



**Response to Ministry of Justice Green Paper:
Rights and Responsibilities: developing our
constitutional framework**

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1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.
2. The Ministry of Justice has issued a Green Paper consulting on various proposals for a bill of rights for the UK.

Position of the European Convention on Human Rights and the Human Rights Act

3. JUSTICE welcomes the commitment in the Green Paper to the Human Rights Act (HRA) and the European Convention on Human Rights (ECHR). The Green Paper states that

The Government is committed to the fundamental rights and freedoms protected by the European Convention on Human Rights and included in Schedule 1 to the Human Rights Act; and to the mechanisms in the Human Rights Act for 'bringing rights home' – a duty on public authorities to act in compliance with the rights; a right to challenge infringements in the UK courts; an obligation on the higher courts to interpret legislation compatibly with the Convention rights; and powers for the courts to make declarations of incompatibility where they cannot do so. The Government is proud that it introduced the Human Rights Act and it will not resile from it nor repeal it.¹

4. We would entirely agree with this position, and this must form an absolutely fundamental and basic minimum requirement if there is to be a bill of rights.
5. The content of any British bill must comply both with the provisions of the ECHR and subsequent relevant case law of the European Court of Human Rights. The UK is bound by international law to implement decisions of ECtHR to which it is a party. No attempt can be made to fudge that commitment. The UK is effectively bound to follow the ECHR in many areas because of its membership of the EU. The ECHR, in any event, is not an alien document: it successfully articulates UK traditional civil liberties.

¹ *Rights and Responsibilities: developing our constitutional framework*, Cm 7577, March 2009, para 4.29

6. The core of the HRA imposes a duty on public authorities to comply with the ECHR; requires the courts to interpret legislation 'so far as it is possible' in accordance with the ECHR; obliges them to take account of ECtHR jurisprudence; and allows for the making of declarations of incompatibility. These are essential to ensure that the Convention is fully and predictably applied both by UK public authorities and courts.
7. Otherwise, it would, once again, become slower and more costly to obtain a ruling on the application of the European Convention to the UK, by requiring recourse to the ECtHR. Speed and lower cost were major objectives behind enactment of the HRA.
8. It would be illogical for the UK to be bound by the European Convention but to exempt public authorities from any duty to comply with it.
9. It would be incoherent to block UK courts from 'taking into account' European Court judgements in making decisions, at least to the extent that the development of UK law is compatible with decisions of the European Court.² The recent case of *Horncastle* shows the way in which the UK courts can establish an appropriate measure of dialogue with the European Court of Human Rights over the application of its decisions to the UK. The Supreme Court said that:

The requirement to 'take into account' the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances, it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a dialogue between this court and the Strasbourg court.

10. The HRA was devised to reconcile the traditions of Parliamentary supremacy with the operation of the European Convention. It establishes a 'dialogue' model in which the domestic courts have no power to strike down legislation. They may only give their

² See further Metcalfe, 'Free to lead as well as to be led': Section 2 of the HRA and the relationship between the UK courts and Strasbourg', (2010) *JUSTICE Journal* (forthcoming).

view that the ECHR has been infringed. Separately from the HRA and under the ECHR itself, the UK accepts that it will implement a final judgement of the European Court of Human Rights. This is the minimum degree of enforcement of the ECHR that it is appropriate.

Additional rights

11. The Green Paper discusses certain additional rights that could be included in a UK bill of rights. No doubt this consultation process will provide the opportunity to discuss the merits and demerits of additional rights.
12. In its 2007 report, *A British Bill of Rights: Informing the debate*, JUSTICE went into some detail about possible additional rights, discussing their value and possible methods of enforcement.³
13. The UK government has signed and ratified a number of international human rights treaties, covering for example torture, children and equality, which should be reflected in any new domestic bill of rights. The increased focus on international obligations in all jurisdictions indicates the potential for embedding international standards in a new British constitutional document.⁴
14. Possible content of a new bill of rights might include:
 - a. Various guarantees of basic civil liberties that are traditionally British but not covered by the ECHR. This would include trial by jury, though this does not play the same role in Scotland as elsewhere.
 - b. Social, economic and cultural rights, though there is wide disagreement as to the value of including any right which is not justiciable. At the same time, this debate often overlooks the extent to which some economic and social rights are already widely accepted in UK law, e.g. the right to health care under the NHS, and the right to education under the HRA.

³ *A British Bill of Rights: Informing the debate* (2007) Chapter 2

⁴ *Ibid.*, Chapter 2, para 137, p51

- c. International obligations which go beyond the ECHR, not least the UN International Covenant on Civil and Political Rights.
- d. The European Union's Charter of Fundamental Rights and Freedoms, from which the UK has negotiated a form of opt out but which binds the EU as a whole.

Responsibilities

15. JUSTICE is concerned at the value, necessity and relevance of the inclusion of responsibilities in any constitutional text. Any statement of responsibilities or duties must not detract from the protection of human rights.⁵
16. Most rights, such as that of free expression, carry their own inherent limitations. For example, freedom of expression can be curtailed under the European Convention for a set of reasons including the protection of reputation and rights of others. Thus, speech can be prohibited which is designed to stir up hatred or violence. There are a number of dangers in setting out additionally expressed duties together with existing rights.
17. Some rights are absolute and cannot be limited. For example, however egregiously someone behaves, it is never acceptable to torture them.
18. Many duties are already enshrined in statute and the value of restating a duty is unclear. The Italian constitution repeats statutory duties to pay taxes, which the Green Paper uses as an example⁶: it is not evident that this has any additional effect.
19. The value of restating moral duties, such as to be a good neighbour and member of society, is similarly questionable in a document which is otherwise concerned with enforceable rights.
20. If some recitation of responsibilities or duties is felt necessary, then they should be set out in another document or perhaps in a preamble to a document which, in itself, is concerned with rights.

⁵ See further, Metcalfe, 'Rights and Responsibilities' (2007) 4 *JUSTICE Journal* 41-58.

⁶ *Rights and Responsibilities* (Green Paper), para 2.63

21. JUSTICE explained in its 2007 report:

The relationship between rights and responsibilities needs to be understood. Most rights are qualified and, in practical terms, depend on the responsibility of everyone in society to respect one another's freedoms (so that one party's right to free expression, for example, does not impinge too far on another's right to a private and family life). Even the right to life is not absolute. It may, for example, be limited by the use of proportionate force in various circumstances, such as effecting a lawful arrest. Very few rights are unconditional – these are the right against torture and inhuman treatment (Article 3 ECHR) and against slavery (Article 4 ECHR).

These rights cannot be subjected to any all-encompassing limitation, such as that they are legally contingent on performance of set of duties and responsibilities. Their application regardless of such considerations is precisely the point of their existence.

Human beings have important social duties with which they are morally bound to comply so that society functions harmoniously. Such duties depend on the integrity of each individual and are not legally enforceable through the machinery of human rights. Of course, citizens in a democracy will have specific voting rights that are not shared by foreign nationals, as well as legal duties, for example to pay tax. These do not affect the universal application of the core human rights, regardless of citizenship. In terms of a bill of rights, the importance of social responsibilities and community relations is sometimes articulated in a preamble. A preamble, stating the purpose of the instrument, can emphasise that responsibilities are the (moral) counterpart to rights, even though the rights themselves are legally inalienable, and thus make a political point.⁷

22. The recently published Ministry of Justice research paper: *The relationship between rights and responsibilities*⁸ is a comprehensive analysis of constitutional responsibilities and considers the role of responsibilities from a number of

⁷ *A British Bill of Rights: Informing the debate* (2007) Chapter 1, paras 38-40

⁸ Lazarus, Goold, Desai and Rasheed, Ministry of Justice Research Series 18/09, December 2009

perspectives. JUSTICE would endorse the analysis taken by that paper, and in particular the conclusion that

that there is little to be gained from incorporating lists of specific duties into any proposed written constitution or Bill of Rights [and] [t]hat the proper place for any statements about responsibilities is in the preamble to any such document. This approach not only ensures that such statements are seen as educative and aspirational but also guards against the risk of misinterpretation and any suggestion that such duties should be regarded as justiciable and directly enforceable against individuals.⁹

23. In addition, that

any debate on the role of responsibilities must always be conducted in the context of a continuing and robust commitment to the protection and advancement of fundamental human rights.¹⁰

Process

24. JUSTICE welcomes the commitment in the Green Paper to an extensive consultation involving the whole country:

We intend to involve all parts of our country and our society in discussions both about the fundamental arguments for and against such a Bill of Rights and Responsibilities as well as the advantages and disadvantages of the individual components of any such Bill. Full consultation and debate about such a constitutional development will inevitably take some time. It cannot be the property of one Parliament and one Government. All sections of the UK will have a view.¹¹

25. This view is endorsed. Any bill of rights must attract a degree of wide consensus, not just of lawyers and politicians but also the public at large. This is a tall order. At present, a non-partisan approach seems unlikely. However, the language of the Glorious Revolution of 1688 cannot be appropriated by any one political party. The original Bill of Rights had a wide degree of political support. That must be replicated

⁹ *Ibid.*, p32

¹⁰ *Ibid.*, p33

¹¹ *Rights and Responsibilities* (Green Paper), para 5.3

in any later document which seeks to echo its language. The drafting of a bill of rights goes beyond a political project: it is constitutional in nature. As a result, any proposal for a bill of rights should be subject to considerable independent review and public consultation, eg by a Royal Commission or equivalent body. This would help to overcome the way in which support or opposition to the HRA has tended to be portrayed as a party political matter even though, as a matter of fact, all parties contain people holding a wide range of views. The public need a debate which expressly identifies a British Bill of Rights as building on the European Convention to protect additional civil liberties which they understand as relevant to them.

Devolution

26. The Green Paper is correct in saying that

Any UK-wide discussion of rights and responsibilities raises important questions about the relationship between rights, responsibilities and the UK's governance arrangements in respect of devolution.¹²

27. Consideration of a Bill of Rights and Responsibilities for the UK – whatever form it might take – will clearly need to involve Parliament, the devolved legislatures, and the devolved executive bodies as well as the Human Rights Commissions which operate in the different parts of the UK. Each has its own history, conventions and identity and has different responsibilities and obligations in relation to fundamental rights, how they are safeguarded, and how they are respected in the delivery of key public services. In order to generate the degree of consensus appropriate for a Bill of Rights and Responsibilities, each will have an important contribution to make about the way rights and responsibilities should be expressed. This will require further careful consideration.¹³

28. However, there is concern that the government may have underestimated the significance of the devolution settlements when considering whether a bill of rights would be possible.

29. The Human Rights Act is built into the devolution settlement for Northern Ireland, Scotland and Wales. Under the Good Friday Agreement, the Northern Ireland Human

¹² *Rights and Responsibilities* (Green Paper), para 4.32

Rights Commission was to be invited to consult and advise on the scope for defining for Northern Ireland rights supplementary to those in the European Convention. The Northern Ireland Human Rights Commission has advised on provisions to be contained in a Northern Ireland Bill of Rights, and the Northern Ireland Office has recently begun consultation on this. An SNP minority administration in Scotland is pledged to hold an independence referendum after the election. A single 'British' or UK bill of rights must recognise the devolved jurisdictions. If covering the whole country, then it will need the consent and agreement of the Scottish Parliament and its equivalents. This may be difficult to achieve. It would, of course, be possible for each jurisdiction to have its own bill, thereby transforming the proposal to four bills of rights - English, Scottish, Welsh and Northern Irish. This would, however, potentially challenge the coherence of the project. By way of a compromise, it might be possible to have some common UK provisions reflecting international obligations and then different sections for the four jurisdictions that added rights which were particular to each, such as jury trial in England and Wales.

30. JUSTICE recently published a report: *Devolution and Human Rights*, which highlights the legal, constitutional and political issues and problems that a bill of rights would involve in relation to devolution. The report draws the following conclusions:

106. The devolution statutes are complicated, and the human rights frameworks under them are tied up in a number of ways with the HRA and the indeed the ECHR.

107. A bill of rights covering the devolved jurisdictions would be legally, constitutionally and politically very difficult to achieve.

108. Any amendments to the HRA and any enactment of a bill of rights would almost certainly, from a legal perspective, require amendments to be made to the devolution statutes.

109. Any amendments to the HRA and any enactment of a bill of rights may, from a constitutional perspective – or simply to take account of the political ramifications – need the consent of the devolved institutions.

¹³ *Rights and Responsibilities* (Green Paper) para 4.42

110. It would also require careful consideration so that the UK would not derogate from its international treaty obligations to the Republic of Ireland in regard to the Belfast (Good Friday) Agreement.

111. It may be possible to have an English bill of rights, but that would raise its own problems and complications. In particular there would be a raft of problems between the competing jurisdictions within the UK.

112. The HRA works, and at present the devolution framework has also been successful. Amendments to the HRA or legislating for a bill of rights would be dangerous and risky – to the protection of rights, to the constitution of the UK, and to the Union itself.

Enforcement and Entrenchment

31. The Green Paper considers a number of approaches in relation to the enforcement and entrenchment of a potential bill of rights. The 2007 JUSTICE report goes into some detail about the various options.¹⁴

32. Some argue that the protection of rights requires some form of legislative entrenchment that limits amendment. It is extremely difficult under the UK constitution for one Parliament to bind another though provisions might be passed requiring amendment to be made only after passage of legislation that obtains the consent of both Houses of Parliament. The HRA provides a minimum form of enforcement through the 'dialogue model' referred to above. There should be discussion and decision as to whether judiciary should have any more extensive 'strike down' power over legislation that breaches the provisions of the bill of rights.

Role of Parliament

33. The full operation of any bill of rights and, indeed, the HRA, depends on the vigilance of Parliament as against the executive. Decisions of the European Court, such as that relating to the DNA database, suggest that Parliament needs to find ways to strengthen its ability to monitor and amend legislation that is incompatible with the ECHR or any bill of rights. Failing that, too much reliance will be placed on the courts

¹⁴ *A British Bill of Rights: Informing the debate* (2007), chap 4

to do so. This requires Parliamentarians to demonstrate greater independence of the executive and of party, an admittedly difficult issue to address. However, the successful operation of the Parliamentary Joint Committee shows a way in which this can be done.

Political positioning

34. The scope for reform should not be oversold. Certain elements in the media have taken against the HRA: *The Sun* and *Daily Mail* openly campaign for its repeal. But, the debate needs to be conducted within the parameters of what is possible. All major political parties agree that the UK should remain a member of the Council of Europe and hence (necessarily) subject to the ECHR. In that case, the scope for reform is extremely limited. Unpopular and minority causes will still rightly be protected. The ECHR will still apply. The ECtHR will still require compliance. There is little point in a bill of rights which is sold to the public on the basis of limiting the ECHR, but which turns out to be ineffective. No government will benefit from that in the long run. Suggestions that the UK might seek to evade its Convention responsibilities by simply ignoring its provisions or failing to follow decisions of the European Court to which the UK is a party would be contrary to a long tradition of UK adherence to the rule of law and would affect our international reputation.

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