HRA impacted on the adjudication of cases by UK courts?

38. It was suggested that historically courts were considered ‘activist’ in resisting change, but that courts were now perceived as ‘activist’ if they brought about change, often in human rights cases.

39. It was noted that it was important to recognise that the judiciary was not a monolithic institution. Judges were being called on to interpret and adjudicate more and more overlapping and sometimes competing legislation. Moreover, they were not in a position to decline to determine cases. The description of judges as ‘activist’ meant that the judge had simply preferred the ‘activist’ argument that had been made by one of the parties to the case.

40. It was argued that the incorporation of the Convention into UK domestic law had animated the judicial interpretation of existing common law rights.

41. It was also argued that the Commission’s main interest should lie in the operation of the HRA and not in the abstract issue of the relationship between the courts and Parliament. The debate should focus, it was argued, on the operation of section 2 of the HRA and the way in which the Strasbourg jurisprudence had impacted on domestic courts.

42. In response it was argued that Parliament’s intention in enacting section 2 HRA had been clear. Parliament had voted against an amendment\(^6\) that would have made Strasbourg decisions binding on domestic courts.

43. It was suggested that domestic courts had not been helped in their interpretation of Strasbourg judgments by the fact that the latter were often not written in the common law style of reasoning through the setting out of the facts and applicable legal principles. Indeed Strasbourg judgments were often quite brief in setting out their application of legal principles to the case. For example, in cases involving public authorities, liability was often a question of degree, and it was at times difficult to reconcile Strasbourg jurisprudence with the intention of democratic legislatures. The Supreme Court judgment in *Quila and Bibi*\(^7\) was cited as an example.

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\(^7\) *R (on the application of Quila and another) (FC) (Respondents) v Secretary of State for the Home Department (Appellant); R (on the application of Bibi and another) (FC) (Respondents) v Secretary of State for the Home Department (Appellant)* [2011] UKSC 45.
44. There was, however, scope for Parliament to respond to individual Supreme Court decisions by amending the law in circumstances where it disagreed with the Court’s approach. For example it was open to Parliament to legislate to overturn the Supreme Court’s decision in *Quila and Bibi*.


45. There was a wide-ranging discussion of the paper at Annex A which contained a number of suggestions for reform of the status quo.

46. It was argued that those who sought to preserve the status quo in the current political environment had unrealistic expectations. Change was inevitable and it was necessary for those in favour of human rights to take action to secure their protection.

47. It was also necessary to decouple criticisms of the Strasbourg Court from calls for a form of national veto on Strasbourg decisions.

48. The paper argued that the Strasbourg Court did not sufficiently command the acceptance or confidence of the public; and that the Convention system did not have checks and balances on a par with those contained in national systems of adjudication; the changes proposed in the paper were an attempt to help legitimise the Council of Europe system, in part as an alternative to ignoring Strasbourg decisions or withdrawing from the Convention, as some critics of the Court were advocating.

49. The paper attempted to address what many considered to be a ‘democratic deficit’ within the Council of Europe system.

50. The view was expressed that criticism of this nature was not, however, confined to the supranational protection of human rights; many questioned the democratic legitimacy of other supranational and international bodies in areas such as trade and investment.

51. Doubts were expressed as to the extent to which any of the measures proposed in the paper might appease those critical of the role of the Strasbourg Court.

52. It was also argued that reforms such as those proposed in the paper risked opening the door to further measures which might fatally undermine the Court and therefore pose a major risk to the current system of human rights protection.

53. It was argued that the Strasbourg Court should be directed to ‘presume’ a margin of appreciation, since those who had drafted the Convention had clearly intended for the Convention to allow for a range of interpretive approaches. It was cautioned, however, that this needed to be carefully considered. The margin of appreciation was both potentially valuable and harmful: valuable in that it allowed the Strasbourg Court to be sensitive towards local conditions; harmful in so far as it led to supine decisions where the Court paid undue deference to the views of the Member State. Doubts were expressed as to the impact which any such presumption in respect of a measure considered by a domestic legislature would in fact have. In *Hirst*, it was argued that the Strasbourg Court’s reference to the doctrine had not led it to give any greater deference to the Member State.

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8 Ibid.
54. It was argued in this context that the fact that some might disagree with certain judgments did not mean that the whole system should be revised.

55. It was argued that the rules of interpretation contained in the Vienna Convention on the Law of Treaties applied to the interpretation of the ECHR. Article 31(1) of the Vienna Convention provided: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”9 It was further argued that the ‘purposive’ approach to interpretation adopted by the Strasbourg Court had been in pursuance of this rule and had been unjustly criticised. Others disagreed that the Vienna Convention provided the basis for the interpretative approach adopted, at times, by the Strasbourg Court.

56. From this perspective it was problematic for treaty-based interpretation to include reference to the ‘living instrument’ doctrine. The latter was arguably more appropriately deployed by Constitutional Courts. It was further argued that the Vienna Convention did not legitimise the Strasbourg Court’s use of the doctrine.

57. A comparison was drawn in this context with the European Court of Justice in Luxembourg. There had been criticism of the Luxembourg Court in the 1990s similar to that which the European Court in Strasbourg was now facing regarding judicial activism. However, a key difference was that, at a European level, lawmakers could change the law if they disagreed with the Court’s finding (under the EU treaties).

58. Others pointed to a number of existing checks and balances within the Strasbourg system:

a. there was evidence of increasing ‘judicial dialogue’ between domestic courts and the Strasbourg Court. The influence of the Supreme Court’s approach in *Horncastle*10 in the context of the Grand Chamber’s determination of *Al-Khawaja and Tahery v United Kingdom*11 was one example;

b. the role of the Joint Committee on Human Rights and the requirement in section 19 of the HRA were examples of how the legislative and executive branches had a role in this dialogue. The ADI case12 was one example of the potential power of section 19;

c. the mechanism for allowing Member States to intervene in cases involving other Member States before the Strasbourg Court provided a further, although indirect, safeguard in respect of the role carried out by the Strasbourg Court;

d. it would be advantageous to consider whether it might be possible to create a form of democratic constraint on the Court’s judgments similar to that under article 1131(2) of the North American Free Trade Agreement,

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10 *R v Horncastle and others (Appellants) (on appeal from the Court of Appeal Criminal Division)* [2009] UKSC 14
11 *Al-Khawaja and Tahery v United Kingdom* (Applications nos. 26766/05 and 22228/06)
12 *R (On the Application of Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] UKHL 15.
by which the trade ministers of each of the three member states could issue a binding interpretation of a provision of the Agreement. Doubts were, however, expressed about the appropriateness of such a mechanism in this context, and about its feasibility, given that there were 47 Member States of the Council of Europe.

Session 3:

59. The Chair of the session opened with some introductory comments. He noted that the session was intended to explore what arrangements other countries had and how they had responded to a supranational Court.

Norwegian Commission on Human Rights in the Constitution

60. Participants were informed of the experience of Norway where a Commission on Human Rights in the Constitution had been established. The following points were noted:

- the Norwegian constitution was the second oldest written constitution in the world, and the oldest in Europe;
- the Norwegian Parliament had appointed a Commission on Human Rights in the Constitution with a remit to make recommendations for updating the Norwegian Constitution to coincide with the forthcoming bicentennial of Norway’s existence as an independent nation;
- in the context of the Commission’s deliberations, there had been a similar debate in Norway as in the UK on many human rights issues, including in relation to the balance between Parliament and the judiciary;
- there had also been political debate before the Commission had been established. For example, the Norwegian executive had been wary of additional restrictions of its powers;
- the Commission had published its report in 2011 proposing 20 new paragraphs for the Norwegian constitution, as well as a proposed new ‘paragraph 2 of the constitution, which would stipulate that the object of the Constitution was to protect democracy, the constitutional state and human rights. There had been debate in this context over whether ideas of democracy, constitutional state and human rights supported each other or sat in tension with one another;
- there was unlikely, however, to be any final decision by the Norwegian Parliament on the recommendations in the Commission’s report until 2014 because a general election had to take place between the presentation of the report and any final decisions being taken on its proposals;

13 The Human Rights Commission concerning Human Rights in the Constitution was established in 2009 as part of preparations for the Bicentenary of the Norwegian Constitution in 2014. The Commission’s terms of reference were to “prepare and put forward recommendations for a limited revision of the Constitution with the object of strengthening the position of statutory national human rights by means of enshrining central human rights in the Constitution.”
the concept of Parliamentary sovereignty did not really exist per se in Norway. Since 1814, the Norwegian constitution had stipulated that power lay with the people and was executed through the Parliament. Parliament was therefore an instrument; it was the people who were sovereign;

opponents of the Commission’s recommendations had nevertheless pointed to the danger of the ‘judicialisation’ of human rights, with the role of articulating human rights increasingly passing from the people to the courts. However, it was asserted by supporters of the Commission’s recommendations that if Parliament voted by a two-thirds majority to include new human rights in the constitution, this would be an acceptable way to bind the state because it was a democratic method;

international conventions ratified by Norway had become part of the Norwegian common law after an Act of Parliament in 1999 that provided for them to be automatically incorporated into Norwegian domestic law. This Act also provided for international conventions to take precedence if there were a conflict between a convention and the domestic law. However, the Norwegian Supreme Court was robust in adjudicating human rights cases under the Norwegian constitution rather than referring automatically to the Convention and the jurisprudence of the European Court of Human Rights.

61. There followed a discussion on the experience of the Norwegian Commission in which a number of observations were made, including:

very few cases went from Norway to the European Court of Human Rights. (those cases that had had predominantly raised issues of freedom of expression and the Norwegian Supreme Court had since adjusted its interpretation);

the Commission had not set out explicitly to follow the wording of the Convention, but instead had considered all of Norway’s international obligations;

it was clarified that under Norwegian law if there were a conflict between international law and domestic law international law took precedence;

it was noted that the socioeconomic rights found in the Convention were already part of the Norwegian constitution or ordinary statutes. However, these matters were seldom brought before the courts, probably because it was generally felt that they were not matters on which it was appropriate for the courts to rule;

the view had been expressed that socioeconomic rights might take the courts into territory that many viewed as the purview of the legislature such as the right to a satisfactory standard of living;

through the proposed new Article 114 of the constitution, it would be possible for the courts to strike down legislation;

it was noted that the text proposed consolidating all the articles on rights into one chapter of the Norwegian Constitution.
Other international perspectives

62. The Chair of this part of the session set out two objectives: to discuss how other countries approach fundamental rights and set the balance between the courts and the legislature; and how other countries respond to the situation of a supranational court adjudicating fundamental rights.

63. On the first objective, it was noted that some democracies (such as Canada and New Zealand) had provisions akin to the declaration of incompatibility mechanism in the UK. The provision in New Zealand was essentially the same as that in the UK, but the provision in Canada (section 33 of the Canadian Charter of Rights and Freedoms) allowed a legislature to pass a resolution following a court judgment that said that an impugned provision would operate ‘notwithstanding’ the right in question. This provision had never been used by the federal government in Canada and only a handful of times by certain provincial legislatures, presumably on account of the political consequences of such a resolution.

64. It was further noted that all genuine democracies regarded fundamental rights as an inherent part of a democratic society. Various different approaches were noted, including:

a. the ECHR model of rights;

b. aspirational rights though if these were too vague they risked being meaningless;

c. socioeconomic rights (such as in South Africa) which, where they were justiciable, were often conditional on the availability of resources, or constituted relevant considerations when other decisions were being taken; and

d. open-ended and wide ranging rights (such as the right to life, liberty, property etc. in the US Bill of Rights), which could be so general that the role which the courts then played in interpreting them could lead to the politicisation of the judiciary.

65. In terms of supranational courts and their interaction with the states over which they have jurisdiction, various examples of international/supranational courts were cited, including:

a. the Judicial Committee of the Privy Council which still played a final appellate role in relation to certain Commonwealth countries. It was suggested that it might be useful to review the role which the Privy Council had had in developing a common law for the Commonwealth, and in adjudicating human rights issues;

b. various courts in Africa, which had had differing degrees of success. It was suggested that these courts had nevertheless helped states to establish rights collectively that they had not been able to establish on their own;

c. the Inter-American Court, which had left a margin of appreciation to states, while at the same time developing a common standard between its signatory states; and
d. the European Court of Human Rights, influenced by the UK approach, which had sought to build common European standards for human rights. It was noted that the Convention (and the Strasbourg Court) had a different status in different states. For example, in Germany the fundamental constitutional principles had a higher status than the Convention; in France, this issue was less settled.

66. It was suggested that some commentators in Council of Europe member states had welcomed the establishment of a UK Commission on a Bill of Rights because they saw it as assisting in rebutting judgments of the European Court.

67. It was noted that fundamental rights in other member states of the Council of Europe were generally enshrined in written constitutions. It was suggested that this meant that although these states had incorporated the ECHR into their domestic laws, their domestic courts tended to adjudicate cases about fundamental rights using the constitutionally entrenched domestic rights apparatus. It was suggested that they therefore interacted with Strasbourg cases more effectively from a position of constitutional strength. For example, the German Constitutional Court in the case of Görgülü\(^\text{14}\) had effectively indicated to the Strasbourg Court that in respect of the determination of fundamental values within Germany, sovereignty lay in Germany, not in Strasbourg. It was suggested that this approach went beyond that adopted by the UK Supreme Court in Horncastle\(^\text{15}\).

68. It was noted that the Strasbourg Court’s judgments were monitored by the Legal Affairs Committee of the Council of Europe. It was suggested that the Legal Affairs Committee had been a successful bridge between Strasbourg and member states. It was suggested that there could be greater recourse to this Committee.

69. There followed a discussion on the dissemination of the European Court’s judgments. The view was expressed that the Court’s judgments were not sufficiently accessible or prepared for a wider audience. The question then followed about how subsidiarity could work effectively if judges in Council of Europe states could not read the judgments of the Court directly.

70. It was suggested in this context that the Court’s judgments should be translated into more languages than at present (English and French). It was thought that wider translation might be achieved relatively easily by providing a summary of the facts of the case (which was already available) and the relevant key paragraphs of judgments in which the European Court outlined its decision and the reasons for it. Each member state might then be responsible for translating this into its national language(s) and for dissemination of the judgment.

71. In opposition to this suggestion, it was argued that there was already difficulty translating between the current official languages of the Court; English and French, which could lead to mistranslations. This problem would be multiplied if judgments had to be translated into every Council of Europe language, in addition to being prohibitively expensive.


\(^{15}\) R v Horncastle and others (Appellants) (on appeal from the Court of Appeal Criminal Division) [2009] UKSC 14.
72. The concept of cosmopolitanism was outlined: it denoted the growing tendency when arguing cases before the courts of looking to other legal systems in order to persuade judges to follow certain approaches. Lawmakers and civil servants had taken similar approaches in their own fields of work.

73. However, it was argued that overuse of this approach had led to some poor decisions because conclusions had been reached by considering issues out of context.

74. There was then a discussion on case law involving issues of deportation and extradition. In particular:

- there was debate about absolute rights and what the extent of the jurisdiction of the European Court should be in this area;

- in this discussion, attention was drawn in particular to two recent Strasbourg cases involving the UK: *Sufi & Elmi v UK*\(^ {16}\) and *Othman (Abu Qatada) v UK*.\(^ {17}\) It was suggested that these cases went to the heart of the current debate amongst the general public as to whether the Court was ignoring the rights of the majority of law abiding citizens to live lives free from the risks arising from the presence in the UK of such individuals;

- It was argued that it was fundamental to the notion of human rights that they extended to all irrespective as to whether they were seen as ‘good’ or ‘bad’ individuals.

- it was debated whether the European Court had so overreached in its judgments in these cases as to be an excess of jurisdiction, or whether the Court had been right to rule as it had.

75. Some felt that the UK had a key role to play in setting an example internationally. The view was expressed that this might be an area of the Convention where views might differ, but in which the Court had not acted in excess of its jurisdiction.

76. However, others held the view that, whilst the UK might have a role to play internationally, this should not mean that Parliament had to accept highly questionable interpretations of the Convention. It was argued that there were many examples of other member states not implementing judgments from the European Court and that the UK Parliament should not have to accept every judgment from the European Court.

77. It was further argued that the issues at the heart of the cases cited above were not in any event matters for the European Court because there had been no breach of the Convention within its jurisdiction (as per Article 1). In concrete terms, any potential breach would have occurred outside the territory/jurisdiction of the Council of Europe states. Judgments such as in *Othman* or *Sufi and Elmi* were, it was argued, examples of the Court overreaching its role.

78. The view was also expressed that such cases should be assessed against a balance of risk: the risk of harm to the individual weighed against the risk of harm to the public if s/he remained in the country. Such cases in practice posed very

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\(^{16}\) *Sufi & Elmi v UK* (Application no. 8319/07)

\(^{17}\) *Othman v UK* (Application no. 8139/09)
difficult challenges for Ministers and senior civil servants who had to balance different obligations and considerations taking into account both the individual’s rights but also public security and protection.

The nature of a UK Bill of Rights

79. A discussion followed of whether and with what effect the provisions in a UK Bill of Rights could differ from the text of the Convention rights. One aim might be to provide more detail about the scope of certain rights and the balance between rights. A concern was expressed about the potential consequences of attempting too detailed and exhaustive an elaboration of rights. Support was voiced for a principle-based approach, under which rights would be left for judges to apply to the facts of the particular circumstances before them.

80. The view was also expressed that a new vision for the UK’s constitutional future was needed before there could be a UK Bill of Rights because the landscape had changed, particularly in the light of devolution.

81. The view was expressed that a Bill of Rights would not make a difference to the current debate about the Strasbourg Court’s judgments. Although it could potentially, for example, amend legislation to clarify the scope and/or application of certain rights, such as Article 8, it would not be possible to have a Bill of Rights that curtailed the judgments of the European Court.

General conclusions and reflections

82. A number of concluding observations were made in response to the day’s proceedings and related matters.

83. It was argued that changes to, or a departure from, the Human Rights Act had not been demonstrated to be necessary and that a symbolic UK Bill of Rights would not only not enhance the protection of rights but could also pose other challenges to rights adjudication and protection. Others, however, expressed support for a UK Bill of Rights so long as it built on the standards of the Human Rights Act and the Convention, and did not subtract from them. The view was also expressed that if it were feasible to create a Bill of Rights which enhanced the protections in the Human Rights Act, then there would be no good reason not to proceed with it.

84. By way of response, the view was expressed that the Human Rights Act had not sufficiently reflected the UK’s historic development of rights and freedoms. A national Bill of Rights could reconnect the UK with its heritage and with the development of the common law. It was argued from this perspective that it was both desirable and important to remove the ‘European’ label from human rights in this country, and thus to address the negative perceptions held by many people about the Human Rights Act, the Convention and the Strasbourg Court. A UK Bill of Rights could gain greater acceptance and so reinforce the rights contained in it. Recourse to Strasbourg would still be possible under such an arrangement.

85. It was suggested that such a Bill could include certain rights for the whole of the UK (either as set out in the existing language of the Convention or with the language tailored to the UK’s heritage as well as providing for differing arrangements in some respects in Northern Ireland, Scotland and Wales in recognition of the different heritage in each country and the competence of the
devolved administrations and legislatures. Certain additional rights might be included solely for England in such a Bill such as the right to jury trial, and open justice in civil cases. It would then be a matter for the devolved administrations and Parliaments in Northern Ireland, Scotland and Wales to decide whether to introduce such rights within their own jurisdictions.

86. On the other hand, it was argued that such a Bill would be unlikely to gain acceptance in the other countries of the UK which were looking increasingly to their own legislatures rather than to Westminster for such protections and would be likely to be averse to the concept of a ‘UK’ Bill of Rights. It was suggested that an ‘England only’ Bill of Rights might be the only viable solution if such a Bill was needed at all.

87. Concern was also expressed that now was not the moment for consideration of such fundamental changes because of the uncertainty currently surrounding the UK’s constitutional arrangements.

88. In a final set of interventions the question was raised of what precisely was the ‘mischief’ to which a UK Bill of Rights would be the solution.

89. The view was expressed in this context that current public concern stemmed primarily from certain decisions of the Strasbourg Court, and not from particular Convention rights or the interpretation of them by UK courts. Some suggested that there were various ways to address this concern, but these did not include a UK Bill of Rights. Others rejected this argument because they considered that the European Court’s jurisprudence was central to the debate given the UK’s obligations under the Convention and because the domestic courts would always need to consider jurisprudence from Strasbourg.

90. It was also argued in this context that the current public concern stemmed from more than simply anti-'Europe' sentiment. Rather it arose primarily from concerns about the democratic legitimacy of rulings from the Strasbourg Court given that there were no democratic means whereby a Strasbourg judgment could be changed.

91. On the other hand it was argued that it had simply to be accepted as part of the rule of law that there would always be judgments from the Court which would not be universally welcomed. That was the natural outcome of submitting to the jurisdiction of the Court and to the constraints that this entailed.

92. In that context it was argued that public outrage at a particular judgment might simply at times have to be accepted.

93. Finally the view was expressed that it was a false to suggest that there had to be a choice between the status quo and a Bill of Rights which would promote isolationism. A UK Bill of Rights could help over time to promote a more mature relationship between the UK and the European Court.

Chair’s concluding remarks

94. Summing up the discussion, the Chair said that it had been a very rich and wide-ranging discussion on an important subject and that he and Commission members were very grateful to all participants for their contributions.
Annex A

SUGGESTED ISSUES for ALL SOULS SEMINAR

1. The European Convention of Human Rights is an international treaty and should be interpreted in accordance with the standard principles for interpreting treaties, which today are embodied in the Vienna Convention. This has been recognised by leading writers⁴, and by the Strasbourg Court itself⁵. It is reasonable to regard the UK as having adhered to the Convention and accepted a treaty obligation to accept the Court's decisions on this basis.

2. The fundamental principle for the interpretation of treaties is to seek the intentions of the parties when making the treaty as expressed in the text³. Distinguished judges have regarded this as the correct approach to interpreting the Convention¹.

3. However, the Strasbourg Court has in recent years more clearly developed jurisprudence at various with those principles, and which under the banner of "living instrument" has repeatedly held contracting states bound by obligations which they did not expressly accept and clearly would not have been willing to accept. There are innumerable examples. For instance:-

   a. In Hirst v UK⁶ the Court held that denying votes to prisoners was an infringement of 1st Protocol Art 3. However, in the course of the negotiation of the Convention a proposal to include the words "universal suffrage" was rejected after the UK representative pointed out that the UK barred the vote not merely from prisoners, but also peers and the insane⁶. Under article 32 of the Vienna Convention preparatory work is an admissible aid to interpretation in the event of ambiguity⁷.

¹ e.g. "Law of the European Convention on Human Rights" Harris, O'Boyle & Warbrick (2nd ed, 2009): "As a treaty, the Convention must be interpreted according to the international law rules on the interpretation of treaties. These are to be found in the Vienna Convention on the Law of Treaties 1969"

² In Jama v UK [1985] 2 EHRR 123 the Court explicitly applied art 31(1) of the Vienna Convention in determining the meaning of the Convention's text

³ e.g. "Principles of Public International Law" Ian Brownlie (6th ed ) p. 602: "The [International Law] Commission and the Institute of International Law have taken the view that what matters is the intention of the parties as expressed in the text, which is the best guide to the more recent common intention of the parties."

⁴ e.g. Lord Bingham in Brown v Stott [2003] 1 AC 686 at p.703: "In interpreting the Convention, as any other treaty, it is generally to be assumed that the parties have included the terms which they wished to include on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree. Thus particular regard must be had and reliance placed on the express terms of the Convention .... This does not mean that nothing can be implied into the Convention .... But the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept."

⁵ (2006) 42 EHRR 41

⁶ Research into this is set out in "Prisoner Voting, Human Rights & the Case for Democracy" Dominic Raab MP (Civitas, 2011) pp.5-6
b. In *Wynne v UK* the Court held that the Home Secretary's role in determining when to release life prisoners was compatible with the Convention. Just 8 years later in *Stafford v UK* the Court decided the opposite: the reason for the change was said to be developments which caused reassessment "in the light of present-day conditions". But if the 1995 decision correctly interpreted the intention of the parties when making the treaty as expressed in the text, it is impossible that subsequent developments can have altered that intention.

c. In *Sigurjonsson v Iceland* (1993) 16 EHRR 462 a domestic law required taxi-drivers to belong to a specified occupational association: the Court took note of the fact that *travaux preparatoires* showed that those drafting the Convention had deliberately omitted a right not to be compelled to belong to an association, but held nonetheless that the applicant had such a right. The Court was influenced by a "growing measure of common ground at international level", including a 1989 Charter of Social Rights of Workers adopted by the European Community, of which Iceland was not a member.

d. In *Safi & Elmi v UK* the Court in 2011 held that the rights of two Somalis with atrocious criminal records in England would be infringed by their deportation, because the chaotic internal conditions in Somalia would amount to "inhuman or degrading treatment or punishment"; it was not suggested that the UK was responsible for the internal state of Somalia. Yet the obligation on contracting states in art 1 of the Convention is to secure rights only "within their jurisdiction". It cannot be seriously suggested by anybody that the contracting states in 1950 considered that a state would be breaching art.3 by such a deportation.

4. In consequence there is an ever growing list of restrictions on the scope for choices by the UK’s Parliament and Government -- not by reason of obligations freely and consciously agreed, but by reason of the Strasbourg Court treating the words of the Convention as a blank cheque enabling it to make decisions without any predictable boundary. Thus parliamentary democracy is being eroded in favour of what might be called a dikastarchy.

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7 Brownlie op. cit. p.605
8 (1995) 19 EHRR 133
9 (2002) 35 EHRR 32
10 28 June 2011 judgment on applications 8319/07 and 11449/07
11 This form of rights inflation is also the reason why the Court's decision in *Othman (Abu Qatada) v UK*, 17 January 2012, flies in the face of the text of the Convention. Qatada was subject to an order for expulsion, not extradition. The breach found was of art 6, although the Jordanian Court was manifestly not within the UK's jurisdiction.
12 δικαστής - a judge
5. This erosion is qualitatively different from the diminution of national freedom of action occasioned by membership of the European Union. For membership of the EU involves pooling of sovereignty in a transnational organisation which is itself democratic: EU decision-making is in the hands of a Council of Ministers drawn from the governments of states which are parliamentary democracies, and of a European Parliament, which is itself directly elected. There is no comparable element of parliamentary democracy in the emergence of the restrictions on the Westminster Parliament currently being imposed under the Convention.

6. This erosion of parliamentary democracy is undermining the acceptance of the Convention's obligations in the UK by Members of Parliament13, liberal opinion-formers14, and the people generally15. So what should be done?

7. One option for the UK is permanent withdrawal from the Convention. However, this option is precluded by the Commission's Terms of Reference, and anyway would be a pity.

8. A second option, supported by a growing number of MPs is that the UK should simply disregard some Strasbourg judgments: this might, for example, be done if the House of Commons on a free vote resolved to do so16. But the wilful disregard of the treaty obligation contained in art 46 of the Convention would be a departure from the customary British way of behaving.

9. A more attractive and internationalist approach is to seek at European level significant checks and balances upon the Court's absolute power. For instance:

a. Press the Strasbourg Court to adopt a new policy of respect for democratic rights, and specifically,
   i. interpreting in accordance with the Vienna Convention principles; and
   ii. presuming a margin of appreciation in respect of a measure considered by a democratic legislature.
   A variant on this idea would be an Interpretive Protocol17.

b. Press the Committee of Ministers to adopt a new policy of declining to enforce

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13 Resolution on 10 February 2011 carried by 234 votes to 22

14 E.g. "Call Strasbourg's bluff: send Qatada home" Camilla Cavendish The Times 9th February 2012

15 YouGov survey September 2011 "Do you think the European Court of Human Rights has too much power to intervene in British laws, not enough power, or is the balance about right?" Too much power - 67%. Not enough power - 5%. balance is about right - 18%. Not sure - 9%.

16 This was suggested by Dominic Raab MP in "Strasbourg in the Dock: Prisoner Voting, Human Rights and the Case for Democracy" published by Civitas 2011.

17 See the suggestion in "Rescuing Human Rights" by Jonathan Fisher QC published by the Henry Jackson Society, 2012
Court decisions which it considers would not have been made if the Court had applied a policy of respect for democratic rights\textsuperscript{18}. This would be a species of what has been called "democratic dialogue"\textsuperscript{19}. An example of such an arrangement is provided by section 33 of the Canadian Charter of Fundamental Rights and Freedoms, whereunder the legislature may insert a provision into legislation to the effect that it shall take effect notwithstanding the Charter.

c. Press the Committee of Ministers to adopt a new policy of announcing agreed interpretations on the meaning and application of the Convention to current or prospective issues. Unlike the idea in the previous sub-paragraph, this would involve no retrospective override of a Court decision, but merely a prospective new policy for the future. Under the Vienna Convention art.31(3) subsequent agreements between the parties are to be taken into account regarding the interpretation or application of a treaty. The NAFTA Agreement offers an example of state parties agreeing "authoritative interpretations" (art.1131(2)).

d. Press the Strasbourg Court to submit to the jurisdiction of the International Court of Justice to determine challenges by member states that it has exceeded its jurisdiction by determining cases before it other than in accordance with Vienna Convention principles\textsuperscript{20}.

e. UK give 6 months notice of withdrawal under art.58 of the Convention, and immediately re-apply, making reservations in respect of matters on which the UK is unable to accept the Court's interpretation. Assuming that this course of action was approved by the Westminster Parliament, it would have the effect that, upon the UK rejoining, there would be a democratic mandate, subject to the UK's reservations, not only for the Court as an institution, but also its known "living instrument" jurisprudence.

10. The final option is that favoured by almost the whole of the soi-disant "Human Rights Community" -- do nothing. But the likely outcome of this course is a continual rise of the temperature within the Conservative Party and wider national pressure cooker of frustration and outrage leading to an eventual explosion, from which the collateral damage is unforeseeable.

ANTHONY SPEIGHT Q.C.  

15 March 2012

\textsuperscript{18} A variant mentioned in the side letter from the Chair of the Commission to Ministers in July 2011 would be for an element of co-decision between Committee of Ministers and Parliamentary Assembly, or prior consultation with the Parliamentary assembly.

\textsuperscript{19} See "Parliamentary Sovereignty and the Human Rights Act" by Alison Young, Hart Publishing 2009, pages 112 to 127.

\textsuperscript{20} It is interesting to observe that in the Lisbon treaty there is now an arrangement for the ECF to strike down acts of an institution which acts in a manner which, whilst otherwise within its competence, are incompatible with subsidiarity. The Strasbourg Court would benefit from some similar restriction when it acts ultra vires.
Report to the Presidium of the Storting
by the Human Rights Commission concerning Human Rights in the Constitution


To the Storting

As part of the Storting’s preparations for the Bicentenary of the Norwegian Constitution in 2014, the Presidium of the Storting appointed on 18 June 2009 a commission whose terms of reference were to

“prepare and put forward recommendations for a limited revision of the Constitution with the object of strengthening the position of statutory national human rights by means of enshrining central human rights in the Constitution.”

The Commission’s terms of reference also instruct it to base its recommendations on the draft constitutional amendments resulting from the cross-party settlement of 2008 on the State and the Church of Norway, cf. Document no. 12 (2007-2008), draft constitutional amendment no. 10. In this context, the Commission has attached particular importance to the proposed objectives clause in the new § 2:

“This Constitution shall safeguard democracy, the constitutional state and human rights.”

The assignment has now been completed, and the Storting’s Human Rights Commission is pleased to submit its recommendations for a limited revision of the Constitution.

Oslo, 19 December 2011

Inge Lønning
(Chair)

Carl I. Hagen
Indreberg

Jan E. Helgesen

Hilde

Pål W. Lorentzen
Nordheim-Larsen

Janne Haaland Matlary

Kari

Benedikte Moltumyr
Høgberg

Mari Mæland
Part I Introduction

1. Summary

1.1 The Commission’s recommendations for constitutional amendments

The Storting’s Human Rights Commission was appointed to prepare and put forward recommendations for a limited revision of the Constitution with the object of strengthening the position of human rights in Norwegian law.

The Commission has debated in which ways the protection of human rights in the Constitution may be reinforced.18 Several of the Constitution’s provisions on human rights were drawn up in 1814. Certain of these are as relevant today as ever, while others have little or no relevance. Some of the provisions are also extremely difficult to understand. Society has changed in the time that has passed since the Constitution was adopted. Only to a moderate degree has this been reflected by new human rights provisions.

This means that, in the sense that only certain, central human rights are expressed in the Constitution, the protection of human rights in today’s Constitution is fragmented. The Constitution does not present an overall picture of the degree to which the protection of human rights really exists in Norwegian legislation. Thus, there is the danger that those reading the Constitution will form a distorted and insufficient picture of the values that Norwegian society is based on. At the time of the State/Church of Norway settlement, there was broad cross-party consensus that the Constitution must have a new objectives clause in § 2, where it is stated that the object of the Constitution is to protect democracy, the constitutional state and human rights.19 This is an argument in favour of revising and supplementing the protection of human rights in the Constitution in order to improve the visibility of these values and to satisfy the proposed objectives clause in the new § 2.

It is also possible that today’s fragmentation may lead to judicial ambiguity regarding whether the values expressed in the Constitution are more important than or take precedence over human rights in other legislation. If this is the case, application of the Constitution in courts of law and administration may lead to a situation where certain human rights are unintentionally given special attention at the expense of others.

Additionally, we have seen that in every parliamentary term, several draft amendments to the provisions on rights in the Constitution have been put forward. This indicates that there is general dissatisfaction with the extent of today’s constitutional rights. In recent years more comprehensive public reports on personal privacy and protection against discrimination have concluded that the protection of rights in the Constitution must be reinforced.20

The Commission concludes that protection of rights in the Constitution should cover, at minimum, those central human rights that form the basis of the international human rights conventions endorsed by Norway. It is a prerequisite of the international work on human rights that these questions, first and foremost, find an expedient and effective solution nationally so that international bodies set up by the UN and the

18 For questions about whether the protection of human rights in the Constitution should be reinforced, see chapter 10.
19 For more about the State/Church of Norway settlement, see point 10.3.
Council of Europe are not weighed down unnecessarily by legal questions that could be solved at a national level. Even though Norway places relatively little strain on these bodies, it is important all the same that Norway accepts the same responsibility as other member states for finding good national solutions to human rights questions. Since the Constitution is more difficult and time-consuming to amend than other legislation, cf. Constitution § 112, the enshrining of central human rights in the Constitution would advance stability and predictability in Norwegian society.

In the view of the Commission, the enshrining of central human rights in the Constitution would not result in what is often described as the juridification of society. 21 The principal function of human rights is to safeguard the freedom of the individual, equality and human dignity, cf. the preamble to the Universal Declaration of Human Rights from 1948. Throughout history there have been countless examples of freedom, equality and human dignity being grossly neglected and violated. Central human rights set the limits for legislative and executive power, with one of the duties of the courts being to protect these rights so that individuals do not suffer wrong. This balance between the branches of the state is integral to any constitutional state. This is why it is hard to envisage a credible constitutional state and a good democracy unless the most fundamental rights are safeguarded. With regard to those rights whose role is to safeguard the freedom of the individual, equality and human dignity, it is consequently wide of the mark to say that enshrining such rights in the Constitution may lead to the increased juridification of society. It may be added that these rights already form part of Norwegian law through the incorporation of several international conventions in the Human Rights Act of 1999. Consequently, the enshrining of central human rights in the Constitution would not result in there being more rights in the statutory framework.

In its preparation of specific recommendations for how the protection of human rights in the Constitution should be reinforced, the Commission has taken as its point of departure the premise in the terms of reference that it is the “central” human rights or the “universal principles” that are to be incorporated into the Constitution. When identifying these central human rights, the Commission has taken several aspects into account. The Commission has, inter alia, taken into consideration the minimum level of protection developed globally and in Europe. The Universal Declaration of Human Rights from 1948 and subsequent UN conventions have had great significance in determining which human rights are considered “central” in an international context. Next, the Council of Europe’s conventions, and in particular the European Convention on Human Rights of 1950 as interpreted by the European Court of Human Rights have played a prominent role in the development and safeguarding of central human rights in Europe.

In addition, the Commission has considered how human rights have been expressed in modern Western European constitutions, in particular the constitutions of our Nordic neighbours and the EU’s Charter of Fundamental Rights. At the same time, the commission has placed considerable emphasis on Norwegian traditions and values, both with a view to improving the visibility of the values that Norwegian society is built upon and in order that the Constitution is better suited to meeting Norway’s future challenges.

The Commission has endeavoured to reach agreement on which values and which rights should be included in the Constitution, and how these rights should be formulated. Alternative formulations may be found in the record of the Commission’s deliberations.

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21 For a more detailed assessment of juridification, see in particular point 10.5.3.
The Commission considered there to be two alternative models for how to place human rights in the Constitution. The first model entails that the new provisions in the Constitution would be placed among the existing provisions in the Constitution, while the second model entails that human rights in the Constitution would be collected in a new Part E, which would deal with human rights only. In the latter model, it is proposed that those provisions that currently reside in Part E but that do not relate to human rights would be moved to a new Part F consisting of general provisions. The Commission was unanimous in its view that the latter model would improve the visibility of human rights in the Constitution and would consequently best realize the new § 2. At the same time, a separate part on human rights would play a clarifying and educational role when compared to placing human rights provisions among the existing provisions in the Constitution. Such a clarification would in turn contribute to raising public understanding of and interest in the Constitution.

In light of this, the Commission recommends a new Part E on human rights and a new Part F consisting of general provisions. In this summary, the Commission’s proposals for a new Part E in the Constitution have been phrased in the constitutional language currently in use. In the last part of the report, the specific voting proposals have been phrased in both a general style and in the constitutional language currently in use:

Kari Nordheim-Larsen does not endorse the Commission’s proposal for a new § 103 first sentence, cf. point 31.5.6. Carl I. Hagen does not endorse the Commission’s proposals for new §§ 104, 107, 108, 109, 110, 111, 112, 115 and 116, cf. point 11.4.2. In accordance with the Commission’s recommendations, the new Part E in the Constitution will appear as follows (the amendments have been highlighted in italics):

“E. Human Rights.

§ 92
It is the responsibility of the authorities of the State to respect and ensure human rights.

§ 93

Every human being has an inherent right to life. No person may be sentenced to death.

No person may be subjected to torture or other inhuman or degrading treatment or punishment.

No person shall be held in slavery or forced labour.

It is the responsibility of the authorities of the State to protect the right to life and to prevent torture, slavery, forced labour and other forms of inhuman or degrading treatment.

§ 94

No person may be taken into custody or otherwise be deprived of their liberty except in the cases determined by law and in the manner prescribed by law.

22 For a more detailed examination of these two models, see chapter 17.
23 For those existing provisions that the Commission has proposed moving to another article number, the Commission has used as its basis today’s constitutional language or the modernization of the language in the Constitution resulting from draft constitutional amendment no. 16 in Document no. 12 (2007-2008), which will be considered by the Storting during the current parliamentary term.
Deprivation of liberty must be so required and must not constitute an unreasonable infringement.

Persons detained should as soon as possible appear before a court. Others who have been deprived of their liberty should have the right to bring their deprivation of liberty before a court without unreasonable detention.

For unwarranted arrest, or illegal detention, the officer concerned is accountable to the person imprisoned.

§ 95

Everyone has a right to have their case tried by an independent and impartial court within reasonable time. Legal proceedings shall be fair and public. The court may however conduct proceedings in camera if considerations for the privacy of the parties concerned or if a weighty and significant public interest necessitates this.

§ 96

No one may be convicted except according to law, or be punished except after a court judgment.

Everyone has the right to be presumed innocent until proved guilty according to law.

No one may be punished more than once for the same act.

No one may be sentenced to surrender property or accumulated wealth unless the assets have been used to commit or are profits from a criminal act.

§ 97

No law must be given retroactive effect.

§ 98

All people are equal under the law.

No person must be exposed to unfair or disproportionate discrimination.

§ 99

Everyone has the right to freedom of thought, conscience, religion and life view. This freedom includes the individual’s right to change their religion or life view, and to practise their religion or life view alone or in community with others.

§ 100

There shall be freedom of expression.

No person may be held liable in law for having imparted or received information, ideas or messages unless this can be justified in relation to the grounds for freedom of expression, which are the seeking of truth, the promotion of democracy and the individual’s freedom to form opinions. Such legal liability shall be prescribed by law.

Everyone shall be free to speak their mind frankly on the administration of the State and on any other subject whatsoever. Clearly defined limitations to this right may only be imposed when particularly weighty considerations so justify in relation to the grounds for freedom of expression.

Prior censorship and other preventive measures may not be applied unless so required in order to protect children and young persons from the harmful influence of moving pictures. Censorship of letters may only be imposed in institutions.

Everyone has a right of access to documents of the State and municipal administration and a right to follow the proceedings of the courts and democratically
elected bodies. Limitations to this right may be prescribed by law to protect the privacy of the individual or for other weighty reasons.

It is the responsibility of the authorities of the State to create conditions that facilitate open and enlightened public discourse.

§ 101

*Everyone has the right to form, join and leave associations, including trade unions and political parties.*

*All people may meet in peaceful assemblies and demonstrations.*

The Government is not entitled to employ military force against citizens of the State, except in accordance with the forms prescribed by law, unless any assembly disturbs the public peace and does not immediately disperse after the Articles of the Statute Book relating to riots have been read out clearly three times by the civil authority.

§ 102

*Everyone has the right to the respect of their privacy and family life, their home and their communication.*

It is the responsibility of the authorities of the State to ensure the protection of personal integrity and information. The systematic collection, retention and use of information about others’ personal affairs may only take place in accordance with the law.

§ 103

*The family is a fundamental group unit of society. Everyone who is of marriageable age has the right to found a family, to marry and to dissolve the marriage in accordance with the specific provisions prescribed by the law. Marriage may only be entered into with the consent and free will of the intending spouses.*

§ 104

*Children have the right to respect for their human dignity. They have the right to be heard in questions that concern themselves, and due weight shall be attached to their views in accordance with their age and development.*

*For decisions that affect children, the best interests of the child shall be a fundamental consideration.*

*Children have the right to protection of their personal integrity. It is the responsibility of the authorities of the State to create conditions that facilitate the child’s development, including ensuring that the child is provided with the necessary economic, social and health security, preferably within their own family.*

§ 105

*If the welfare of the State requires that any person shall surrender his movable or immovable property for the public use, he shall receive full compensation from the Treasury.*

§ 106

*Everyone who resides legally in the Realm may move freely within the borders of the Realm and choose their place of residence there.*

*No person may be denied the right to leave the Realm, unless so required out of consideration for effective legal proceedings or the performance of military service. Norwegian citizens may not be refused entry into the Realm.*
§ 107

It is the responsibility of the authorities of the State to respect the individual’s cultural identity and to create conditions that enable the individual to participate in cultural activities and to experience a diversity of cultural expression.

Scientific and artistic freedom shall be respected.

§ 108

It is the responsibility of the authorities of the State to create conditions enabling the Sami people, as an indigenous people, to preserve and develop its language, culture and way of life.

§ 109

Everyone has the right to education. Children are obliged to receive basic education. The education shall safeguard the individual’s abilities and needs, and promote respect for democracy, the constitutional state and human rights.

It is the responsibility of the authorities of the State to ensure access to upper secondary education and equal opportunities for higher education on the basis of qualifications.

§ 110

It is the responsibility of the authorities of the State to create conditions enabling every person capable of work to earn a living by their work or enterprise. Those who cannot themselves provide for their own subsistence have the right to support from the State.

Specific provisions concerning the right of employees to co-determination at their work place shall be laid down by law.

§ 111

It is the responsibility of the authorities of the State to respect and ensure the right to a satisfactory standard of living.

Similarly, it is the responsibility of the authorities of the State to promote the health of the population and to secure the right to essential health care.

§ 112

Every person has a right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources should be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.

In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.

It is the responsibility of the authorities of the State to take measures for the implementation of these principles.

§ 113

Infringement of the authorities against the individual must have a legal basis.

§ 114
In cases brought before the Courts, the Courts have the right and duty to examine whether the law and other decisions made by the authorities of the State conflict with the Constitution.

§ 115
Every limitation of rights that is recognized in this Constitution must be laid down in the law and must respect the essence of the rights. The limitation must be proportional and necessary for safeguarding the public interest or others’ human rights.

In no case may such limitations be made in §§ 93, 94, 95, 96, 99 first sentence and 105. The same applies in § 97 for questions regarding punishment.

§ 116
The rights in this Constitution may not be departed from unless a decision is adopted to make a temporary exception when a proclaimed war or emergency situation makes it openly necessary to protect democracy, the constitutional state or the existence of the Realm.

In no case may a decision be adopted to depart from §§ 93, 96 and 99 first sentence. The same applies in § 97 for questions regarding punishment."

In addition, the Commission recommends that the existing § 49 is supplemented by a formulation about free and secret elections. The Commission’s proposal is highlighted in italics.

“§ 49
The people exercise the Legislative Power through the Storting. The Members of the Storting are elected through free and secret elections.”

1.2 Composition of the report

The Commission has divided the report into six parts, with consecutively numbered chapters. The six parts deal with different subjects, while the chapters examine the specific issues at hand more closely.

In Part I of the report, Chapter 1, a summary of the Commission’s conclusions and recommendations, along with this overview are presented. In Chapter 2 the Commission’s composition and terms of reference, the Commission’s work, and the reasons for appointing the Commission are explained.

In Part II of the report an overview of the legal points of departure and assumptions for the Commission’s work is provided. Chapter 3 introduces this part. Chapter 4 provides a closer examination of the Constitution’s previous history, its role and functions, along with which rights appeared in the resolution of 1814 and which rights have come later. Chapter 5 gives a summary of the development of international human rights. Chapter 6 provides a review of the position of international human rights in Norwegian law. In the final chapter of Part II an outline of human rights in other countries’ constitutions is provided, cf. Chapter 7.

In Part III of the report the Commission considers the general issues at hand that are raised by the Commission’s terms of reference. In this part the Commission has assessed and made decisions on several fundamental questions which must be answered before being able to conclude more specifically on which rights should potentially be enshrined in the Constitution. In this part general points of discussion relating to all of the rights in the Constitution are also raised.
To begin with, in Part III Chapter 9, the Commission raises the question of what is meant by human rights. In Chapter 10 the Commission considers the fundamental question of whether or not changes should be made to the human rights provisions in the Constitution. Chapter 11 assesses which rights must be considered central or universal. This is followed by Chapter 12, which deals with the Constitution’s general provisions on the protection of human rights. In Chapter 13 the Commission examines more closely whether a general statutory authority that stipulates the conditions for when limitations to the different rights provisions may be made should be enshrined in the Constitution. This is followed by Chapter 14, which concerns the maintenance and scrutiny of human rights. In this chapter various ways of securing human rights are referred to, and, among other things, an assessment is made of whether the courts’ power of judicial review should be enshrined in the Constitution. In Chapter 15 the Commission raises the question of how the Constitution’s human rights provisions shall be interpreted, including the question of whether an interpretation provision should be enshrined in the Constitution. In Chapter 16 the Commission deals with the question of whether human rights may be departed from in a war or emergency situation, so-called derogation. In this respect, it is considered whether or not it would be expedient to enshrine in the Constitution the conditions for when human rights may be departed from. Finally in Part III the Commission considers where to place possible new human rights in the Constitution, cf. Chapter 17.

In Part IV of the report the Commission considers the question of enshrining individual rights in the Constitution. In chapters 19 to 42, the rights that the Commission has identified in Chapter 11 as central or universal are dealt with in turn. In these chapters the Commission goes through each individual right in turn and makes reference to prevailing law in the area, what Norway’s obligations are through the international human rights conventions, and in what ways, if at all, the rights have been expressed in other countries’ constitutions, especially in those of our Nordic neighbours. Next, the Commission makes an assessment of whether rights should be enshrined in the Constitution, and, if so, how this should happen.

In Part V of the report the Commission briefly considers the potential economic and administrative consequences that an adoption of the Commission’s recommendations would have.

In Part VI of the report the Commission’s specific voting proposals are presented. These proposals will be phrased in both a modern language style and in the constitutional language currently in use. This should be seen in conjunction with the fact that during this parliamentary term a vote will be held on a proposal about whether to modernize the language of the Constitution, see draft constitutional amendment no. 16 in Document no. 12 (2007-2008).

2. About the Commission

2.1 The Commission’s appointment and composition

The Presidium of the Storting decided on 18 June 2009 to appoint a commission whose terms of reference were to prepare and put forward recommendations for a limited revision of the Constitution with the object of strengthening the position of statutory national human rights by means of enshrining central human rights in the Constitution.

The Commission has comprised the following seven members:
Kari Nordheim-Larsen was appointed by the Presidium of the Storting on 3 December 2009 to replace Grete Faremo, one of the original members of the Commission. This followed the appointment of Ms Faremo as Minister of Defence in the autumn of 2009.

The Commission’s secretariat has comprised Benedikte Moltumyr Høgberg, Ph.D., who has been the Commission’s specialist secretary throughout. In addition, the work of the secretariat has been supported by the fact that one of the Commission’s members, Hilde Indreberg, was on leave of absence from the Supreme Court for the purposes of contributing to the work between 1 October 2010 and 31 March 2011. Moreover, Mari Mæland, senior executive officer in the Storting’s administration, has provided the Commission with practical and technical assistance.

2.2 The Commission’s terms of reference

The Commission was given the following terms of reference:

“The Presidium of the Storting has appointed a commission whose purpose is to prepare and put forward recommendations for a limited revision of the Constitution with the object of strengthening the position of statutory national human rights by means of enshrining central human rights in the Constitution. The Commission’s work is included as part of the Storting’s preparations on the occasion of the Bicentenary of the Norwegian Constitution in 2014.

The Constitution regulates certain fundamental human rights. The current tradition of revising individual provisions means that both the subject and angle of such revisions may appear relatively random. During the forthcoming parliamentary term, several draft constitutional amendments, inter alia on discrimination, dwelling rights and the right to asylum, are under consideration.

It is therefore necessary to view the different constitutional provisions on human rights as a whole with a view to tidying up and adapting the Constitution to today’s situation. § 110 c of the Constitution states “It is the responsibility of the authorities of the State to respect and ensure human rights. Specific provisions for the implementation of treaties thereon shall be determined by law.”

Norway has incorporated a number of human rights conventions into its legislation. These conventions take precedence over other legislation if there is a disparity. This is why it is important that a fundamental and complete assessment of the place of human rights in the Constitution is undertaken. This should also include an evaluation of the Human Rights Act’s rule of precedence and the question of whether it should be possible to refer rights to the courts.

The purpose of this review will be to enshrine the universal principles of human rights in the Constitution, rather than to form a list of individual rights, which naturally belongs in ordinary legislation.
The Commission shall, on the basis of this, assess how the protection of human rights in the Constitution should be formulated.

It is assumed that the political agreement of 10 April 2008 on the State and the Church of Norway, which the seven parties represented in the Storting entered into (cf. Recommendation S. no. 287 (2007–2008)), underlies the Commission’s work.

Draft provisions shall take as their point of departure Norwegian constitutional tradition, and today’s Constitution shall be normative with respect to the scope, formulation, structure and division of the text. The Commission may propose necessary editorial changes that are a consequence of the substantive amendments recommended.

The Commission’s report is to be submitted to the Presidium of the Storting by 1 January 2012.”