a JUSTICE briefing paper

CIVIL LIBERTIES, THE CONSTITUTION AND CUTS

Engaging with the coalition

Advancing access to justice, human rights and the rule of law

Introduction

David Cameron and Nick Clegg are not bashful about their achievement in leading their parties into a coalition government. They described the coalition's *Programme for Government* as 'an historic document in British politics: the first time in over half a century two parties have come together to put forward a programme for partnership government'.[1] And they are right. Both the coalition itself and the *Programme* are a new departure. The latter is the kind of document that we have rarely seen and would be more familiar to someone from continental Europe where coalitions are more frequent.

JUSTICE is an all party organisation and a registered charity. Engaged in it at every level are members of all three major UK political parties. We have recently underlined this by holding fringe meetings at the annual conferences of all three major political parties jointly with the respective associations of party lawyers. This paper is unavoidably political in the sense of 'relating to, or dealing with the structure or affairs of government, politics, or the state'. It is not political in the sense of partisan. We want to encourage a debate about the way forward in which lawyers of all parties and none can happily participate.

This document is in three parts:

- First, it lists, and gives an initial response to, the commitments relevant to civil liberties made by the government in its *Programme for Government*. The intention is to provide an overview of what is undoubtedly an impressive project
- Second, it sets out the considerations which we think should underlie any UK-wide bill of rights which sought to replace or supplement the Human Rights Act (HRA). This is an issue which looks to be, for the moment, on the back burner. A review will only be established next year and it is not clear that much will happen in the short term. However, we have gone to some lengths to establish our position on a bill of rights and this part articulates results which will become more politically relevant when the issue resurfaces on formation of the commission promised by the government
- Third, the paper opens a discussion on how cuts to legal aid might be approached. This is necessarily more general and less precise than the other two sections.

Our briefing is based on one underlying principle of the prime duty of government which is at odds with the way that it is expressed by David Cameron and Nick Clegg in their introduction to the *Programme*:[2]

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[1] *The Coalition: Our Programme for Government*, p7.

[2] Ibid.

> *We are agreed that the first duty of government is to safeguard our national security and support our troops in Afghanistan and elsewhere.*

This needs further clarification. Interestingly, Lord Bingham in his book on the rule of law made reference to this idea of the prime aim of government.[3] With characteristic learning, he traced its origin to Cicero's concern that 'the safety of the people is the supreme law'. That was not, however, the limit of Lord Bingham's learning. He quoted two comments by historical figures on this assertion: 'there is not any thing in the world more abused than this sentence' and Benjamin Franklin's famous statement that 'he who would put security before liberty deserves neither'.

The primary duty on states is surely better expressed as to protect national security both from external aggression and internal subversion. This was very much the concern of the great constitutional documents of our past. National security is safeguarded by more than troops in foreign lands. This can be seen in the great constitutional documents of our past. *Magna Carta* privileged the rights of the Church and the liberties of free men; the Bill of Rights 1689 called for vindication of 'ancient rights and liberties'. The oath administered to an incoming US President indicates a similarly wide notion of protecting national security:

> *I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.*

Thus, the 'first duty of government' must be to protect the constitution of the UK, certainly so far as its core elements of democracy and constitutionality are concerned. That includes civil liberties and human rights. As Lord Bingham concluded: 'we cannot commend our society to others by departing from the fundamental standards which make it worthy of commendation'.[4]

It is from this principled perspective that we examine the proposals of the coalition. Government's prime duty is to defend the traditional civil liberties as articulated by the common law and reinforced by the European Convention on Human Rights to which the UK – like 46 other European countries – has bound itself by treaty.

A striking omission from the coalition's programme is any express link between civil liberties and human rights. Before the election, there was considerable discussion of a 'British' or UK bill of rights and we consulted our members on the conditions that they would like to see imposed on such a development. Members were not unanimous but they were overwhelmingly supportive of the approach set out in the second part of this document. In

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[3] T Bingham, The Rule of Law, Allen Lane, 2010.

[4] Ibid.

the event, the coalition has decided not to proceed immediately on any reform to the Human Rights Act but to establish a review in 2011. We set out below the approach that we would commend to that review. Finally, the coalition's legal agenda in its early years will be dominated by the cuts that it intends to make to legal aid and the courts. The outcome of the coalition's review of legal aid is as yet unknown. As a result, this section is necessarily less precise than the previous two.

Civil Liberties

JUSTICE response to the coalition *Programme for Government*

Below we set out in italics the coalition's proposals in its *Programme for Government* accompanied by JUSTICE's response. We concentrate solely on matters relating to civil liberties.

'We will implement a full programme of measures to reverse the substantial erosion of civil liberties and roll back state intrusion'

We commend the coalition for this commitment and for its early review of matters such as counter-terrorism legislation and anti-social behaviour orders.

'We will introduce a Freedom Bill'

A bill was announced in the Queen's Speech 'to restore freedoms and civil liberties, through the abolition of Identity Cards and repeal of unnecessary laws'. A 'Your Freedom' website was established on which the public could make suggestions as to what should be included within it. A wide range of proposals have been made – some of them somewhat outlandish. The government has announced that it will respond in due course. The original impetus for this exercise appears to have been an initiative from the Liberal Democrats who launched a consultation on a specific draft bill. The general intention of this bill is excellent. It would be a pity if its detailed effect was marred by poor drafting and we hope that the government will allow time for further consultation on specific draft proposals.

'We will scrap the ID card scheme, the National Identity register and the ContactPoint database, and halt the next generation of biometric passports'

JUSTICE welcomes the announcement to scrap the ID card scheme and the National Identity register, both of which it opposed in parliamentary briefings. We note that the ContactPoint database is only one of a number of government-run databases introduced in recent years. Rather than debate the merits of particular measures, we recommend that the government undertake a comprehensive review of existing databases, in particular whether they are truly necessary and proportionate. We also recommend establishing a clear set of principles governing the creation of any new government databases.

'We will outlaw the finger-printing of children at school without parental permission'

We welcome this proposal and, in March 2007, we wrote to the Liberal Democrat Shadow Spokesman on Schools to express our view that the collection of biometric data by schools for purposes of monitoring attendance and allowing access to meals and libraries was a wholly unnecessary and disproportionate interference with pupils' right to respect for privacy.

'We will extend the scope of the Freedom of Information Act to provide greater transparency'

The Freedom of Information Act 2000 was one of the major positive measures of the previous government. We strongly support the new government's commitment to build upon the 2000 Act to extend its scope.

'We will adopt the protections of the Scottish model for the DNA database'

JUSTICE recommended the adoption of the Scottish model in its parliamentary briefings on the Crime and Security Bill. This would bar the retention of the DNA of any person arrested or charged but not convicted of a criminal offence (with an exception for the retention of a person's DNA for up to three years in cases of sexual or violent offences). This seems to us a proportionate response to the judgment of the European Court of Human Rights in *S and Marper v United Kingdom* in December 2008.

'We will protect historic freedoms through the defence of trial by jury'

The right of any person charged with a serious criminal offence to a jury of his peers is a constitutional right recognised throughout the common law world. On this basis, we opposed the previous government's proposal to restrict trial by jury in cases of serious fraud and as a jury tampering measure, on the basis that both were unnecessary restrictions whose purposes could be better achieved by other measures. We therefore welcome the new government's commitment to protect the right to jury trial in cases involving serious criminal offences. Some jury trials do last for such long periods that they put tremendous pressure on jurors. It would be desirable to look at how the length might be reduced. At its lowest, this might mean that judges were more consistent in taking greater control of time-tabling.

'We will restore rights to non-violent protest'

JUSTICE opposed the various restrictions on public protest introduced by the Serious Organised Crime and Policing Act 2005, as well as measures such as the disproportionate use of stop and search powers under section 44 of the Terrorism Act 2000. We also gave oral evidence to the Joint Committee on Human Rights inquiry into Policing and Protest in June 2008. We therefore welcome the coalition government's commitment to restoring the right to peaceful protest, a fundamental right under Article 11 of the European Convention on Human Rights.

'We will review libel laws to protect freedom of speech'

JUSTICE supports initiatives to review existing libel laws to safeguard freedom of speech and expression. We responded to the recent Ministry of Justice consultation on the double publication rule. Other key aspects of libel reform that must be pursued including reducing costs and ending conditional fee agreements, ending so-called 'libel tourism', and strengthening the defences of fair comment and public interest.

'We will introduce safeguards against the misuse of anti-terrorism legislation'

JUSTICE has long been engaged with the human rights aspects of the UK counter-terrorism legal framework. Although we do not doubt that the UK faces a serious threat from terrorism, it is plain that terrorism legislation is increasingly used against individuals and organisations with no connection to terrorism, such as the use of stop and search powers against protestors, the freezing of the assets of the Icelandic government under the Anti-Terrorism Crime and Security Act 2001, or the interference with photography in public places by police using section 76 of the Counter-Terrorism Act 2008. As with surveillance, this is an issue requiring a comprehensive overhaul of existing legislation and policy, in order to prevent the arbitrary and disproportionate use of terrorism powers by public officials.

'We will further regulate CCTV'

The UK has gained the unenviable reputation as a market leader in the field of CCTV, with more cameras per capita than any other country. We have repeatedly criticised the lack of regulation in this area, for instance in our oral evidence to the House of Commons Home Affairs Committee inquiry on the 'surveillance society' in June 2007, and to the House of Lords Constitution Committee inquiry on Surveillance and Data Collection in February 2008. We welcome the coalition government's promise to regulate CCTV, but note that it is but one aspect of the more general issue of surveillance reform.

'We will end the storage of internet and email records without good reason'

JUSTICE has opposed the increasing trend of government to seek the retention of internet and email records, most recently in the Communications Data Bill published by the previous government. This issue is linked to the scope of the government's surveillance powers under the Regulation of Investigatory Powers Act 2000, as well as the more general trend of increasing government databases.

'We will introduce a new mechanism to prevent the proliferation of unnecessary new criminal offences'

In our many briefings on criminal justice and counter-terrorism legislation over the years, we have complained that the proliferation of criminal offences is just part of a broader problem of unnecessary legislation generally, as well as unnecessary emergency or 'fast-track' legislation. (Among other things, we gave oral evidence to the House of Lords Constitution Committee's inquiry into emergency legislation in March 2009). We therefore strongly welcome the coalition government's commitment to govern well by legislating less, and are happy to discuss ways to identify a workable mechanism to prevent further legislation.

'We will amend the health and safety laws that stand in the way of common sense policing'

It is unclear which health and safety laws have prevented common sense policing.

'We will introduce measures to make the police more accountable through oversight by a directly elected individual, who will be subject to strict checks and balances by locally elected representatives'

We are unconvinced by the arguments for directly elected police commissioners. We are conducting a joint pilot project with the Police Foundation in relation to a wider range of issues about policing and we consider that there should be a comprehensive review of policing powers, organisation and accountability before implementing reform in this area.

'We will give people greater legal protection to prevent crime and apprehend criminals' and **'We will ensure that people have the protection that they need when they defend themselves against intruders'**

JUSTICE has consistently opposed proposals to further extend the existing law governing the use of force in self-defence. In our view, the current law strikes a reasonable balance between the interests of suspects and occupiers. We note, for instance, that in the most recent *cause célèbre* of Munir Hussain in December 2009, self-defence was not even raised

as a defence – Mr Hussain's defence was instead that he did not participate in the beating of his would-be kidnappers, which was not accepted by the jury. It would be unwise for the coalition government to legislate in circumstances where there is such significant public misunderstanding of the true state of the law.

'We will review the operation of the Extradition Act – and the US/UK extradition treaty – to make sure it is even-handed'

There has been considerable criticism of the US/UK extradition treaty and of the operation of the European Arrest Warrant, both of which were given force by the Extradition Act 2003. One point which may be made about the treaty is the contrast in the scrutiny that it was given in the US, which was considerably more than in the UK. While it took several years to gain approval from the US legislature, here it passed through Parliament under the Ponsonby Rule, a constitutional convention that dictates that most international treaties must be laid before Parliament 21 days before ratification. There is an argument that the treaty is unbalanced in the relative obligations of both signatories but, in fact, requests for extradition from the UK are dealt with under the Extradition Act 2003. The US is designated as a category 2 country which does require consideration of whether there are reasonable grounds for arrest. Problems with extradition to the US lie less with the wording of the Treaty or the Act and more with the different approaches of the two legal systems to matters such as white collar fraud and sentencing. This is a rather more intractable problem.

JUSTICE is currently engaged in a project to monitor the operation of the European Arrest Warrant (EAW). The major problem appears to be one of proportionality with some countries, such as Poland, using the EAW for very minor crimes.

'We will stop the deportation of asylum seekers who have had to leave particular countries because their sexual orientation or gender identification puts them at proven risk of imprisonment, torture or execution'

We welcome the government's promise to halt deportations in this area. It is well established that, whether or not an asylum seeker is entitled to the protection of the Refugee Convention, no person should be deported to a country where they face a real risk of torture, inhuman or degrading treatment contrary to Article 3 ECHR. In addition, it is also well-established that no person should be deported to a country where it would give rise to a flagrant breach of another of their Convention rights, eg the right to private life under Article 8 ECHR. We note that the judgment of the Court of Appeal in *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*[5] requiring 'discretion' on the part of gay and lesbian asylum seekers if returned, is currently under appeal to the UK Supreme

[5] [2009] EWCA Civ 172

Court. In the event that the appeal is dismissed, we trust that the government will nonetheless implement a policy of non-return in such circumstances.

'We will never condone the use of torture'

The prohibition against the use of torture is a fundamental principle of both common law and international human rights and humanitarian law. Despite this, JUSTICE was gravely concerned at the previous government's apparent willingness to turn a blind eye to the use of torture by its allies as part of the US-led 'war on terror', whether by allowing rendition flights through UK airports, receiving material from third countries obtained using torture, or even alleged complicity in interrogations involving torture abroad. We gave evidence to the UN Committee against Torture concerning these issues in October 2004 and oral evidence to the EU Parliament's Temporary Committee on alleged CIA transportation and illegal detention of prisoners in October 2006. We intervened before the House of Lords in *A and others v Secretary of State for the Home Department* (No 2) to argue against the use of evidence obtained by torture, and we intervened before the Court of Appeal in *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*[6] in February 2010 to argue for the disclosure of material indicating UK complicity in torture abroad.

In this context, we very much welcome the new coalition government's promise never to condone the use of torture. In light of the previous government's protestations to the same effect, however, we would note that promises alone are not enough. With mounting evidence suggesting complicity of UK officials in the use of torture abroad, nothing less than an independent public inquiry is needed to fully investigate the various allegations that have been made. This inquiry should look at, among other things, the guidance provided to members of the intelligence services, the degree of involvement of the government departments responsible for the services, and the adequacy of the existing oversight arrangements (including the role of the Intelligence and Security Committee). The statement of the Foreign Secretary William Hague MP on 20 May that a judicial inquiry will be held on the issue, the launch of which the Prime Minister subsequently announced on 6 July, is an important first step in this direction.

'We will create a new 'right to data' so that government-held datasets can be requested and used by the public, and then published on a regular basis'

We welcome this initiative. The right to access government data is an important complement to the principles of freedom of information, and the right to receive and impart information under Article 10 ECHR. More generally, it promotes democratic transparency and accountability, and more effective public policy.

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[6] [2010] EWCA Civ 65

'We will end the detention of children for immigration purposes'

We strongly support the government's commitment to end the detention of children in this area. This should be accompanied by a comprehensive review of the use of immigration detention in general. In 2001, JUSTICE intervened in *Secretary of State for the Home Department ex parte Saadi*[7] to argue that detention should only be allowed where it is strictly necessary to do so, and must never be used purely for the sake of administrative convenience. Notwithstanding the previous government's claim to only use detention proportionately, the use of immigration detention has grown dramatically since the policy of so-called 'fast-track' detention was introduced in the late 1990s.

'We will … tackle human trafficking as a priority'

We welcome this assurance. JUSTICE was one of a number of organisations that had urged the previous government to sign and ratify the Council of Europe Convention on Action against Trafficking in Human Beings, and we submitted written evidence to the Joint Committee on Human Rights inquiry on the issue in January 2006. We regret the government's decision not to opt in to the EU directive on human trafficking. We note that this was explained on the following grounds:[8]

The UK already complies with most of what is required by the draft EU directive. The government will review the UK's position once the directive has been agreed, and will continue to work constructively with European partners on matters of mutual interest. By not opting in now but reviewing our position when the directive is agreed, we can choose to benefit from being part of a directive that is helpful but avoid being bound by measures that are against our interests.

We consider that the failure to opt in to this directive is unfortunate and sends the wrong message. It is unclear what part of this directive might be against our interest.

'We will explore new ways to improve the current asylum system to speed up the processing of applications'

We agree that the processing of asylum applications leaves much to be desired, and that delays can give rise to considerable hardship and injustice. However, delay in processing applications is but one of a number of flaws in the current system, the most problematic of which is the *quality* of the decision-making process. As JUSTICE has made clear in numerous

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[7] [2001] EWCA Civ 1512

[8] See http://www.homeoffice.gov.uk/media-centre/news/trafficking-directive

submissions on immigration legislation, most recently in relation to the Borders, Citizenship and Immigration Act 2009 and the draft Immigration and Citizenship Bill in 2008, poor quality decision-making at first instance is an endemic problem, giving rise to considerable pressure on the appeals process. This problem was made worse by the previous government's repeated attempts to limit the appeal rights of applicants. In our view, the most effective way to reduce the overall waiting time in processing asylum applications would be to ensure that the decisions made at first instance are made by properly qualified staff who, among others things, have a good understanding of the UK's obligations under the Refugee Convention and the European Convention on Human Rights. More accurate decisions at first instance would, in turn, reduce the need for appeals and delays.

'The Government believes that more needs to be done to ensure fairness in the justice system. This means introducing more effective sentencing policies, as well as overhauling the system of rehabilitation to reduce reoffending and provide greater support and protection for the victims of crime'

There is a major need to reduce the inappropriate use of prison. We welcome the apparent renewed interest in 'restorative justice'.

'We will introduce a 'rehabilitation revolution' that will pay independent providers to reduce reoffending, paid for by the savings this new approach will generate within the criminal justice system'

We welcome a commitment to reduction of re-offending although we are concerned that an overly mechanistic approach to the reduction of offending may not be helpful.

'We will conduct a full review of sentencing policy to ensure that it is effective in deterring crime, protecting the public, punishing offenders and cutting reoffending. In particular, we will ensure that sentencing for drug use helps offenders come off drugs' and **'We will explore alternative forms of secure, treatment-based accommodation for mentally ill and drugs offenders'**

We welcome the review of sentencing and hope that it will lead to a more balanced approach.

'We will change the law so that historical convictions for consensual gay sex with over 16s will be treated as spent and will not show up on criminal records checks'

We welcome this reform

'We will introduce effective measures to tackle anti-social behaviour and low-level crime, including forms of restorative justice such as Neighbourhood Justice Panels'

We support greater use of restorative justice measures.

'We will urgently review control orders, as part of a wider review of counter-terrorist legislation, measures and programmes.

JUSTICE has long opposed the use of control orders under the Prevention of Terrorism Act 2005 on the basis that they are unnecessary, expensive, ineffective, and offend basic principles of our justice system. We intervened in all the major control order appeals, including *Secretary of State for the Home Department v MB* [9] and *Secretary of State for the Home Department v AF and others.*[10] We have also briefed both Houses of Parliament on the annual renewal of the 2005 Act, recommending against renewal. We therefore welcome the new coalition government's commitment to urgently review control orders as part of a broader review of counter-terrorism legislation and measures.

We have long argued for a comprehensive review of the UK's counter-terrorism legislation, and this was also one of the central recommendations of the February 2009 report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights entitled *Assessing Damage, Urging Action,* an initiative of the International Commission of Jurists of which JUSTICE is the UK section. Since the Terrorism Act 2000, which was itself intended to be a comprehensive framework for counterterrorism measures, Parliament has enacted the Anti-Terrorism Crime and Security Act 2001 (in response to 9/11), the Prevention of Terrorism Act 2005 (in response to the Belmarsh judgment), the Terrorism Act 2006 (in response to the 7/7 bombings) and the Counter-Terrorism Act 2008 (which was built around the government's proposed increase of the maximum period of pre-charge detention to 43 days). In addition to the problems caused by the broad statutory definition of terrorism under the 2000 Act, subsequent Acts have given rise to a number of measures offending fundamental rights including indefinite detention under the 2001 Act, control orders under the 2005 Act, and the extension of the maximum period of pre-charge detention to 28 days under the 2006 Act. Among other things, the previous government's preference for exceptional measures in the name of national security has led to an unprecedented rise in the use of closed proceedings and special advocates in British courts since 1997, as detailed in our June 2009 report *Secret Evidence.*[11] We urge the new coalition government to review the use of secret evidence as part of its broader review of counter-terrorism measures.

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[9] [2007] UKHL 46

[10] [2009] UKHL 28

[11] *Secret Evidence*, JUSTICE, June 2009. (Available to download from www.justice.org.uk/publications)

'We will seek to find a practical way to allow the use of intercept evidence in court'

JUSTICE first argued for the ban on intercept evidence to be lifted in our 1998 report *Under Surveillance: Covert Policing and human rights standards.* In October 2006, we published *Intercept Evidence: Lifting the ban*, which set out in greater detail the arguments in favour of using intercept in open court. The report also included a comparative study of the use of intercept evidence in Australia, Canada, Hong Kong, Ireland, South Africa and the United States. We subsequently gave oral evidence to the Privy Council review of Intercept as Evidence chaired by Sir John Chilcot, and the 2008 report of the committee cited our 2006 report.

We remain of the view that the case for lifting the ban on intercept is as strong as ever, not least because of the prominent role played by intercept material (ultimately obtained from California) in the conviction of three men of conspiracy to blow up transatlantic airliners in September 2009, as well as the recent decision of the Special Immigration Appeals Commission in the case of Abid Naseer in May 2010. The use of intercept as evidence would be a major step towards closing the gap between suspicion and proof that has been the engine of so many disproportionate measures adopted since 9/11, including indefinite detention, pre-charge detention and control orders.

Since 2008, we have met the Home Office team working on the implementation of the Chilcot report on two occasions, and have made clear our view that it is perfectly feasible to introduce legislation allowing the use of intercept material in criminal and civil proceedings in a manner that would both protect sensitive details about interception capabilities while remaining compatible with the European Convention on Human Rights.

'We will deny public funds to any group that has recently espoused or incited violence or hatred. We will proscribe such organisations, subject to the advice of the police and security and intelligence agencies'

Incitement of violence has been a criminal offence since at least the 19th century, and there are also more recent offences covering the incitement of racial and religious hatred. To this extent, we would be extremely surprised if there were any groups engaged in this activity found to be in receipt of public funds, rather than being prosecuted. The Terrorism Act 2000 already provides the power to proscribe groups involved in terrorism, and the scope of the proscription powers were extended by the Terrorism Act 2006. In our many briefings on counter-terrorism legislation, and in particular in our submission to Lord Carlile's review of the statutory definition in March 2006, we have noted that the definition of 'terrorism' under the 2000 Act remains unacceptably broad, and would in principle apply to the democratic resistance in countries such as Burma or North Korea. We urge the new coalition government to exercise its proscription powers under the 2000 Act in a way that respects

the legitimate and proportionate use of force against oppressive and non-democratic foreign governments.

'We believe that Britain should be able to deport foreign nationals who threaten our security to countries where there are verifiable guarantees that they will not be tortured. We will seek to extend these guarantees to more countries'

JUSTICE strongly opposes the use of assurances against torture as a means to seek the deportation of persons to countries which are known to use torture. As we made clear in our interventions before the House of Lords in *RB (Algeria) v Secretary of State for the Home Department*[12] in October 2008, and before the European Court of Human Rights in *Othman v United Kingdom* (pending), virtually all the countries in this category are already signatories to the UN Convention against Torture and therefore are already known to have broken their promise not to use torture. The coalition government should not be so unrealistic as to believe the promise of a government that is known to use torture. Not only are such assurances unenforceable and unreliable, but they are likely to undermine the international prohibition against torture. Rather than seek to negotiate special exemptions from countries which practise torture in relation to specific individuals, the UK government should work with foreign governments to end the use of torture. More generally, deportation of suspected terrorists is an ineffective way of addressing the threat of terrorism, as the Privy Council Review of the Anti-Terrorism Crime and Security Act 2001 noted in December 2003. The new coalition government should concentrate its efforts on prosecuting terrorists, rather than exporting them.

[12] [2009] UKHL 10

The Constitution

A 'British' bill of rights

In recent years, proposals for a bill of rights have been made by all three major political parties – albeit in rather different terms. There is considerable uncertainty about what such a bill might look like, what it would contain, and how its provisions might be enforced. We, like others, worry that a bill of rights might, by design or unforeseen consequence, result in undermining the provisions of the Human Rights Act (HRA). In 2007, we published *A British Bill of Rights: Informing the debate*.[13] This report represented an attempt to set out the issues that needed to be decided under the headings of:

- Content
- Amendment
- Adjudication and enforcement
- Process

Informing the debate took no position on these issues. It sought merely to set out what needed to be decided. We maintain that position. The section below identifies the requirements that JUSTICE considers should be contained within any bill of rights that seeks to replace the HRA. A fundamental point is that any such proposal would amount to reform of constitutional dimensions and should only be introduced with the transparency and width of debate appropriate to such a measure. That is why we have emphasised the constitution in the title of this paper.

The election result was as unexpected by the political parties as it was by the general electorate. The Conservatives went into coalition, having undertaken considerable spadework on how the HRA might be amended, with a party which had in 2007 committed itself to entrenching 'the rights presently enshrined in the European Convention in the British constitutional framework.'

The result was a commitment in the coalition programme that was clearly crafted with care and after intense negotiation:[14]

> *We will establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties. We will seek to promote a better understanding of the true scope of these obligations and liberties.*

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[13] (Available to download from www.justice.org.uk/publications)

The Ministry of Justice has, since the election, published its structural reform plan. Previously, it had managed without one. It contains a commitment to 'establish a Commission to investigate the creation of a UK Bill of Rights'. This is expanded with the following detail: 'establish Commission and agree detailed scope and timetable, working with the Deputy Prime Minister'.

The review is to be established in 2011 and is the one commitment in the Ministry's plan which has no finite end date. If we were in any doubt as to the meaning of this, the *Daily Mail* recently reported that Lord McNally, the minister with specific responsibility for human rights and civil liberties, insisted at the recent Liberal Democrat conference:[15]

> *... there would be 'no retreat' over controversial human rights laws the Tories promised to scrap. The Lib Dem peer declared that - while the Coalition was 'looking' at the Human Rights Act - there was no intention to 'diminish it'. Instead, Lord McNally said the government wanted the Act to be 'better understood and appreciated'.*

Below are seven principles that we think should underlie any attempt to amend the Human Rights Act by introducing a bill of rights.

Any bill of rights must be based on a broad 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 and the Bill of Rights 1689 cannot be appropriated by any one political party. The original Bill of Rights had a wide degree of political support. That must be replicated 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.

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[14] *The Coalition: Our Programme for Government*, p. 11

[15] See J Slack and D Martin, 'Lib Dem Justice Minister insists 'no retreat' on Human Rights Act, despite Tory pledge to scrap it', *Daily Mail*, 22 September 2010.

The process of agreeing a UK bill of rights, and its content, must reflect the increasingly devolved nature of the United Kingdom.

The HRA is built into the devolution settlement for Northern Ireland, Scotland and Wales. Under the Good Friday Agreement, the Northern Ireland Human Rights Commission was to advise on the scope for rights supplementary to those in the European Convention which were required by the particular circumstances of Northern Ireland. The Northern Ireland Human Rights Commission has done so, though its advice has been largely rejected by the Northern Ireland Office.

The devolution statutes are complicated, and their underpinning human rights' framework is tied up in a number of ways with the HRA and, indeed, the ECHR. A bill of rights covering the devolved jurisdictions would be legally, constitutionally and politically very difficult to achieve. 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, as Qudsi Rasheed argued in the last edition of the JUSTICE *Journal*.[16] The Westminster Parliament undoubtedly has the ultimate competence to amend these without the consent of the devolved jurisdictions as a result of the doctrine of ultimate parliamentary sovereignty. However, under present legislation and depending on exactly what was proposed, the consent of at least the Northern Ireland Assembly and the Scotland Parliament would surely be required, as a matter of practice and pragmatic politics. The UK government must also ensure that it does not derogate from its international treaty obligations to the Republic of Ireland in regard to the Belfast (Good Friday) Agreement.

In these circumstances, political parties may consider an omnibus bill of rights which contains separate content for each jurisdiction in the United Kingdom. It would, of course, be possible for each jurisdiction to have its own bill, thereby presumably 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. However, this would raise the issue of competing jurisdictions within the UK.

A UK bill of rights must guarantee as a minimum, or extend beyond, the rights guaranteed by the European Convention on Human Rights.

All main political parties accept that the UK must remain subject to the European Convention. Therefore, the content of any British bill must comply both with the provisions

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[16] Q Rasheed, 'Devolution and Human Rights', *JUSTICE Journal*, Vol 7 No 1, 2010, p106.

of the ECHR and subsequent relevant case law of the European Court of Human Rights (ECtHR). 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 ECHR, in any event, is not an alien document: it successfully articulates UK traditional civil liberties within the context of the human rights framework.

The UK's relationship with the Council of Europe and its ECHR is now woven into our legal and political fabric. As a matter of political reality, any move to alter our model of rights protection must build on the foundations laid by the ECHR. Those who object to the ECHR itself and, with it, the UK's membership of the Council of Europe, must engage in a different debate. This applies also to our continuing membership of the European Union, which in practice is conditional on compliance with the ECHR. Britain cannot risk accusations of hypocrisy by distancing itself from the very standards it sets for others in its political and diplomatic relations.

Any proposed model for a British bill of rights must therefore be 'ECHR-plus'. A British bill of rights must not detract from any of the rights in the ECHR. The argument is sometimes made that a domestic bill of rights would encourage the ECtHR to allow the UK greater flexibility under its doctrine of the 'margin of appreciation'. However, the crucial factor remains the *substance* of legal protection, not the fact that a bill of rights is presented as being specific to a particular country. The provisions of a British bill of rights will not affect the ECtHR's power to rule that a member state has breached the ECHR. States with their own constitutional bills of rights such as Germany (whose constitution gives even greater protection than the ECHR in some respects) continue to be subject to close adjudication by the ECtHR. Meanwhile, the ECtHR is increasingly receptive to case law developed under our current HRA, the quality of which has had significant influence on European human rights jurisprudence and is central to a proper understanding of how human rights work in the British context.

Much of the support for a British bill of rights stems from the wish to 'domesticate' human rights jurisprudence. British judges, adjudicating within the domestic context, would become more authoritative on the domestic constitutional text. It might be argued that this could stand the courts in good stead in terms of defending against potentially less well-informed decisions from the ECtHR, which lacks the insight of British judges in relation to the British system. The domestication of rights would proceed on the basis that the ECHR rights already incorporated into British law constitute the minimum level of protection.

Inevitably, any proposal for a bill of rights which goes beyond the terms of the ECHR will prove contentious. The ECHR has existed since 1950 and its provisions are relatively well understood. The UK government was particularly sceptical of the EU's attempt to go beyond the relative clarity of the ECHR when it drafted its proposed EU Charter of Fundamental Rights in 2000.

Nevertheless, while any British bill of rights must ensure an ECHR-minimum, it is worth exploring options for a model which strengthens or expands the ECHR. If agreement were possible, it would constitute a significant advance in safeguarding rights, not to mention an educative process to encourage understanding of the nature of rights in the British constitution.

Any domestic bill of rights should be compatible with the international obligations of the UK.

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. This would be an excellent opportunity to underline the UK's domestic commitment to these international obligations.

The key enforcement mechanisms of the HRA should be re-enacted.

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. 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. 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.

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. 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:[17]

> *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*

[17] [2009] UKSC 14, para 11.

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.

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 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.

Any statement of responsibilities or duties must not detract from the protection of human rights.

Most rights are qualified and, in practical terms, depend on the responsibility of everyone in society to respect one another's freedoms. 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. 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.

Some rights are absolute and cannot be limited. Very few rights are unconditional – for example 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. For example, however egregiously someone behaves; it is never acceptable to torture them.

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: it is not evident that this has any additional effect. 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. 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.

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. 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.

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.

In addition to the seven minimum conditions, there are, of course, a number of other issues that need to be addressed in the process of drafting a bill of rights. Prime of these is content. This might include:

- 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;
- 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, eg the right to health care under the NHS, and the right to education under the HRA;
- International obligations which go beyond the ECHR, not least the UN International Covenant on Civil and Political Rights;
- The European Union's Charter of Fundamental Rights.

A crucial issue will be the degree of entrenchment of any domestic bill. Some argue that the protection of rights through a specific bill of rights implies a degree of legislative entrenchment that limits amendment. However, 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.

Implementation of the HRA during its first decade has depended on crucial decisions both of the domestic Supreme Court/House of Lords and of the ECtHR. To some extent, this has been a result of the failure of Parliament adequately to test legislation against the standards of the European Convention. 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 to do so. This requires Parliamentarians to demonstrate greater independence of the executive and of party, an admittedly difficult issue to address. The case is sometimes made against the HRA that it has handed disproportionate power to the judges. Any bill of rights – and, indeed, the HRA if it is to find a better fit into the constitutional structure of the UK – must be guarded more jealously by Parliament and mechanisms should be put in place to strengthen its position against the executive. After all, the US bill of rights was seen as its proponents quite distinctly as a limitation on the power of the executive. As Thomas Jefferson put it:

> *[A] bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse.*

Cuts to legal aid

Protecting access to justice

The coalition *Programme for Government* promises:

> *We will carry out a fundamental review of Legal Aid to make it work more efficiently.*

Publication of the spending review, due shortly before the discussion of this paper, will provide the context of this review and set out the cuts expected. Press speculation suggests that Ken Clarke is known to have presented proposed cuts of £500m to his £2bn legal aid budget. Areas rumoured to be in the firing line include lawyers' remuneration, the operation of the police station duty solicitor scheme, judicial review for asylum-seekers and family matters. At our party conference fringe meeting with the Liberal Democrat Lawyers Association, Lord McNally hinted that legal aid for inquests might also be in the frame. This will cause a roar of anger from lawyers. However it is done, the legal aid market is likely to shrink by a quarter. For solicitors alone, this is likely to amount to reduction on the total turnover of the whole profession of something like 3-4 per cent. There is an enormous professional interest at stake.

Rather more directly, there is an enormous personal interest at stake of those who will lose legal aid. The common law places a heavy premium on access to justice, famously set out by Lord Justice Laws in a case where court fees were raised to levels that were prohibitive for some litigants without statutory authority:[18]

> *... the common law has clearly given special weight to the citizens' right of access to the courts. It has been described as a constitutional right, though the cases do not explain what that means. In this whole argument, nothing to my mind has been shown to displace the proposition that the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right.*

Lord Justice Laws expressed the view – before the HRA has come into force – that:[19]

> *As regards the ECHR jurisprudence I will say only that, as it seems to me, the common law provides no lesser protection of the right of access to the Queen's courts than might be vindicated in Strasbourg. That is, if I may say so, unsurprising.*

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[18] *R v Lord Chancellor ex parte Witham* [1998] QB 575, para 24.

[19] Ibid, para 23.

However, Article 6(3)(c) has an enviable clarity: anyone charged with a criminal offence has the right to defend themselves 'in person, or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free where the interests of justice so require'.

And, in cases like *Salduz v Turkey,*[20] the ECtHR has shown itself ready to construe the point at which this right arises as at the point of initial police interview. In a wider set of cases, the right to legal assistance may arise – as in *Steel and Morris*[21] (the McLibel case) – where, otherwise, a person is deprived of effective participation in legal proceedings.

JUSTICE has recently participated in a nine country study of effective criminal defence funded by the European Commission. This actually found that England and Wales had relatively good levels of legal aid provision in criminal cases – second only to Finland, which appeared to be the best country in the study. In the context of the limitations imposed by the European Convention on potential cuts to criminal legal aid, it may be worth quoting the final report of that project: [22]

> *Recent Strasbourg case law has confirmed the importance of legal assistance for a proper defence in all its aspect, and that the right to legal assistance arises immediately on arrest. Especially in the early stages of the criminal investigation it is the task of the lawyer, among other things, to ensure respect for the right of the accused not to incriminate himself. The ECtHR has also stressed that the principle of equality of arms requires that a suspect, from the time of the first police interrogation, must be afforded the whole range of interventions that are inherent to legal advice, such as discussion of the case, instructions by the accused, [etc] ... The ECtHR has even set standards for sanctioning breaches of the right to legal assistance by ruling that incriminating statements obtained from suspects who did not have access to a lawyer may not be used in evidence.*

Thus, both the common law and the European Convention place constraints on the potential results of a fundamental review of legal aid. On the other hand, save where the ECHR specifically requires the presence of a lawyer, the government is entirely able to look at whether the intended result – that poverty should not be a bar to equal justice for all members of society in the sense of a fair determination of legal rights and responsibilities – can be achieved by means other than the employment of lawyers.

We look forward to examining those areas of legal aid expenditure which the government earmarks for cuts to determine whether justice may be obtained for poor people in any

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[20] (2009) 49 EHRR 19

[21] [2005] EMLR 314

[22] E Cape, Z Namoradze, R Smith and T Spronken, Effective Criminal Defence in Europe, Intersentia, 2010, p558-9.

other way. However, alternative means are likely to come with a price tag. It is unlikely that provision can simply be cut and not substituted by some other route. In addition, it would not be acceptable to cut poor people out of the courts simply by withdrawing legal aid when legal assistance would help those who are richer to get a significant advantage in getting justice for their claim. Thus, poor people should not be deprived of legal aid in cases where those richer can retain lawyers to use against them. Particular vigilance will be required to ensure that cuts do not bear disproportionately on women. This would be the result of any removal of legal aid for matrimonial cases (disproportionately received by women) while making no alteration to the position of men who can disproportionately pay for their own representation. It would not, therefore, be acceptable simply to cut legal aid in matrimonial cases. If fair out-of-court procedures could be identified, then in principle it might be acceptable to request them to be used in every case. This would prevent the richer having an advantage over the poorer within the court system. Reform of this kind would be difficult to implement but this approach to cuts must be considered.

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Civil Liberties, the Constitution and Cuts: Engaging with the coalition is a JUSTICE briefing paper in three parts:

- First, it lists and responds to the commitments relevant to civil liberties made by the coalition in its *Programme for Government*. The intention is to provide an overview of what is undoubtedly an impressive project
- Second, it sets out the considerations that we think should underlie any UK-wide bill of rights which sought to replace or supplement the Human Rights Act
- Third, it opens a discussion on how cuts to legal aid might be approached

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