

Do we need a UK Bill of Rights?
Response of the Sussex Centre for Responsibilities, Rights and the Law
11 November 2011

The Sussex Law School's Centre for Responsibilities, Rights and the Law was established in 2008 to facilitate and develop doctrinal, theoretical and empirical research into responsibilities, rights and the law nationally, in the European Union and internationally. It brings together research into responsibilities and rights cutting across the key areas of research within the Sussex Law School (constitutionalism and citizenship; governance; solidarity; security; and responsibilities and rights) and operates through a programme of conferences, lectures, workshops, seminars and funded research projects.

A roundtable on the need for a UK Bill of Rights was convened by the Centre in order to discuss the Commission's consultation paper. The session was held on Wednesday 19 October 2011 and chaired by Dr Elizabeth Craig. Presentations were given by the following Centre members: Jo Bridgeman, Prof Marie Dembour, Prof Jane Fortin, Dr Charlotte Skeet and Dr Richard Vogler. The subsequent discussion focused on whether there was a need for a UK Bill of Rights, the process of drafting such a Bill, the role and impact of the Human Rights Act 1998 (HRA), the possible inclusion of criminal process rights, socio-economic rights and children's rights and the relationship between rights and responsibilities. This response reflects the content of the discussions that took place as well as subsequent inputs by members of the Centre.

Question 1, Do you think we need a UK Bill of Rights?

The overriding consensus expressed by roundtable participants was that we already have a UK Bill of Rights, the UK Human Rights Act 1998, and that this existing mechanism of rights protection needs to be protected at all costs. Although subject to much criticism in the press and amongst politicians, this is a well-crafted instrument, which manages to internalize the requirements of the European Convention of Human Rights (ECHR) into domestic law whilst allowing the possibility for the development of a distinctively British jurisprudence and the development of a constructive dialogue between UK courts and Strasbourg.¹ Section 2 of the Human Rights Act merely requires decisions of the European Court of Human Rights to be taken 'into account' by UK judges and there have been occasions when UK courts have decided not to follow Strasbourg and indeed used the opportunity to challenge the reasoning of the Strasbourg courts, most notably in the *Horncastle* case.² Meanwhile it was confirmed in the case of *Kay v Lambeth LBC*³ that, save in exceptional circumstances, the lower courts should continue to follow binding

¹ On the extent to which we are starting to see the development of an 'indigenous jurisprudence' under the HRA, see e.g. Wright, J. 'Interpreting Section 2 of the Human Rights Act 1998: Towards an Indigenous Jurisprudence of Human Rights' [2009] *Public Law* 595-616 and Klug, F. and Wildbore, H. 'Follow or Lead? The Human Rights Act and the European Court of Human Rights' [2010] *European Human Rights Law Review* 621-630.

² *R v Horncastle* [2009] UKSC 14.

³ [2006] UKHL 10.

precedent, regardless of whether or not there has been a subsequent ruling of the Strasbourg Court that appears inconsistent or in conflict with the approach of the House of Lords/Supreme Court.

Parliamentary sovereignty is also protected under the HRA. The courts notably do not have the power to strike down legislation that is incompatible with the ECHR and a declaration of incompatibility under s. 4 has no legal effect. The case of *Ghaidan v Godin-Mendoza*⁴ provides a useful illustration of the potential of section 3 of the HRA, which places an obligation on courts to interpret legislation '[s]o far as it possible to do so ... in a way which is compatible with the Convention rights.' In this case section 3 of the Human Rights Act was used to rectify the discriminatory effects of the previous interpretation of para. 2 of Schedule 1 of the Rent Act 1977 (as amended by the Housing Act 1988) by extending protection to the surviving partner of a same sex relationship. However, Parliament can always introduce legislation if the application of s.3 results in interpretations that it considers produce unacceptable outcomes.

It would therefore appear that discomfort with, or criticisms of, rulings of the Strasbourg Court need to be decoupled from concerns about the Human Rights Act itself, which appear to relate more to the power of judges vis-à-vis Parliament as representatives of the people. We would refer the Commission in particular to the 15th report of the Joint Committee on Human Rights 2009/10, *Enhancing Parliament's Role in Relation to Human Rights Judgments*,⁵ which makes recommendations on the strengthening of the role of Parliament in relation to implementation. We believe that the Human Rights Act 1998 provides an important mechanism for the protection of vulnerable and marginalised individuals and for holding the executive to account. Without it, the UK would remain internationally bound by the ECHR but the rights provided for in the Convention would not be directly justiciable in the domestic courts. This would mean that a crucial check-and-balance mechanism to protect individuals would be lost. Therefore our conclusion is that any UK Bill of Rights should as a minimum ensure the levels of protection currently guaranteed under the Human Rights Act 1998.

Question 2, What do you think a Bill of Rights should contain?

It is important to stress that the form and structure that a Bill of Rights takes is as significant as the rights provisions contained therein. Given our conclusion to question one, that as a minimum any UK Bill of Rights needs to ensure the levels of protection currently guaranteed under the Human Rights Act 1998, we would urge the Commission to give careful consideration to the opportunity which their review presents to consider other international human rights norms that could be internalised into UK law. For example, consideration might be given to imposing a new obligation on courts to consider the UK's wider obligations under international human rights law in interpreting Convention rights.⁶

⁴ [2004] UKHL 30.

⁵ HL 85/HC 455.

⁶ See, for example, s. 39 of the South African Bill of Rights.

With regard to the elaboration of new rights, we would urge the Commission not to see this as an opportunity to develop a UK Bill of Rights and Irresponsibility (on this point see further below) but rather an occasion to extend the ECHR into UK law in a fashion appropriate for modern life in the UK. For example, we would direct the Commission to:

1. Equality rights, and in particular the need for the UK to ratify Protocol 12 to the ECHR in order to add a freestanding right to non-discrimination to the list of rights protected under the Human Rights Act,
2. Socio-economic rights
3. Children's rights
4. Women's rights
5. Culture, identity and language rights
6. Criminal process rights.

It should be noted in particular that the New Zealand Bill of Rights Act 1990, which is based on the rights in the International Covenant on Civil and Political Rights 1966 rather than its regional counterpart, includes both a free standing right to non-discrimination⁷ and a minority rights provision.⁸ The Canadian Charter of Fundamental Rights 1982 goes even further, including an equality rights guarantee and a provision on minority language education rights.⁹ It is our view that the inclusion of a free standing right to non-discrimination in a UK Bill of Rights should be regarded as a matter of priority as currently the right to non-discrimination under Article 14 of the ECHR has to be invoked with another Convention right. This could be achieved through the ratification of Protocol 12 to the ECHR and its inclusion in the list of Convention rights in Schedule 1 to the Human Rights Act. In our view it is also worth considering the extent to which a minority rights guarantee along the lines of Article 27 of the International Covenant on Civil and Political Rights¹⁰ would be a useful addition to the existing rights framework.

There has been extensive work undertaken in Northern Ireland on the inclusion of socio-economic rights, children's rights, women's rights and culture, identity and language rights in any future Northern Ireland Bill of Rights.¹¹ We would certainly welcome an examination of different ways of internalising other international human rights instruments (e.g. the

⁷ S. 19.

⁸ S. 20 Rights of minorities

'A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.'

⁹ Sections 15 and 23.

¹⁰ Article 27: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

¹¹ In relation to the latter, see .g. Craig, E. 'The Framework Convention for the Protection of National Minorities and the Northern Ireland Bill of Rights Process' (2009) 60(2) *Northern Ireland Legal Quarterly* 201-11.

International Covenant on Economic, Social and Cultural Rights 1966, the UN Convention on the Rights of the Child 1989, the Convention on the Elimination of All Forms of Discrimination Against Women 1979 and the Framework Convention for the Protection of National Minorities 1995), with a particular focus on what can be learnt from other jurisdictions.¹² However, it is our view that lessons need to be learnt from the Northern Ireland Bill of Rights process and that this should not be seen as an opportunity for well established lobbying and interest groups to dominate the agenda. In particular, there is a need to ensure that proposals are informed by evidence rather than rhetoric. It is our view that the Commission should consider commissioning research into the extent to which the needs of the poorest and most marginalized individuals in society are adequately addressed under the rights provisions in the ECHR/HRA. Such research could consider the extent to which additional entrenched rights would help address these needs.

It might be thought that the area of criminal process is one that is well-suited for the elaboration of new rights guarantees for inclusion in a UK Bill of Rights. Much of the demand for a domestic Bill of Rights has arisen as a result of perceived failings of the ECHR in the criminal justice area, particularly in relation to jury trial and the treatment of prisoners. In fact, the impact of the ECHR on our criminal justice processes, as in many other countries, has been almost entirely beneficial. The European Court of Human Rights has frequently expressed support for the concept of jury trial (see eg. *Taxquet v Belgium*)¹³ and has been highly influential in humanising and modernising attitudes to imprisonment in the UK, consistently with the 2006 European Prison Rules. The fair trial provisions contained in Article 6 of the ECHR are by far the most frequently invoked sections of the Convention in the European Court of Human Rights' caselaw and have proved influential around the world. Its well known deficiencies in the 1950s drafting (no rights for victims, no right of silence, no right to appeal etc) have nearly all been rectified by subsequent caselaw and no longer present significant difficulties.

In an era of internationally mobile crime and international co-operation in policing and enforcement practices, we have a strong collective interest in ensuring universal rights respecting criminal procedure everywhere rather than in just one jurisdiction. This is the approach which is increasingly being adopted around the world, notably in Europe through the Stockholm Process, requiring all states to adopt baseline due process provisions. The global influence of the ECHR, itself a creation of British ideas about criminal process rights, has been formidably strengthened by UK support and our view is that the challenge of protecting individuals against oppressive procedure continues to demand an international rather than a purely domestic approach.

¹² E.g. Skeet, C. 'Strengthening Women's International Human Rights Norms in the UK after the Human Rights Act 1998: Lessons from Canada' in Waters, C. (ed) *UK-Canada Perspectives on International Law* (Kluwer, 2006) pp149-168.

¹³ 926/05 [2010] ECHR 1806, 16 November 2010.

Question 3, How do you think it should apply to the UK as a whole, including its four component countries of England, Northern Ireland, Scotland and Wales?

Centre members recognise that this issue raises a number of important constitutional questions, particularly in respect of devolution. Centre members (Dr Charlotte Skeet and Dr Elizabeth Craig) have engaged extensively in their work with the human rights implications of the devolution settlements and with the Northern Ireland (NI) Bill of Rights process.¹⁴ Our view is that there are significant lessons to be learnt from these earlier processes. For instance, it is possible for the HRA 1998 to remain a UK wide Bill of Rights but for other local/regional provisions to be developed and applied alongside Convention rights. Though it is recognised that the UK government has ultimate responsibility to international institutions for the health of human rights in all parts of the UK, symmetrical provision need not be a presumption where there are good reasons advanced for local/regional differences. In relation to this we should not prejudge the outcome of wider public engagement and consultation processes and should note that wide debate on this has already been initiated in both Scotland and Northern Ireland. The Scottish Constitutional Convention involved over 100 delegates and led a wide and detailed debate from 1989 through the 1990s. It concluded that the ECHR should be incorporated as a first step in Scotland and followed by a Scottish Bill of Rights. Though Scotland has established a separate Human Rights Commission,¹⁵ there has been no further formal discussion on a Scottish Bill of Rights. In contrast in Northern Ireland there have been two very wide ranging consultations on a NI Bill of Rights in the last ten years and two complete draft Bills of Rights produced. We believe that there should be no firm decision taken on UK wide application until further deep and considered engagement with the populations in all four constituent parts of the UK has taken place. Engagement needs to take place both in relation to what rights are needed and on which mechanisms might be best used for implementation.

This engagement is important not just for the development of a further policy but as an end in itself. Contemporary constitutional rights building exercises show that engagement can help to build a culture of respect for rights - rather than a culture of rights litigation. Democratic participation in the making of constitutional rights instruments is also recognised as affecting the subsequent use of constitutional provisions by both citizen¹⁶ and the judiciary¹⁷ It also raises debate in political institutions. Therefore wide

¹⁴ E.g. Skeet, C. *Constitutionalism and Difference: Women and the 1997 Constitutional Reform Programme in the UK* (University of Sussex, examined winter 2004/2005) and Craig, E. 'The Framework Convention for the Protection of National Minorities and the Northern Ireland Bill of Rights Process' (2009) 60(2) *Northern Ireland Legal Quarterly* 201-11.

¹⁵ Scottish Commission For Human Rights Act 2006 (asp 16).

¹⁶ Carbert, L., (1996), "With, Without, and In Spite of an ERA: Legal Equality and Public Opinion in Canada, United States and Japan." Paper presented at American Political Science Association San Francisco, California, September 1996.

¹⁷ In relation to the way that constitutional Articles and principles are interpreted, see Penner, R., "The Canadian Experience with the Charter of Rights: Are There Lessons for the United Kingdom?" [1996] *Public Law* Spring 104.

involvement in process itself generates education and consensus around rights, and positive discourses which act both internally on civil society and externally on constitutional institutions.

Question 4, Are there any other views that you would like to put forward?

Do Responsibilities have any Place in a Bill of Rights?

We observe that the questions posed for consultation do not ask for consideration of the relationship between rights and responsibilities. However, we note that Commission members have agreed that it should consider 'whether rights should be accompanied by responsibilities'.¹⁸ We would urge the Commission to exercise caution in this regard. Examination of the place of the concept of responsibility in law, and its relationship with morality, has a long tradition amongst scholars of jurisprudence in relation to criminal, civil and public law. There is evidently a possible corollary relationship between individual rights and individual responsibilities, with the enjoyment of a right by one person imposing a responsibility upon another person to fulfil this right. However, we note that the Prime Minister, David Cameron, frequently refers to responsibility in his speeches,¹⁹ in order to refer to irresponsibility, a lack of responsibility, and the need for government to support people to take responsibility: 'The problem today is that a culture of responsibility is too often absent in our country. And we need to restore it.'²⁰

We would strongly oppose any attempt to couple enjoyment of fundamental individual human rights to fulfilment of responsibilities in a UK Bill of Rights and Responsibilities. Other measures are available to ensure that citizens fulfil their legal obligations and duties. The enjoyment of rights should not depend upon the fulfilment of a set of responsibilities. For example, if the concept of right was uniformly linked to responsibility, would the effect be to deny children their rights?

If the Commission decides to explore this issue further, we would encourage it to consider the concept of responsibility and the relationship between legal rights and responsibilities. Writing in the context of Family Law and Personal Life, John Eekelaar has argued that responsibility is not simply a reflection of our legal obligations, rather it incorporates these and exceeds them. Responsible behaviour, he argues, can be encouraged but not enforced; once it becomes enforceable it is no longer a responsibility but a legal duty. He

¹⁸ Commission on a Bill of Rights, Minutes, 6th May 2011.

¹⁹ David Cameron: *Building a bigger, stronger society*, May 23 2011; see also, for example, David Cameron: *Reducing the burden and impact of health and safety*, 1 December 2009 in relation to health and safety; David Cameron: *Supporting Parents*, 11 January 2010 in relation to children, schools and families.

²⁰ David Cameron: *Building a bigger, stronger society*, May 23 2011. See also: *The Conservative Manifesto 2010, Invitation to Join the Government of Britain*, 79: 'To protect our freedoms from state encroachment and encourage greater social responsibility, we will replace the Human Rights Act with a UK Bill of Rights.'

argues that responsible people will not always assert their legal rights and they will also act beyond their legal duties.²¹

We would therefore reiterate that we would not want to see a UK Bill of Rights and Responsibilities which couples enjoyment of individual fundamental human rights to fulfilment of a set of responsibilities.

Other Key Questions

The roundtable identified a number of other key questions not consulted upon on this occasion but which were understood by Centre members to be central to any debate about a UK Bill of Rights. These include:

- (1) What should a Bill of Rights process look like? How do you ensure that a Bill of Rights results from a democratic and transparent process? Who should be consulted? How do you ensure adequate representation of views of marginalised and disadvantaged groups? What can be learnt from experiences in other jurisdictions?
- (2) To what extent is the Human Rights Act 1998 a 'lawyers' instrument? How do you ensure that a UK Bill of Rights is not perceived in a similar way? Are there risks of having a multiplicity of human rights instruments and procedures?
- (3) What would the relationship be between a UK Bill of Rights and other pieces of legislation such as the Equality Act 2010?
- (4) Given the way in which debates about the Human Rights Act have been conducted, should mechanisms be put in place in order to counter misinformation and inaccuracies being circulated by politicians and in the media?
- (5) What is the relationship between the Commission's mandate in relation to a UK Bill of Rights and proposals for reform of the Strasbourg Court?

The need for the Commission to take into account work already done by the Joint Committee on Human Rights, in particular the 29th report of the Joint Committee on Human Rights 2007/08, *A Bill of Rights for the UK?*,²² and in the devolved jurisdictions, as well as to challenge some of the myths about the ECHR/HRA, was also emphasised.

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²¹ Eekelaar, J. *Family Law and Personal Life* (OUP, 2007) 127-128.

²² HL 165-I/HC 150-I.