



## Background to proposals for a British Bill of Rights and Duties

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The three major political parties have all proposed that the UK should adopt a 'British Bill of Rights' of some kind. This paper outlines these proposals and sets them within the context of the incorporation of the *European Convention on Human Rights* into UK law in the *Human Rights Act 1998*. It considers how the discussion for a British Bill of Rights differs from previous discourse on the *Human Rights Act* through its emphasis on 'Britishness', responsibilities as well as rights, and the involvement of the public in developing and discussing such rights. Some commentators have questioned which additional rights should be included in a British Bill of Rights, and there has been some focus on economic and social rights. There has also been some discussion about whether British rights would apply to all people within Britain, or to British citizens. Questions relating to devolution have also been raised.

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## **1 Recent proposals**

### **1.1 The Governance of Britain Green Paper**

The July 2007 *Governance of Britain* Green Paper, published just days after Gordon Brown became Prime Minister, set out a wide range of proposals for constitutional reform under the headings of ‘limiting the powers of the executive’, ‘making the executive more accountable’ and ‘re-invigorating our democracy’ before considering ‘Britain’s future: the citizen and the state’.<sup>1</sup> After considering the nature of citizenship in the UK, the Green Paper raised the importance of “our common British values”. It stated that:

It is important to be clearer about what it means to be British, what it means to be part of British society and, crucially, to be resolute in making the point that what comes with that is a set of values which have not just to be shared but also accepted. There is room to celebrate multiple and different identities, but none of these should take precedence over the core democratic values that define what it means to be British. A British citizen, playing a part in British society, must act in accordance with these values.

Shared values are the bedrock on which the elements of our nation are built. Our values are given shape and meaning by the institutions that people know and trust, from the NHS to Parliament. The symbols of the UK, and our rights, are among the most recognisable in the world...<sup>2</sup>

The *Governance of Britain* continued:

The Government believes that there is considerable merit in a fuller articulation of British values. Through an inclusive process of national debate it will work with the public to develop a British statement of values that will set out the ideals and principles which bind us together as a nation.<sup>3</sup>

The Green Paper went on to discuss the need for a ‘British Bill of Rights and Duties’:

Over many years there has been debate about the idea of developing a list of the rights and obligations that go with being a member of our society. A Bill of Rights and Duties could give people a clear idea of what we can expect from public authorities, and from each other, and a framework for giving practical effect to our common values. However, if specifically British Rights were to be added to those we already enjoy by virtue of the European Convention, we would need to be certain that their addition would be of real benefit to the country as a whole and not restrict the ability of the democratically elected Government to decide upon the way resources are to be deployed in the national interest. For example, some have argued for the incorporation of economic and social rights into British law. But this would involve a significant shift

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<sup>1</sup> For more information see the Library Research Paper 07/72, [The Governance of Britain](#)

<sup>2</sup> Ministry of Justice, *The Governance of Britain*, Cm 7170, July 2007, paras 195-196

<sup>3</sup> *Ibid*, para 198

from Parliament to the judiciary in making decisions about public spending and, at least implicitly, levels of taxation.

A British Bill of Rights and Duties could provide explicit recognition that human rights come with responsibilities and must be exercised in a way that respects the human rights of others. It would build on the basic principles of the Human Rights Act, but make explicit the way in which a democratic society's rights have to be balanced by obligations. The Government itself recognized, in its review last year of the implementation of the Human Rights Act, the importance which must attach to public safety and ensuring that Government Agencies accord appropriate priority to protection of the public when balancing rights. A Bill of Rights and Duties might provide a means of giving clarity and legislative force to this commitment. However, a framework of civic responsibilities – were it to be given legislative force – would need to avoid encroaching upon personal freedoms and civil liberties which have been hard won over centuries of history.<sup>4</sup>

Since the publication of the *Governance of Britain* the Government has made further announcements about the way in which they will consult on proposals for a British Statement of Values and a British Bill of Rights and Duties.<sup>5</sup> In October 2007 the Lord Chancellor Jack Straw, stated that “over the coming months” he would publish a Green Paper which would “frame the debate on how we might codify [these] rights in a way that articulates more clearly the relationship between citizens, the community, society and the state”.<sup>6</sup> In July 2008, the *Governance of Britain: One year on* document published by the Ministry of Justice stated that a Green Paper would be published ‘soon’.<sup>7</sup> In evidence given to the Joint Committee on Human Rights, Jack Straw stated that the Government aimed to publish the Green Paper “before Easter”. He went on to state:

It [publication] has taken some time because it is new territory and there are three aspects to it. One is the extent to which a new document should seek to lay out and encapsulate and summarise rights which citizens have, for example, in respect of health and education and the environment, but to do so in a summary form so that they would be part of a single document. The second issue is the extent to which this document should bring out responsibilities more clearly – responsibilities that we owe to each other and owe to the community. The third issue is the extent to which all or part of what would amount to a new Bill could or should be justiciable. These are really complicated areas and they are very important.<sup>8</sup>

He also said that, “You will certainly not see legislation this side of an election”.<sup>9</sup>

Both the Conservative Party and the Liberal Democrats have also announced plans for a British Bill of Rights.

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<sup>4</sup> *Ibid*, paras 209-210

<sup>5</sup> See Gordon Brown's statement to Parliament, [HC Deb 3 July 2007 cc819-820](#), Gordon Brown's speech to the National Council of Voluntary Organisations, 3 September 2007, and Gordon Brown's speech at the University of Westminster, 25 October 2007. These are discussed later in this paper.

<sup>6</sup> Jack Straw, [Mackenzie-Stuart Lecture](#), 25 October 2007, (last viewed 9 September 2008)

<sup>7</sup> Ministry of Justice, [The Governance of Britain: One year on](#), July 2008, p23, (last viewed 9 September 2008)

<sup>8</sup> Uncorrected transcript of oral evidence taken before the Joint Committee on Human Rights, *A Bill of Rights for the UK and the work of the Human Rights Minister*, Tuesday 20 January 2009, To be published as HC 174-I, Q30

<sup>9</sup> *Ibid*, Q36

## 1.2 The Conservative Party

In his speech of 26 June 2006 *Balancing Freedom and Security: A modern British Bill of Rights* the Leader of the Conservative Party, David Cameron, was highly critical of the operation of the *Human Rights Act*. He went on to propose a 'modern British Bill of Rights':

...I believe that the time has now come for a new solution that protects liberties in this country that is home-grown and sensitive to Britain's legal inheritance that enables people to feel they have ownership of their rights and one which at the same time enables a British Home Secretary to strike a common-sense balance between civil liberties and the protection of public security.

The Conservative Party, under my leadership, is determined to provide a hard-nosed defence of security and freedom.

And I believe that the right way to do that is through a modern British Bill of Rights that also balances rights with responsibilities.<sup>10</sup>

Mr Cameron then announced that "a panel of distinguished jurists and other experts" would help the Party draft such a Bill.

In a policy document produced in August 2007, *How a Conservative government will target Britain's crime crisis*, the party stated:

In Britain today, people rightly sense that the criminal justice system is too often tilted in favour of the criminal and away from the victim.

This is partly the consequence of the Human Rights Act 1998. The Act has created a culture of risk aversion on the part of public bodies, an excessive sensitivity to the demands of criminals, and difficulties in the fight against terrorism.

Meanwhile, even on its own terms the Human Rights Act has not proved to be effective in protecting fundamental rights in Britain. It has not protected the right to trial by jury and it did not prevent the right to free speech from being undermined in the Government's legislation on religious hatred.

**A Conservative Government will repeal the Human Rights Act and replace it with a modern British Bill of Rights.** This will spell out the duties and responsibilities of people living in this country both as citizens and foreign nationals. It will enshrine and protect fundamental liberties such as jury trial, equality under the law and civil rights. And it will guide the judiciary and the Government in applying human rights law when the lack of responsibility of some individuals threatens the rights of others.<sup>11</sup>

The Conservative Party has also questioned Government plans for a 'British Statement of Values'. The Conservative Party Justice spokesman Nick Herbert has stated that:

Conservative Members are highly sceptical of the Government's attempt to describe a statement of values, but until we have seen it, how can we possibly judge the worth of that aspect of the constitutional renewal package? If, as we saw yesterday, the Government are clueless about their vision, how can they credibly set out a vision for the whole country? As the Labour-supporting historian, Tristan Hunt said:

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<sup>10</sup> David Cameron, *Balancing freedom and security – A modern British Bill of Rights*, 26 June 2006

<sup>11</sup> Conservative Party, *How a Conservative government will tackle Britain's crime crisis*, August 2007, <http://www.conservatives.com/pdf/britainscrimecrisis.pdf> (last viewed 9 September 2008)

“Rather than wasting time on a statement of inevitably vacuous values, ministers should focus on bedding down the reforms they have introduced... Given that the government is having enough trouble setting out its own vision, it really doesn't need to take on the country's as well.”

Thus we have a citizenship Bill, a citizenship review and a statement of values, but at least we have them, even if we have absolutely no idea what will be in them....<sup>12</sup>

### 1.3 The Liberal Democrats

The Liberal Democrats have also pledged that they would introduce a Bill of Rights within a written constitution, and would allow citizens to:

...challenge legislation as well as executive action on the ground that it infringed his/her human rights and the courts would be entitled to rule that legislation was unlawful if it was incompatible with the Bill of Rights. Furthermore the rights protected by the Bill would not be capable of being removed or limited by simple parliamentary majority, but would require a constitutional amendment to remove or restrict them.<sup>13</sup>

### 1.4 The Joint Committee on Human Rights

The Joint Committee on Human Rights announced in May 2007 that they would hold an inquiry into a British Bill of Rights.<sup>14</sup> Their report, *A Bill of Rights for the UK?*, was published on 10 August 2008.<sup>15</sup>

In short, the Committee recommended that the UK should adopt a Bill of Rights and Freedoms “in order to provide necessary protection to all, and to marginalized and vulnerable people in particular”. They stated that:

Adopting a Bill of Rights provides a moment when society can define itself. We recommend that a Bill of Rights and Freedoms should set out a shared vision of a desirable future society: it should be aspirational in nature as well as protecting those human rights which already exist. We suggest that a Bill of Rights should give lasting effect to values shared by the people of the United Kingdom: we include liberty, democracy, fairness, civic duty, and the rule of law.<sup>16</sup>

The Committee recommended that some additional rights, such as the right to trial by jury and the right to administrative justice should be included in a Bill of Rights. They also considered the inclusion of environmental rights (or ‘third generation’ rights as they are known). The Committee did not recommend fully justiciable social or economic rights but a situation where the Government would have a duty to progress towards realising certain rights of this kind:

We suggest that the Bill of Rights and Freedoms should initially include the rights to education, health, housing and an adequate standard of living. Government would have a duty to progress towards realising these rights and would need to report that progress to Parliament. Individuals would not be able to enforce these rights through

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<sup>12</sup> HC Deb 7 November 2007 c222

<sup>13</sup> Liberal Democrat Party Policy Paper, *For the People, By the People*, September 2007

<sup>14</sup> Joint Committee on Human Rights, *A British Bill of Rights*, Press Notice 22 May 2007, [http://www.parliament.uk/parliamentary\\_committees/joint\\_committee\\_on\\_human\\_rights/jchrpn38\\_220507.cfm](http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchrpn38_220507.cfm) (last viewed 9 September 2008)

<sup>15</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK?*, 10 August 2008, HL Paper 165 HC 150, 2007-08

<sup>16</sup> *Ibid*, p5

the courts, but the courts would have a role in reviewing the measures taken by Government.<sup>17</sup>

The Committee set out guiding principles for any modern UK Bill of Rights. According to the Committee, a Bill of Rights must:

- Build on the HRA without weakening its mechanisms in any way
- Supplement the protections in the ECHR
- Be in accordance with universal human rights standards
- Protect the weak and vulnerable against the strong and powerful;
- Be aspirational and forward looking;
- Apply to the whole of the UK geographically;
- Apply to all the people within the UK;
- Provide strong legal protection for human rights;
- Enhance the role of Parliament in the protection of human rights.

The Joint Committee published its own of a Bill of Rights as an annex to the report.

The Government's response to the Joint Committee's report was published in January 2009.<sup>18</sup> The Committee called on the Government to publish its Green Paper on a British Bill of Rights "without further delay".<sup>19</sup>

### 1.5 The 2007 JUSTICE report

JUSTICE, the human rights organisation, published a report 'A *British Bill of Rights: Informing the Debate*' in November 2007. JUSTICE defined a Bill of Rights in the following way:

*a formal commitment to the protection of those human rights which are considered, at [a given] moment in history, to be of particular importance. It is, in principle, binding upon the government can be overridden, if at all, only with significant difficulty. Some form of redress is provided in the event that violations occur.*

A bill of rights thus serves several functions. It sets out the fundamental rights of individuals which are legally protected. It expresses the fundamental principles of a democracy and the values of the state in question. As a highly symbolic instrument, a bill of rights also serves as a mechanism for unifying the population. It may remain the symbol of a nation's aspirations, even when the reality of rights protection falls short of its legal provisions.<sup>20</sup>

In its paper, JUSTICE considered the various options for "building on the European Convention on Human Rights (ECHR)". Concluding that the ECHR must be "a floor, not a ceiling of rights protection", it suggested a number of options including:

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<sup>17</sup> *Ibid*, p5-6

<sup>18</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK? Government response to the Committee's Twenty-ninth Report of Session 2007-08*, 19 January 2009, HL Paper 15 HC 145, 2008-09

<sup>19</sup> *Ibid*, para 24

<sup>20</sup> JUSTICE, *A British Bill of Rights: Informing the Debate*, November 2007, p16

- incorporating traditional British common law domestic rights (such as access to courts, trial by jury); and
- including additional rights such as rights relating to the environment, equality or economic and social rights.

JUSTICE concludes with potential advantages of adopting a British Bill of Rights, including discussion of values, democratic engagement, education, Britishness, updating rights, as well as constitutional evolution.<sup>21</sup> However, they also state that “the risk of drawing-up a constitutional document now, is that it would unduly reflect the short-term concerns for security which continue to dominate the political agenda and affect the lives of members of society at large”.<sup>22</sup>

## 2 Some historical context

In its report, *A Bill of Rights for the UK?*, the JCHR set out some historical context to the debate. In particular, it considered the issue of “negative liberty”; economic and social rights (discussed further below); and, “third generation rights” (rights which have attained international recognition as human rights, but are not easily classified either a civil or political rights or economic and social rights – such as the right to natural resources, sustainability and self determination).<sup>23</sup>

The report noted that the focus of classic Bills of Rights, from Magna Carta to those of the seventeenth and eighteenth centuries was the protection of the individual’s liberty against interference by the State. The report argued that “Liberty was conceived as negative liberty, the absence of restraint. It remains the view of many today that the protection of human rights by Bills of Rights should be confined to this set of broadly Enlightenment values and that this is the only legitimate purpose of a Bill of Rights”.<sup>24</sup>

The editors of *Exploring Social Rights: Between Theory and Practice*<sup>25</sup> suggest that:

The roots of our current thinking about human rights can be traced back to the eighteenth century, when the modern notion of rights crystallised in both political philosophy and within the framework of the American and French revolutions. Liberal thought, manifested in the ideas of thinkers such as Locke, advanced the idea of natural rights as a construct that predates the state and whose protection is a primary function of the state. Thus in the Lockean tradition, the state is prohibited from violating the life, liberty or property of its citizens. This is the concept of rights that lies at the heart of the American constitution.<sup>26</sup>

### 2.1 The modern concept of human rights

Costas Douzinas indicates in *The End of Human Rights* that most commentators accept that the modern concept of “human rights” as we know them today entered the world scene after the Second World War. In particular, he notes that:

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<sup>21</sup> *Ibid*, p116

<sup>22</sup> *Ibid*, p117

<sup>23</sup> See: Joint Committee on Human Rights; *A Bill of Rights for the UK?*, Session 2007-08, HL 165-I/HC 150-I, paras 199-210

<sup>24</sup> Joint Committee on Human Rights; *A Bill of Rights for the UK?*, Session 2007-08, HL 165-I/HC 150-I, para 15

<sup>25</sup> Barak-Erez, Gross et al, *Exploring Social Rights: Between Theory and Practice*, (Hart, 2007)

<sup>26</sup> *Ibid*, p1

Symbolic moments include the Nuremburg and Tokyo Trials, the signing of the Charter of the United Nations (1945) and the adoption of the Universal Declaration of Human Rights (1948).<sup>27</sup>

The *European Convention on Human Rights* (discussed further below), otherwise known as the Convention for the Protection of Human Rights and Fundamental Freedoms was adopted under the auspices of the Council of Europe in 1950 and again in focused mainly on rights in the Liberal tradition.

In spite of the change of concept from individual “natural rights” toward “human rights”, many of the rights in the ECHR can be traced back to classical Bills of Rights. For example the Bill of Rights of 1689 contains provisions that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted” and also provides that “all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void.” The French *Déclaration des droits de l'Homme et du citoyen* of 1789 provides that “no person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law.”

These rights could be seen to evolve into the later prohibitions on torture, inhuman and degrading treatment and the right of liberty and security of person. Crucially, however, Douzinas identifies that unlike their 17<sup>th</sup> and 18<sup>th</sup> century forbearers, the new treaties use a language of universalism. They are not longer the rights of a Frenchman contained in the *Déclaration*, but have been “enlarged to include the whole humanity.”<sup>28</sup>

## 2.2 The change in conception of human rights and the move towards economic and social rights

The JCHR tied changes in the conception of human rights to the movements of the second half of the twentieth century – particularly the 1941 “Four Freedoms” speech of US President Franklin D. Roosevelt.<sup>29</sup> The Committee argued that:

The inclusion of freedom from want and freedom from fear in this list of the four essential freedoms, from the mouth of the President of the country with the most cited of the classical Bill of Rights, was a significant moment in the history of human rights protection. It redefined freedom to include not merely the absence of restraint, but the absence of want and fear.<sup>30</sup>

In contrast, *Exploring Social Rights* argues that it was Karl Marx, who in the nineteenth century “made the powerful argument that the protection of civil rights does not in fact guarantee human emancipation” [...] Marx pointed out that the eighteenth-century civil rights declarations had not contended with issues of economic inequality”. It adds:

An understanding of rights relating only to the civic sphere, which is focused, in the Lockean spirit, on limiting the power of the state to violate the rights of individuals, is not committed to the material welfare of those individuals and, ultimately, cannot guarantee equal enjoyment of civil rights themselves. Moreover, such a conception not

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<sup>27</sup> Costas Douzinas, *The End of Human Rights*, (Hart, 2000), p115

<sup>28</sup> *Ibid*, p116, where he goes on to argue that “The higher status of human rights is seen as the result of their legal universalism, of the triumph of the universality of humanity”.

<sup>29</sup> Joint Committee on Human Rights; *A Bill of Rights for the UK?*, Session 2007-08, HL 165-I/HC 150-I, para 16. The “four freedoms” were freedom of speech and expression; freedom of every person to worship God in his own way; freedom from want; and, freedom from fear.

<sup>30</sup> *Ibid*, para 17

only excludes any commitment to the individual's material welfare, but can actually hinder actions taken to foster that welfare: because rights, under this paradigm, are understood as restrictions on the states power to act, the result could be that the civil rights themselves will serve to restrict actions taken by the state to promote welfare. This was the outcome of the US Supreme Court's *Lochner* doctrine during the first third of the twentieth century, under which the Court held various labour and welfare laws to be in violation of the constitutional protection of liberty.<sup>31</sup>

The JCHR report indicates that the "Four Freedoms" were explicitly incorporated into the preamble to the Universal Declaration of Human Rights, which was subsequently given legal effect in two subsequent UN treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

This potential fracture between civil and political rights and economic and social rights can be partly explained by the former Communist states giving preference to social rights and the United States objecting to any legally binding status to these rights. In his book, *The International Law of Human Rights* Paul Sieghart argues that:

The division into two of the single UDHR catalogue reflected certain ideological and political differences between two major groups of negotiating states: unlike all the other instruments, for example, neither of the Covenants mentions any right to property.<sup>32</sup>

*Exploring Social Rights* claims that "the [...] split was not merely symbolic. The civil and political rights treaty established an international supervision mechanism within the United Nations system that is more developed than the mechanisms created under the social and economic rights treaty. Additionally, the ICCPR imposed on states an immediate duty of implementation, whereas the ICESCR determined that they created a duty upon the state to take steps, to the maximum of their available resources, with a view to achieving progressively the full realisation of these rights." It noted that:

Notwithstanding their equal position in the UDHR, social rights have been relegated to secondary status, both in international law and the national laws of many countries. Often, they are regarded with considerable suspicion and as problematic to implement as full legal rights.<sup>33</sup>

Economic and social rights are frequently referred to as "positive rights". They usually require the State to take some action (for example the provision of education or healthcare) as opposed to the "negative rights" contained in classical Bills of Rights, where the State refrains from acting in breach of civil and political rights (such as freedom of speech and expression).

One potential difficulty with economic and social rights is that they are often aspirational. Not only do they often involve some cost for the State, but there may be other issues. For example, Article 6 of the ICESCR provides that:

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

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<sup>31</sup> Barak-Erez and Gross, *Exploring Social Rights: Between Theory and Practice*, (Hart, 2007), p2

<sup>32</sup> Paul Sieghart, *The International Law of Human Rights*, (OUP, 1983) p25

<sup>33</sup> Barak-Erez and Gross, *Exploring Social Rights: Between Theory and Practice*, (Hart, 2007), p4

Unlike committing to refrain from violating the life, liberty or property of its citizens, it is apparent, that in the absence of a planned economy, the State is not in a position to force private employers to facilitate this right to work. It is therefore arguable that even if such economic rights are included in a Bill of Rights, such rights may only really be moral rights<sup>34</sup>, without sufficient specificity to become fully justiciable in the courts.<sup>35</sup>

The JCHR has concluded that “today one of the central questions for any parliamentary democracy considering whether to adopt a Bill of Rights is whether that Bill of Rights should seek to reflect, so far as possible, *both* of these human rights traditions in the international human rights instruments.”<sup>36</sup>

### 3 From Human Rights to a British Bill of Rights and Duties?

Proposals for a British Statement of Values and British Bill of Rights and Duties needs to be set within the context of incorporation of the ECHR into UK law by the *Human Rights Act 1998*, and its subsequent interpretation by the courts, politicians and the press.

#### 3.1 The European Convention on Human Rights

The ECHR is an international treaty adopted under the auspices of the Council of Europe in 1950 to protect human rights and fundamental freedoms. The UK was one of the first nations to sign and ratify the Convention, which came into force in 1953. All Council of Europe member states are bound by the Convention and the EU accession states are expected to ratify the Convention at the earliest opportunity. The Convention is divided into three sections. The first contains a list of rights and freedoms, the second established the European Court of Human Rights which sits in Strasbourg, whilst the third contains miscellaneous provisions.<sup>37</sup> The Convention also has several protocols. The UK allowed individuals the right of access to the European Court of Human Rights in 1965.

The principal rights guaranteed under the Convention include the right to life, the right to freedom from torture, liberty, fair trial, a right to privacy and family life, freedom of expression and freedom of religion. The only absolute rights guaranteed by the Convention are the rights to freedom from torture and inhuman and degrading treatment (Article 3) and the prohibition on slavery (Article 4). All the other rights can either be qualified in some way, which enables them to be balanced against the rights of others (for example the right to life under Article 2 allows for the use of force to defend another person from violence, effect a lawful arrest or quell an insurrection)<sup>38</sup> or are limited under explicit and finite circumstances, such as the right

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<sup>34</sup> That said, not all such rights lack official recognition. In 1998, the UK Government introduced a *Minimum Wage Act*. Whilst not specifically recognised as a human right (and indeed not universally applicable, as it does not apply to all young people), at Second Reading of the Bill, Margaret Beckett, the responsible Minister, argued that “Every other developed nation has some form of national minimum wage or statutory wage protection” and that “minimum wages help to defend the social fabric of industrialised nations”. HC Deb, 16 December 1997, c171. Moreover, other economic rights contained in the UDHR and ICESCR such as the right to equal pay for equal work, Safe and healthy working conditions and the right to free education have been facilitated by legislation in the UK, albeit that they are not necessarily considered to be “human rights” *per se*.

<sup>35</sup> As Douzinas has noted in a different context, “Having a right in the abstract does not mean much, as Burke and Marx noted a long time ago, if the necessary material, institutional and emotional resources for its realisation are not available. Costas Douzinas, *The End of Human Rights*, (Hart, 2000), p232

<sup>36</sup> Joint Committee on Human Rights; *A Bill of Rights for the UK?*, Session 2007-08, HL 165-I/HC 150-I, para 21

<sup>37</sup> The Convention is available on the Internet at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> (last viewed 9 September 2008).

<sup>38</sup> *European Convention on Human Rights*, article 2(2)

to liberty under Article 5. Rights can also be derogated from in certain circumstances (where there is a war or other public emergency threatening the life of the nation).<sup>39</sup>

### 3.2 The Human Rights Act 1998

The *Human Rights Act 1998* incorporated the *European Convention on Human Rights* into UK law. It had been a manifesto commitment of the Labour Party in the 1997 General Election.

#### Real rights for citizens

Citizens should have statutory rights to enforce their human rights in the UK courts. We will by statute incorporate the European Convention on Human Rights into UK law to bring these rights home and allow our people access to them in their national courts. The incorporation of the European Convention will establish a floor, not a ceiling, for human rights. Parliament will remain free to enhance these rights, for example by a Freedom of Information Act.<sup>40</sup>

After its full implementation in 2000 the legislation allowed British citizens to claim rights under the legislation in a UK court, rather than to the European Court of Human Rights in Strasbourg. Strasbourg does, however, remain the final arbiter on interpretation of the obligations included in the Convention.

The Act was introduced in order to “bring rights home” – the Government’s white paper *Rights Brought Home: The Human Rights Bill (1997)* has been described as “predominantly practical” on the basis that the status quo “whereby litigants had no choice but to enforce their human rights claims in Strasbourg took too long and was too expensive”.<sup>41</sup>

During the third reading of the *Human Rights Bill*, Lord Irvine, the then Lord Chancellor, said:

Let us remember that the European Convention was drawn up after the Second World War in response to the devastation it caused, accompanied by the grossest denials of human rights. It is a convention for the protection of human rights and fundamental freedoms. I emphasise the word “fundamental”. For nearly 50 years the United Kingdom has been bound under international law to observe those basic human rights of people within its jurisdiction. [...] It has been the clear desire of all the main political parties, and has had their general assent, that we comply with our convention obligations. That has been so for 50 years. The purpose of this Bill is to bring those rights home. It is to enable people to enforce their human rights in the courts of the United Kingdom rather than having to take their case to Strasbourg. The Bill does not create new human rights or take any existing human rights away. It provides better and easier access to rights which already exist.<sup>42</sup>

The *Human Rights Act* required ministers responsible for Bills to make statements, before Second Reading, about their views on the compatibility of the Bill’s provisions with Convention rights. The Act also provided that legislation must so far as possible be read and given effect to in a way which is compatible with Convention rights. There is provision for the

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<sup>39</sup> *European Convention on Human Rights*, article 15

<sup>40</sup> Labour Party, *New Labour: Because Britain deserves better*, 1997

<sup>41</sup> See for example White Paper, *Rights Brought Home: The Human Rights Bill*, Cm 3782, 1997, paras 1.14 and 1.18 and Jonathon Lewis, *The European Ceiling on Human Rights*, [2007] P.L (Winter) 720-747

<sup>42</sup> HL Deb, 5 February 1998, c755 This has been echoed by the Senior Law Lord, Lord Bingham, who stated in the case of *R (SB) v Denbigh High School* [2006] UKHL 15, [2007] 1 A.C 100 at 29, that the purpose of the Act “was not to enlarge the rights or remedies of those in the United Kingdom whose Convention rights have been violated, but to enable those rights and remedies to be asserted and enforced by the domestic courts of this country and not only by recourse to Strasbourg”

higher courts to make declarations of incompatibility when that is not possible in respect of primary legislation, and to disapply subordinate legislation. However, it is for ministers to decide whether or not to introduce changes to primary legislation following a declaration of incompatibility, but there is a fast track procedure for making remedial orders to amend the legislation where ministers consider that there are compelling reasons for doing so. The former Department for Constitutional Affairs has maintained a table of declarations that had been made by the courts.<sup>43</sup>

Section 6 of the Act makes it unlawful for a public authority to act in a way which is incompatible with Convention rights. It does not directly make it unlawful for anyone else to do so or define the term “public authority” except to say that it includes a court or tribunal, and any person certain of whose functions are functions of a public nature.

### **3.3 The Human Rights Act since its implementation**

Lord Lester QC and David Pannick QC have argued that the *Human Rights Act* has had “substantial influence” on UK law, arguing that “it has substantially improved the quality of public administration – by Parliament, the executive, public bodies and judges “. <sup>44</sup>

Nonetheless, the Constitution Unit at University College London has chronicled how opinion appeared to turn against the *Human Rights Act* in the face of a hostile media and high-profile cases:

It was Labour Party policy in 1997 first to incorporate the European Convention on Human Rights (ECHR) into domestic law, and then to move to a British Bill of Rights as a second stage. The second stage was dropped once the ECHR had been incorporated into the Human Rights Act in 1998, and the Human Rights legislation became the subject of a sustained onslaught from the tabloid press. This reached crescendo in summer 2006, when the Labour and Conservative leaders sought to outdo each other in attacking the Human Rights Act, echoing tabloid outrage at a court decision about deportation. Tony Blair ordered a review of the operation of the Act, and David Cameron went one stage further and promised to scrap the Act and replace it with a British bill of rights. The new Prime Minister must decide at the outset whether he is willing to defend the Human Rights Act... <sup>45</sup>

#### ***Hostility towards the Human Rights Act***

Criticism of the *Human Rights Act* has often suggested that it puts rights of criminals above those of victims. For example, outrage was expressed following the ruling of the Asylum and Immigration Tribunal in August 2007 that the killer of head teacher Philip Lawrence, Chindamo, could not be deported when released from prison. A High Court judge then turned down a Government request to reconsider the decision in October 2007. Chindamo had been born in Italy and lived there until the age of six. The case concerned both European immigration directives (which appeared to be the primary reason behind the decision) and Human Rights legislation, Article 8 of which (which protects the right to private and family life) was also considered by the Tribunal. Commenting in a press notice, David Cameron stated:

The fact that the Human Rights Act means he cannot be deported flies in the face of common sense. It is a shining example of what is going wrong in our country. His is

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<sup>43</sup> Last updated in August 2006, it is available at: <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf> (last viewed 9 September 2008)

<sup>44</sup> Lester and Pannick, *Human Rights: Law and Practice*, Butterworths, Second Edition, 2004, preface

<sup>45</sup> Robert Hazell, *Towards a New Constitutional Settlement: An agenda for Gordon Brown's first 100 days and beyond*, The Constitution Unit, June 2007

someone who has been found guilty of murder and should be deported back to his country. What about the rights of Mrs Lawrence?<sup>46</sup>

The Conservative Party has been highly critical of the operation of the *Human Rights Act*. In a speech given in June 2006 the Leader of the Conservative Party, David Cameron, stated that:

...while the Human Rights Act has had a number of unwelcome direct and indirect consequences for our ability to fight crime and terrorism, even in its own terms it had not actually proved to be effective in protecting fundamental rights in Britain.

It has not protected the right to trial by jury.

It did not prevent the right to free speech from being undermined in the Government's legislation on religious hatred.

So far any audit of the Human Rights Act would come to the conclusion that change is needed in order to protect both our security and freedom more effectively.<sup>47</sup>

### ***The relationship between politicians and the judiciary***

Both Mr Blair and his Home Secretaries were also often critical of the way that the judiciary had interpreted the human rights legislation. For example, after it was found that a group of Afghans who had hijacked a plane and landed in the UK in 2000, and then claimed asylum could not be deported, the former Prime Minister is quoted as having said:

We can't have a situation in which people who hijack a plane, we're not able to depart back to their country. It's not an abuse of justice for us to order their deportation, it's an abuse of common sense, frankly, to be in a position where we can't do this.<sup>48</sup>

The correlation between the introduction of the *Human Rights Act* and the perception of increased tension between the executive and judiciary has already been mentioned above. In addition to making Convention rights justiciable before the British courts, following the introduction of the 1998 Act, there appear to have been increasing complaints of judicial 'activism'. While rarely accused of political partisanship, judges have frequently been criticised (particularly by Home Secretaries), often for their 'liberal' views or judgments.

Professor Robert Stevens has claimed that:

During the 1960s [...] the judges, of their own volition, began rebuilding administrative law which had been largely demolished by the Liberal Law Lords just before the First World War. Naturally, they explained that, in fact, judicial review was merely a restating of what had been good nineteenth-century law. It was, however, to change the face of administrative decision making in Britain. Suddenly, ministers and their civil servants had to live with The Judge over your Shoulder, as the resulting Civil Service pamphlet was called.<sup>49</sup>

During his time as Home Secretary David Blunkett MP made some criticisms of the judiciary. In particular he stated that:

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<sup>46</sup> Conservative Party Press Notice, *Conservatives would abolish the Human Rights Act*, 21 August 2007

<sup>47</sup> David Cameron, *Balancing freedom and security – A modern British Bill of Rights*, 26 June 2006

<sup>48</sup> "Victory for Afghan hijackers fighting to remain in Britain", *The Times*, 5 August 2006

<sup>49</sup> Robert Stevens, *Reform in haste and repent at leisure*, Constitutional Innovation (A special issue of Legal Studies), Butterworths, 2004, p13

This relationship [between Parliament and the judiciary] has changed beyond all recognition over the past 30 years, thanks to the use of judicial review – the process by which an individual can ask the court to overturn effect or implementation of a law on their individual circumstance. Judges now routinely use judicial review to rewrite the effects of a law that Parliament has passed.<sup>50</sup>

In December 2008 the Secretary of State for Justice, Jack Straw, gave an interview to the *Daily Mail*. It reported that:

While taking care not to say anything which would appear to be an overt criticism of the judges, he has strong views on their recent performance...

Some of the judges have been 'too nervous' about deporting terrorist suspects, he says, when there is no reason to believe they were at risk of death or torture – which would preclude their deportation under the act. And he is 'frustrated' by some of the judgements which have encouraged votes to conclude that the act is a 'villain's charter' which favours the rights of criminals over those of victims...

However, giving evidence to the Joint Committee of Human Rights Mr Straw said:

I have religiously avoided, in your terms, attacking judges and I do not regard what I said in this article at all as an attack on the judiciary.<sup>51</sup>

Later in his evidence he stated:

This administration as a whole, particularly since Gordon brown became Prime Minister, has been extremely careful about not criticising judges.<sup>52</sup>

### ***Proportionality and judicial review***

In addition to these general complaints about judicial decision making, one further difficulty is that the 1998 Act has made some complex changes to the way that courts consider claims against public authorities. Prior to the introduction of the *Human Rights Act*, claimants who brought judicial review proceedings<sup>53</sup> against public authorities normally had to demonstrate that the authority had acted in a way that was obviously unreasonable, "irrational" (although he test encompassed a number of wider concepts.<sup>54</sup>) or *ultra vires*.<sup>55</sup>

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<sup>50</sup> David Blunkett MP, "I won't give in to the judges", *Evening Standard*, 12 May 2003

<sup>51</sup> Uncorrected transcript of oral evidence taken before the Joint Committee on Human Rights, *A Bill of Rights for the UK and the work of the Human Rights Minister*, Tuesday 20 January 2009, To be published as HC 174-I, Q3

<sup>52</sup> *Ibid*, Q27

<sup>53</sup> For more information on judicial review generally, see Horne, A, "Judicial Review: A short guide to claims in the Administrative Court, -[RP 06/44](#), 28 September 2008

<sup>54</sup> The classic formulation of the test is contained in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 and it therefore became known as "Wednesbury unreasonableness", however the grounds for judicial review were refined in the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 and subsequently further case law extended the spheres under which the court would intervene.

<sup>55</sup> Beyond the powers available to them.

Under the 1998 Act, where a claimant seeks to rely on rights guaranteed under the Act, the courts could consider a different concept – namely proportionality.<sup>56</sup> It is generally accepted the proportionality test can involve a more “intensive” level of review by the courts, and the courts have acknowledged that this might yield different results to traditional grounds of review.<sup>57</sup>

### **Definition of a ‘public authority’**

As mentioned above, section 6 of the 1998 Act makes it unlawful for a public authority to act in a way which is incompatible with Convention rights. As the term “public authority” was not defined in the Act, there have been issues about how far the term should extend. For the purposes of section 6, the term includes “any person certain of whose functions are functions of a public nature.” (s.6(3)). In addition, s.6(5) states that a body is not a public authority in this context “if the nature of the act is private.”<sup>58</sup> This issue is therefore problematic where public services are provided by the private sector or in circumstances where it may be difficult to be certain whether actions are of a public nature (examples may include the subcontracting of what were formally public functions - such as the operation of private prisons)..

The provision of residential care for the elderly has become the focus of a great deal of discussion. In the case of *YL v Birmingham City Council and others*<sup>59</sup>, the House of Lords decided by a majority of 3 to 2 that a private care home providing accommodation to elderly residents under contract with a local authority was not itself exercising “functions of a public nature” for the purposes of the *Human Rights Act*.<sup>60</sup> The issue of human rights in private care homes was debated during the passage of the *Health and Social Care Bill*, which was subsequently amended.<sup>61</sup> The *Health and Social Care Act 2008* therefore provides that a private care home which provides services which have been arranged by a local authority is to be treated as if it is performing a public function.

The broader effect of the *YL* case remains as yet unchanged. The *Human Rights Act (Meaning of Public Authority) Bill*<sup>62</sup> (a Private Members Bill introduced by Andrew Dismore MP) has proposed that a set of factors should be taken into account in determining whether a

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<sup>56</sup> Under the European Convention on Human Rights, a restriction placed on a freedom guaranteed by the Convention has to be “proportionate to the legitimate aim pursued.” If a Convention right is to be subject to a restriction, any measure will satisfy the proportionality test only if it meets three criteria: (i) The legislative objective must be sufficiently important to justify limiting a fundamental right; (ii) The measures designed to meet the legislative objective must be rationally connected to that objective – they must not be arbitrary, unfair or based on irrational considerations; (iii) The means used to impair the right or freedom must be no more than is necessary to accomplish the legitimate objective – the more severe the detrimental effects of a measure, the more important the objective must be if the measure is to be justified in a democratic society.

<sup>57</sup> See for example *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26, in which Lord Steyn indicated that “The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review”. He also reiterated that “[T]he intensity of review in a public law case will depend on the subject matter in hand [...] That is so even in cases involving Convention rights. In law context is everything”. The use of a proportionality test is seen more frequently in other jurisdictions, where it is sometimes used to control general administrative actions by Government. See for example: Martin, M and Horne, A. “Proportionality: Principles and Pitfalls – Some Lessons from Germany”, [2008] JR 169 and Hickman, T. “Proportionality Comparative Law Lessons” [2007] JR 31

<sup>58</sup> An act which is of a private nature would be governed by private law (eg: contract or tort law.)

<sup>59</sup> [2007] UKHL 27

<sup>60</sup> Alexander Williams, “*YL v Birmingham City Council*: Contracting out and ‘functions of a public nature’” [2008] E.H.R.L.R. Issue 4 p.524-531 analyses the reasoning behind the decision in the *YL* case.

<sup>61</sup> Inserted before Clause 138, plus a consequential amendment

<sup>62</sup> (2006-2007)[43], cl.1

function is of a public nature. In “*A Bill of Rights for the UK?*”<sup>63</sup> the JCHR considers the inclusion of this broader issue in the consultation process on a Bill of Rights. The Committee states that “the resolution of the *YL* problem in the HRA itself is relatively straightforward and need not await the outcome of the Bill of Rights process... [but] whatever happens in the interim in relation to the HRA, we are clear that any UK Bill of Rights should find a way of achieving what was originally intended in the HRA, that is, binding private persons or bodies performing a public function,”

### 3.4 A comparison with other jurisdictions: – the Canadian experience

The UK experience of incorporating the Human Rights Act seems to have been reflected in other jurisdictions that have enacted similar provisions. For example, Robert Sharpe has said that “the amendment of the Canadian Constitution in 1982 to include the Charter of Rights and Freedoms brought about a fundamental change to Canadian law and politics.” Issues that arose included “constitutional litigation [...] used by interest groups to advance their political ends”; an extension of the judicial function; and, “a profound impact on the judiciary”.<sup>64</sup>

Sharpe records that “media attention to legal issues [...] increased significantly”. Decisions of the courts routinely became front page news. He added that “The Supreme Court of Canada [...] developed a media relations policy designed to ensure that its judgments are adequately reported.”<sup>65</sup>

As a result of this, Sharpe records that despite a distaste for the “unsavoury aspects of the American confirmation process”, there has been increasing pressure to make more public the entire judicial appointments process. He states that “this seems inevitable given the significant powers accorded to [Canadian] judges”.<sup>66</sup>

Interestingly, the judiciary of England and Wales has recently established a website<sup>67</sup> and Judicial Communications Office. The Joint Committee on Human Rights also considered the issue of judicial appointments in its report, quoting Baroness Hale (a current Law Lord) who referred to the *Human Rights Act* as one of the factors which has “clearly increased the social and ‘small p’ political content of the judging task” – an issue which the Committee concluded “made it all the more important that the judiciary become more diverse.”<sup>68</sup>

## 4 A British Bill of Rights and Responsibilities

Instead of echoing previous criticisms of the *Human Rights Act* and its interpretation, the *Governance of Britain* Green Paper argued against Conservative calls for the Act to be repealed:

...the effect of repealing the Human Rights Act would be to prevent British Citizens from exercising their fundamental rights in British courts and lead to lengthy delays for British citizens who would need to appeal to Strasbourg to assert their rights. In

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<sup>63</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK?*, 10 August 2008, HL Paper 165 HC 150, 2007-08

<sup>64</sup> Philip Alston et al, *Promoting Human Rights Through Bills of Rights*, (Oxford, 1999), p 431-2

<sup>65</sup> *Ibid*

<sup>66</sup> *Ibid*

<sup>67</sup> <http://www.judiciary.gov.uk/>

<sup>68</sup> Joint Committee on Human Rights; *A Bill of Rights for the UK?*, Session 2007-08, HL 165-I/HC 150-I, para 245. For more information on the current judicial appointments process, see SN/HA/4717 [Judicial Appointments](#)

addition, the European Court of Human Rights would be less likely to take into account the specific British context in making its decisions.<sup>69</sup>

As outlined above, the Government has stated that there might be a case for building on the *Human Rights Act* to produce a 'British Bill of Rights and Duties'. There are three particular aspects of the Government's proposals which mark a departure from the approach of the *Human Rights Act* itself:

- the focus on 'Britishness';
- the importance of responsibilities or duties, alongside rights; and
- the need to involve the public in the articulation of rights and duties.

A number of questions have been raised in relation to the Government's proposals. These include:

- whether there are such things as British Rights, or rights for British people;
- how such rights would operate within the framework of devolution to Scotland, Wales and Northern Ireland;
- whether there should be any inclusion of social and economic rights within a British Bill of Rights;
- whether proposals are motivated by a desire to dilute or extend rights;
- whether it is desirable for rights to sit alongside duties in law and,
- whether a new British Bill of Rights would operate alongside or instead of the *Human Rights Act*.

#### **4.1 'Britishness'**

The interest in a 'British' Bill of Rights can be viewed within the wider context of the Prime Minister's political interests. Gordon Brown has often addressed the themes of 'Britishness' and 'British values', both as Chancellor of the Exchequer and as Prime Minister. His interest in British values is perhaps reflected in the proposal to develop a British Statement of Values before going on to consider a British Bill of Rights. The focus can be ascribed to a number of factors which include:

- the impact of multiculturalism on society;
- the threat of 'home grown' terrorism following the 7 July 2005 bombings and continuing security concerns;
- pressure for Scottish independence and the electoral success of nationalist parties in Scotland and Wales elections;
- the continued political salience of the West Lothian question (as highlighted by the Shadow Cabinet); and

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<sup>69</sup> Ministry of Justice, *Governance of Britain*, Cm 7170, July 2007

- the selection of a Scottish Prime Minister (representing a Scottish constituency) for the United Kingdom.

When Gordon Brown addressed the Fabian Society's 2006 annual conference on the theme of 'The Future of Britishness' he stated that:

...I would argue that if we are clear about what underlies our Britishness and if we are clear that shared values – not colour, nor unchanging and unchangeable institutions – define what it means to be British in the modern world, we can be far more ambitious in forging a new and contemporary settlement of the relationship between state, community and individual; and it is also easier too to address difficult issues that sometimes come under the heading 'multiculturalism' – essentially how diverse cultures, which inevitably contain differences, can find the essential common purpose without which no society can flourish.<sup>70</sup>

During his 2006 autumn Labour Party conference speech he stated that:

We the British people must be far more explicit about the common ground on which we stand, the shared values which bring us together, the habits of citizenship around which we can and must unite. Expect all who are in our country to play by our rules. And while we do not today have a written constitution it comes back to being sure about and secure in the values that matter: freedom, democracy and fairness... And let us reaffirm the truth, that as individual citizens of Britain we must act upon the responsibilities we owe each other as well as our rights.<sup>71</sup>

The *Human Rights Act* has been associated in the public's mind with Europe, due to its origins in the *European Convention on Human Rights*. This has been linked to its unpopularity with the press and the public. As the Lord Chancellor, Jack Straw, stated in an October 2007 speech:

If you read certain newspaper you might be forgiven for thinking that human rights were an alien imposition foisted upon us by 'the other'. It is a misconception that has regrettably taken root.<sup>72</sup>

One aim of a British Bill of Rights would be to give the UK 'ownership' of the rights agenda. As the Constitution Unit at University College have written:

The main aim [of a British Bill of Rights and Duties] should be to repatriate and repackage the ECHR and put a British label on it, in order to gain public acceptance of a catalogue of rights. As the Green Paper points out, there was significant British input into drafting the ECHR, but sections of the press will continue to portray it as an undesirable European import, and many of its readers will believe them. This negative perception is unlikely to change until the rights have been discussed by the British people and adopted as a Bill of Rights.<sup>73</sup>

The Joint Committee on Human Rights identified four ways in which a Bill of rights could be 'distinctively British':

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<sup>70</sup> Gordon Brown, The future of Britishness – Keynote speech to the Fabian Society Annual Conference, 14 January 2006 <http://fabians.org.uk/events/speeches/the-future-of-britishness> (last viewed 9 September 2008)

<sup>71</sup> Gordon Brown, Speech to the Labour Party Conference, Autumn 2006

<sup>72</sup> Jack Straw, *Mackenzie-Stuart Lecture*, 25 October 2007

<sup>73</sup> Robert Hazell, *Constitution Unit response to Cm 7170: The Governance of Britain July 2007*, July 2007, <http://www.ucl.ac.uk/constitution-unit/files/publications/GovernanceResponse.pdf>

- it might contain additional rights, over and above those set out in the ECHR and other international instruments;
- it could relate specifically to people who associate themselves with a British Statement of Values or who consider themselves to be British; and
- by being “home-grown”, it might reassure those who are concerned that human rights were imposed on the UK by “Europe” that human rights have been formulated and agreed in the UK.<sup>74</sup>

### ***Are any rights particularly British?***

It is not clear, however, which rights might be considered as particularly British. The *Governance of Britain* stated that a British Bill of Rights:

...could give people a clear idea of what we can expect from public authorities, and from each other, and a framework for giving practical effect to our common values. However, if specifically British rights were to be added to those we already enjoy by virtue of the European Convention, we would need to be certain that their addition would be of real benefit to the country as a whole and not restrict the ability of the democratically elected Government to decide upon the way resources are to be deployed in the national interest. ...<sup>75</sup>

At his first appearance before the Liaison Committee on 13 December 2007 the Prime Minister was pressed on the issue of ‘British rights’ by the chairman of the Public Administration Select Committee, Tony Wright. Dr Wright asked Gordon Brown:

**Q38 Dr Wright:** Could we just move this on slightly and turn to this Britishness stuff which I am having a bit of trouble with because it says that "the Government is going to work with the public to develop the British statement of values which will set out the ideals and principles that bind us together as a nation". Now, that is not a modest undertaking. Now, I do not understand what such a statement might contain that could not be made in any decent western European society. Indeed, in the document it talks about the principles of liberty, democracy, tolerance, free speech, pluralism, fair play and civic duty. Well, almost any Western society would recite those, so what would be distinctive about ours? There are bits of distinctiveness of course, and I can think of binge-drinking, I think of family breakdown, I think of a growing incivility, but presumably those are not British values that we want to articulate, are they?

The Prime Minister replied that:

...there is something uniquely British about the relationship between liberty, civic duty or social responsibility and fairness. I think Britain was the pioneer of liberty for the modern world, and I think in later years America took it upon itself to claim that it was the leading country in promoting liberty, but our view of liberty is different from the American view of liberty. Our view of liberty is not the 'leave me alone' liberty that you characterise with some of the American Constitution. Our view of liberty is liberty in the context of social responsibility and, in the 19th Century, the idea of civic duty that emerged in response to the industrial revolution is something that also Britain can claim some credit for pioneering, so it is the distinctive relationship between liberty, civic duty and, in the 20th Century, the ideas of fairness that, in my view, characterise what it is for people to think of themselves as British, and that is why we find it easy to accommodate both the liberty of the individual citizen and having a National Health

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<sup>74</sup> Joint Committee on Human Rights; *A Bill of Rights for the UK?*, Session 2007-08, HL 165-I/HC 150-I, para 115

<sup>75</sup> Ministry of Justice, *Governance of Britain*, Cm 7170, July 2007, para 209

Service that is free to people at the point of need. You rightly say that different countries have different ideas about what the boundaries are between acceptable and unacceptable behaviour, and you mentioned binge-drinking, but guns is a very good example. Guns are tolerated in America, but guns are anathema to people here if it is just citizens going around carrying guns without a particular use that they have for them that can be justified for their occupation or for some other purpose, and bullying was not an issue that people thought important in Britain in the 1970s or 1980s in the way that people think of it as something that has got to be eradicated now. British values, I think, can be set down. You can have a debate about what it is to be British, and what is the importance of it? The importance of a debate like that is that it brings people together and it allows people to test what it is that holds them together and gives them purpose as a nation. We are a multinational country which cannot base our identity purely on ethnicity or simply on the existence of institutions. At the end of the day, what holds us together are the values that we can agree we hold in common and I think it is possible for us to discuss and debate these and then, out of that discussion and debate, we get a stronger sense of national unity, so that is why I am proposing that we have this debate.<sup>76</sup>

The inclusion of any rights additional to those already available through the HRA is discussed in section 4.2 below.

### ***Rights and devolution***

The *Governance of Britain* Green Paper refers to a British Bill of Rights, yet there are certain devolution issues which would need to be overcome in order to build such a document.

Northern Ireland has already embarked upon a process of drafting a Bill of Rights. A British Bill of Rights would therefore probably not be a Bill of Rights for the whole of the UK, even though the *Human Rights Act* applies to the whole of the UK.

The Northern Ireland Human Rights Commission was established in 1999 by the *Northern Ireland Act 1998*. Their role is to promote awareness of the importance of human rights in Northern Ireland, to review existing law a practice and to advice the on other measures which ought to be taken to protect human rights in Northern Ireland. It is also specifically charged, under s 68(7) to “advise” the Secretary of State for Northern Ireland on what should be in a Bill of Rights for Northern Ireland. This advice is due to be submitted on 10 December 2008.

The *Belfast (Good Friday) Agreement* stated that the Bill of Rights should reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. The Commission has received over 400 submissions from individuals and agencies, and has organized a number of public meetings, seminars and training events.<sup>77</sup> A Bill of Rights Forum was established to advise the Commission.<sup>78</sup> The Forum set up seven working groups to look into specific areas of human rights, such as children and young people, and economic and social rights. Their final report published in March 2008 report looked at more than 50 areas of human rights. For each issue, the range of views represented on the Forum were set out in the report.

There may also be issues to resolve in Scotland if there were to be a British Bill of Rights. Under s29(2)(d) of the *Scotland Act 1998*, the Scottish Parliament cannot pass legislation which is incompatible with the *European Convention on Human Rights*. This differs from the

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<sup>76</sup> Uncorrected oral evidence taken before the Liaison Committee, The Prime Minister, 13 December 2007, to be published as HC 192-i

<sup>77</sup> Northern Ireland Human Rights Commission, <http://www.nihrc.org/>

<sup>78</sup> Bill of Rights Forum, <http://www.billofrightsforum.org/>

situation in the UK where the courts can find legislation incompatible with the *Human Rights Act* but cannot strike such legislation down. It is not yet clear whether a Bill of Rights for the UK would operate in the courts in the same way as the *Human Rights Act* both for the UK and for Scotland, but consideration would need to be given about the need to amend the *Scotland Act* to refer to the new Bill of Rights. Further questions raised in this context include:

- If additional rights were to be included in the Bill of Rights, and if the *Scotland Act* were to be amended to refer to the Bill of Rights, would this narrow the framework within which the Scottish Parliament would have legislative competence?
- If additional rights (such as social and economic rights) were to be included in the Bill of Rights, what impact would it have on the ability of Scotland to legislate in devolved policy areas (such as health and education)?
- Because many aspects of policy are devolved, the views of Scottish people on what should be included in a British Bill of Rights may differ substantially from those in England (this may also be a consideration for Wales). How will such differences be overcome in one document?

Allan Miller, recently appointed as Chair of the Scottish Commission,<sup>79</sup> has identified a distinctively Scottish approach to human rights which differs from the English or Anglo-American notion. He states that this perspective has a broader view on 'rights'; an individual's freedom is dependant on the extent of freedom of society as a whole. This approach recognises the right to an average level of social and economic provision which then allows an individual to exercise political and civil rights and to fully participate in society.<sup>80</sup>

The Prime Minister was asked about Human Rights in the context of devolution during his appearance before the Liaison Committee:

**Q44 Mr Doran:** Prime Minister, the Green Paper acknowledges the position of the devolved administrations and in some areas it is quite clear, for example, a Bill of Rights or new powers for local authorities, that in the case particularly of Scotland there would need to be legislation, so there would need to be agreement between the Westminster Parliament and the Scottish Parliament on some laws. Can you say a little bit more about the process that you envisage in that debate and, in particular, if we look at the situation at the moment, there is no guarantee that agreement could be reached. I may be wrong about that. Could you say a little about how your goal of a shared national purpose for all the people of the UK would look if we could not reach agreement with the Scottish Executive and people in some parts of the UK had different rights from people in other parts of the UK?

Mr Brown: This is a United Kingdom constitution and the powers that are devolved are powers that are actually devolved by Parliament to the Scottish Parliament and there are areas where it is the right of the Westminster Parliament to legislate and it is not within the power of the Scottish Parliament to legislate. I think sometimes people have forgotten that this is devolution. It is not a form of federalism; it is a form of devolution. If you look at the relationships between Scotland and the rest of the United Kingdom, we should not forget the shared identity. When the Act of Union was signed only three per cent of Scots had relatives in England. Today 50 per cent of Scots have relatives in

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<sup>79</sup> For further information, see [http://www.mcgrigors.com/people/directors/alan\\_miller.html](http://www.mcgrigors.com/people/directors/alan_miller.html)

<sup>80</sup> A Miller, 'Human Rights and the Scottish Parliament', [1998] E.H.R.L.R 260

England so the bonds of family relationships that hold the United Kingdom together are a lot stronger than they were in the past. The bonds of economic interest that hold the United Kingdom together are far stronger as well. There is hardly a business in Scotland or in Wales that does not have trade or relies upon a market that is broader than Scotland and Wales, if it is in the big industry category. The financial services industry: most of its services in Scotland are to the rest of the United Kingdom. The bonds that hold us together are actually growing stronger over the years and I think that has to be increasingly recognised in this debate about the future of the United Kingdom.<sup>81</sup>

The Joint Committee on Human Rights was slightly dismissive of the devolution issues in their conclusions and recommendations, stating that “the devolution settlement creates certain difficulties for a UK Bill of Rights, but we do not accept that it creates an insuperable obstacle”. However, in the body of its report, it acknowledges a number of issues, including the fact that Scottish Justice Minister, Kenny MacAskill MSP had indicated that the Scottish Government had not been significantly involved in discussions on a Bill of Rights.<sup>82</sup> The Committee also cited the evidence of Professor Robert Hazell that a similar issue arose in Canada, during the introduction of the Canadian Charter of Rights and Freedoms, without Quebec’s consent, which led to Quebec refusing to accept the new constitution as a whole.<sup>83</sup>

### ***British rights or rights for British people?***

JUSTICE has raised the question whether a British Bill of Rights would apply to British citizens, or to those within British jurisdiction. They argue that it must be the latter:

...There has been a tendency to refer to a new bill of rights as protecting not *human* rights but *citizens’* rights. Rights would thus be defined as something one has by virtue of carrying a British passport rather than by virtue of being human. There are, of course, political rights which are dependent on citizenship. However, talk of ‘citizens’ rights’ must not undermine the principle of universality in core rights – that everyone is entitled to human rights protection regardless of race, religion, nationality or other status... A British bill of rights must make clear that it protects all those within British jurisdiction.<sup>84</sup>

The Joint Committee on Human Rights agreed:

The rights enshrined in the HRA apply to everyone in the UK, irrespective of their citizenship or immigration status. Bill of Rights protect rights which people have by virtue of being human, not according to their legal status as citizen or non-citizen. It is regrettable that the loose language of the Governance of Britain Green Paper appeared to suggest that some of those rights – such as equality before the law – are associated with citizenship. We welcome the Justice Secretary’s acknowledgement that fundamental human rights cannot be restricted to apply solely to citizens. We also note that there are rights – such as the right to vote – which are legitimately linked to citizenship. Nevertheless, we are concerned that by making an explicit link between human rights and citizenship, the Government may foster the perception that non-citizens are not entitled to fundamental human rights. It risks turning the important debate about a Bill of Rights into a surrogate for anti-outsider sentiments, rather than

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<sup>81</sup> Uncorrected oral evidence taken before the Liaison Committee, The Prime Minister, 13 December 2007, to be published as HC 192-i, Q44

<sup>82</sup> Joint Committee on Human Rights; *A Bill of Rights for the UK?*, Session 2007-08, HL 165-I/HC 150-I, pg 31-32. At para 103, Mr MacAskill in answer to the question about Scottish Government involvement in discussions, is quoted as saying “Not really a great deal at all and I think the fact that devolution is not mentioned is perhaps an indicator of that”.

<sup>83</sup> *Ibid*, para 101

<sup>84</sup> JUSTICE, *A British Bill of Rights: Informing the Debate*, November 2007, para 37

an opportunity to define and celebrate the values regarded as particularly fundamental in the UK as a nation state. We call on the Government to decouple the debate about a Bill of Rights from the debate about citizenship and the rights and duties of the citizen, and to ensure that in future the universality of fundamental human rights is explicitly recognized in documents and speeches relating to a Bill of Rights.<sup>85</sup>

The Government response to the Joint Committee stated:

The Government has never sought to assert that human rights are anything but universal. Clearly many of our more specific rights and entitlements within the UK may depend on nationality and immigration status. However, this is a separate issue from that of the values and principles which bind us together in a modern UK society. It is also separate from the task of seeking, through any future constitutional reform exercise, to give expression and effect to these common values as part of a new constitutional settlement.<sup>86</sup>

### ***A British Statement of Values***

As well as proposing a British Bill of Rights and Duties, the July 2007 *Governance of Britain* Green Paper proposed a deliberative process to draw up a British Statement of Values.

The Joint Committee suggested that such a statement of values might make an effective preamble to the Bill of Rights:

**...in principle that, if there is to be a UK Bill of Rights, as we believe there should be, it ought to have a Preamble which sets out, in a simple and accessible form, first, the purpose of adopting a UK Bill of Rights and, second, the values which are considered to be fundamental in UK society.** The HRA contains no such preamble and, in retrospect, might have benefited from one, as a source of guidance for courts and other decision-makers as to the purpose of that Act and its underlying values.<sup>87</sup>

In their own Bill of Rights published as an annex to their report, the JCHR included the following preamble:

This Bill of Rights and Freedoms is adopted to give lasting effect to the values which the people of the United Kingdom of Great Britain and Northern Ireland, consider to be fundamental:

- The rule of law: the commitment to power being exercised lawfully as determined by an independent judiciary;
- Liberty: the freedom from both unwarranted restrictions and basic wants;
- Democracy: giving as much control as possible to individuals over the decisions which affect their lives;
- Fairness: the equal right of each and every person to be treated with dignity and respect;

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<sup>85</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK?*, 10 August 2008, HL Paper 165 HC 150, 2007-08, para 84

<sup>86</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK? Government response to the Committee's Twenty-ninth Report of Session 2007-08*, 19 January 2009, HL Paper 15 HC 145, 2008-09, p15

<sup>87</sup> *Ibid*, para 114

- Civic duty: the responsibilities to each other, to the communities to which we belong and to future generations.<sup>88</sup>

## 4.2 Which rights should be included?

### *Economic and social rights*

There has been some debate about which rights that are not contained within the *Human Rights Act* could be included in a British Bill of Rights. Some focus has been on economic and social rights. The Chairman of the Joint Committee on Human Rights, Andrew Dismore, asked the Prime Minister whether such rights were effectively 'off limits' in discussions about a British Bill of Rights. Gordon Brown stated that:

I do not think they [social and economic rights] can ever be off-limits in a debate and I think when people look at what does hold Britain together, some of the social changes that happened in the 20<sup>th</sup> century are seen by people to be of such importance that they accord them the status of rights in the way they talk about them, as you have rightly said about the National Health Service. The question however is whether, if you are setting down in legislation rights, are you setting them down so that people can take legal action on the basis of enforcing them or not.<sup>89</sup>

The *Human Rights Act* does currently offer very limited opportunities for judicial intervention in socio-economic issues.<sup>90</sup> Furthermore, it can be argued that traditionally, the courts themselves have been leading proponents of the view that discretionary resource allocation decisions are not for them. In the case of *R v Cambridgeshire Health Authority, ex parte B* [1995] 1 WLR 898, Lord Bingham observed that:

It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like; they cannot provide all the treatments they would like; they cannot purchase all the extremely expensive medical equipment they would like, they cannot carry out all the research they would like; they cannot build all the hospitals and specialist units they would like. Difficult and agonizing judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. This is not a judgment which the court can make.<sup>91</sup>

It has also been suggested that while "social and economic goods such as housing and health are not protected as rights in the United Kingdom's constitutional scheme [...] entitlements to social welfare benefits are protected in ordinary legislation and decisions made in terms of such legislation are judicially reviewable".<sup>92</sup>

The idea of making additional rights justiciable, under a Bill of Rights, has caused concern amongst some commentators that the judiciary would further expand its sphere of influence on matter better dealt with by parliamentarians. For example, during his appearance before

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<sup>88</sup> *Ibid*, Annex 1

<sup>89</sup> *Ibid*, Q40

<sup>90</sup> See *R v Secretary of State for Social Security ex p Joint Council for the Welfare of Immigrants* which considered the provision of benefits to asylum seekers in order to protect them from destitution. In *R. (Bernard) v. Enfield L.B.C.* [2002] EWHC 2282 (Admin), the court found that the local authority had acted unlawfully and incompatibly with art. 8, by failing (for over 2 years) to provide suitable accommodation for a family which included a severely disabled woman. The High Court ruled that just satisfaction for the failure required an award of compensation. It is important to note, however, that it is an unusual case where such rights become enforceable and awards of monetary compensation under the HRA are rare

<sup>91</sup> For an alternative view, see Emma Douglas, *Incorporating socio-economic rights in a British Bill of Rights: pragmatic progression or a step too far?*, JUSTICE Journal, [2007] 1, pp88-102

the Joint Committee on Human Rights, the Human Rights Minister, Michael Wills, took part in the following exchange about economic and social rights:

**Q54 Chairman:** Before we move off this, on the question of economic and social rights we seem to be pretty well ruled out. Last week, talking about eminent jurists, Justice Albie Sachs of the South African Constitutional Court said to us when we were talking to him about the economic and social rights in their constitution and whether we should do that, "A country that does not have social and economic rights in its constitution is a country without aspirations for the future". What would you say to that?

Mr Wills: I would say it is a very interesting comment. I think most politicians in this country think that the decisions on economic and social rights are for democratically accountable politicians to make. In the end they are difficult to make without making complex decisions about the allocation of scarce resources for which we are accountable to the British people in regular elections.

**Q55 Chairman:** As they are in South Africa, and as they have a whole series of checks and balances within their constitution and in the way the system operates.

Mr Wills: I would not presume to comment on the constitutional arrangements of South Africa. My job is to represent my constituents in this Parliament appropriately and I think that you have to be extremely careful once you start taking powers away from Parliament which properly and historically have always belonged there. These are difficult issues. Courts will always take a decision on the evidence and the facts of the case before them, rightly and properly so. Politicians, whatever decision they take, have to take account of all the other decisions that are in some way contingent and dependent on that particular decision, not least about funding. They are difficult trade-offs, they are complicated. Politicians sometimes get them right, sometimes get them wrong, but the crucial thing is that we are all regularly accountable to the people of this country for those decisions. I think that is very important and precious and I do not think we should jeopardise it for whatever reason.<sup>93</sup>

In respect of economic and social rights, the Joint Committee on Human Rights recognized three broad objections to the inclusion of economic and social rights – namely:

- The rights themselves are too vaguely expressed and will only raise expectations and encourage time –consuming and expensive litigation against public bodies;
- It hands too much power to the courts and so is undemocratic;
- It involves the courts in making decisions about resources and priority setting that they are ill equipped to take.

While the Committee rejected the idea of fully justiciable enforceable rights, it proposed a model whereby some constitutional recognition could be given to social and economic rights, falling short of making them specifically legally enforceable.

It suggested that:

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<sup>92</sup> Anashri Pillay, *Courts, Variable Standards of Review and Resource Allocation: Developing a Model for the Enforcement of Social and Economic Rights* [2007] E.H.R.L.R 616

<sup>93</sup> Joint Committee on Human Rights, Uncorrected evidence given by Michael Wills MP (Human Rights Minister) and Edward Adams (Head of the Human Rights Division, Ministry of Justice), To be published as HC 132-i Session 2007-08

The main objection to the inclusion of social and economic rights in a Bill of Rights are not, in the end, objections of principle, but matters which are capable of being addressed through simple drafting [...] We put forward for consideration an approach which draws inspiration from the South African approach to economic and social rights, but which contains additional wording, designed to ensure that the role of the courts in relation to social and economic rights is appropriately limited.<sup>94</sup>

It concluded:

196. We recommend that any Bill of Rights should in the first place include only rights to health, education, housing and an adequate standard of living, with a view to reviewing the experience after a period and considering whether to add other social and economic rights not currently included.

197. [...] Rights such as the right to adequate healthcare, to education and to protection against the worst extremes of poverty touch the substance of people's everyday lives, and would help to correct the popular misconception that human rights are a charter for criminals and terrorists. [...] <sup>95</sup>

The Government's response to the Joint Committee on the issue of Economic and Social Rights was as follows:

The Government notes the Committee's recommendation but re-iterates its concern over any new constitutional document which could result in increased judicial intervention in areas involving resource allocation in the socio-economic sphere which should, in its view, remain a matter for democratically accountable institutions of government.<sup>96</sup>

Some commentators believe that the whole notion of non-justiciable social and rights is misconceived. Yuval Shany, one of the co-authors of *Exploring Social Rights* has argued that civil and political rights also have "redistributive characteristics". He has claimed that since the 1970s the European Court of Human Rights "has held on numerous occasions that the duty incumbent upon member states [...] to 'secure' the rights enumerated in the Convention also entails 'positive obligations'".<sup>97</sup> In particular, he has picked out the cases of *Osman v UK* (1998) (where the ECtHR held that the state must apply all police measures that could reasonably be expected in order to prevent risk to the lives of individuals from other individuals); *Airey v Ireland* (1979) (which required Ireland to provide legal aid when such assistance is 'indispensable' for effective access to a court) and *Moldovan v Romania* (2005) (where it was held that the Romanian state had failed to promptly and adequately reconstruct houses belonging to Roma dweller, which were destroyed in a mob attack, exposing the dwellers to prolonged inhumane living conditions. On that basis, he has argued that if the European Court of Human Rights "was able to develop methods for the examination of complaints alleging the inadequacy of police efforts to curb crime [...] then there would seem to be no *a priori* bar against the introduction of similar methods for reviewing 'positive ESR obligations'".<sup>98</sup>

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<sup>94</sup> Joint Committee on Human Rights; *A Bill of Rights for the UK?*, Session 2007-08, HL 165-I/HC 150-I, paras 191-192

<sup>95</sup> Joint Committee on Human Rights; *A Bill of Rights for the UK?*, Session 2007-08, HL 165-I/HC 150-I

<sup>96</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK? Government response to the Committee's Twenty-ninth Report of Session 2007-08*, 19 January 2009, HL Paper 15 HC 145, 2008-09, pp19-20

<sup>97</sup> Barak-Erez, Gross et al, *Exploring Social Rights: Between Theory and Practice*, (Hart, 2007), pg 99-103

<sup>98</sup> *Ibid*, pg 79

### **“Third Generation” rights**

The Joint Committee also pressed for the inclusion of some “third generation” rights, particularly, the right to “a healthy and sustainable environment”.<sup>99</sup> In support of this view, it quoted from the constitutions of various other States, including Spain, Portugal and South Africa.<sup>100</sup>

The Government’s response to the Joint Committee’s report stated that:

...Allowing sustainable development principles to feature in some form on an enduring basis in a new constitutional document might help to foster awareness of and collective responsibility for our environment. Importantly, this would need to be considered alongside the desire to preserve the balance between the executive, legislative and judicial branches of the constitution, and to ensure decisions about resource allocation remain the business of democratically elected and accountable representatives.<sup>101</sup>

### **Other rights**

Note that the JCHR suggests the following nationally distinctive rights:

- the right to trial by jury in serious cases in England, Wales and Northern Ireland
- the right to administrative justice
- equality

### **4.3 Rights and Duties**

A key difference between a new British Bill of Rights and the *Human Rights Act* may be the inclusion of the duties and responsibilities as well as rights. The *Governance of Britain* suggested that:

A Bill of Rights and Duties could provide explicit recognition that human rights come with responsibilities and must be exercised in a way that respects the human rights of others. It would build on the basic principles of the Human Rights Act, but make explicit the way in which a democratic society’s rights have to be balanced by obligations... However, a framework of civic responsibilities – were it to be given legislative force – would need to avoid encroaching upon personal freedoms and civil liberties which have been hard won over centuries of our history.<sup>102</sup>

In his October 2007 Mackenzie-Stuart speech, Jack Straw explained that he would be working with Lord Goldsmith who has been asked to conduct a review of citizenship, to

...look at how a British Bill of Rights and Responsibilities can help ... to foster a stronger sense of citizenship. It can do so by establishing and articulating the balance between the rights we are all entitled to **and** the obligations we all owe to each other.

This is not a new concept; it goes back to Tom Paine. He declared that:

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<sup>99</sup> Joint Committee on Human Rights; *A Bill of Rights for the UK?*, Session 2007-08, HL 165-I/HC 150-I, para 210

<sup>100</sup> *Ibid*, para 208

<sup>101</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK? Government response to the Committee’s Twenty-ninth Report of Session 2007-08*, 19 January 2009, HL Paper 15 HC 145, 2008-09, p22

<sup>102</sup> Ministry of Justice, *Governance of Britain*, Cm 7170, July 2007, para 210

“A Declaration of Rights is, by reciprocity, a Declaration of Duties also. Whatever is my right as a man, is also the right of another, and it becomes my duty to guarantee as well as to possess.”

A Bill of Rights and responsibilities imposes obligations on government: but it also makes clear that the citizen has mutual obligations. The extent of this ‘horizontal’ relationship, is something we will explore, and we can look more recently than Tom Paine to the example of South Africa as to how this could work in practice.

During the December 2007 Liaison Committee hearing, the Prime Minister was asked whether there would be rights that those within the UK jurisdiction would not be entitled to. Andrew Dismore questioned whether “Effectively, do you have to speak English to access your human rights under this?” The Prime Minister responded:

If you wish to apply for citizenship or permanent residence in this country – and there is a debate about what the distinction between these two is, of course – you should be expected to and have the responsibility to learn our language.<sup>103</sup>

The appropriateness of containing duties within a Bill of Rights was raised by the Earl of Onslow during the Joint Committee on Human Rights’ evidence session with Michael Wills:<sup>104</sup>

**Q60 Earl of Onslow:** You talk about the Bill of Rights and Duties. If my history teaches me correctly, and I think it does on this, neither the 1689 Bill of Rights nor the amendments to the American Constitution mention any form of duties on the part of the subject or citizen. Once you start imposing rights on individual people you are starting to boss them about, and surely the object of the state is that it must not boss people about unless it absolutely has to, and so it should be a Bill of Rights, which means that these are rights which are designed to protect the subject from arbitrary government and in a funny way duties does not come into that.

Mr Wills: With great respect, I am not sure I agree with that. First of all, the responsibilities and duties are inherent in most of the rights that are set out in the ECHR and it is right that they should be. Philosophically rights are nearly always accompanied by responsibilities. That position goes back a very long way. We have to look at this in a particular historical context. In the context that you are talking about there was a particular issue about the relationship of the state to the individual. There still is and you were right to draw attention to it and that will be fundamental, but individuals do also have responsibilities for community, perhaps embodied in the state, but they also have responsibilities to each other. Those sets of responsibilities are not necessarily ones for government to impose. You cannot impose a duty to be a good neighbour on somebody. You can set up all kinds of mechanisms to encourage it, but to impose it, absolutely not.

**Q61 Earl of Onslow:** Our common law and tradition basically say that we can do anything we like unless we are told by the Queen in Parliament not to. If you have a rights culture, like the French, a Bill of Rights, that is something which is automatically prescribed and limited, whereas the old-fashioned liberty of the subject is unlimited unless you are checked. There seems to me a fundamental and important difference between those two concepts and our one is the grander and more noble of the two ideas.

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<sup>103</sup> Uncorrected oral evidence taken before the Liaison Committee, The Prime Minister, 13 December 2007, to be published as HC 192-i, Q42

<sup>104</sup> See also Eric Metcalfe, Rights and Responsibilities, JUSTICE Journal, [2007] Vol 4, No 2 p41

Mr Wills: There is certainly a difference between them. It depends where you stand about the value you attach to each of them, but that is a slightly different point from the importance of responsibilities in the mix, and I think acknowledging that we all have responsibilities to each other, and this is an acknowledgement; this is not new.<sup>105</sup>

There have been questions raised over how duties or responsibilities can be made enforceable in a Bill of Rights. The use of preamble is one suggested mechanism. Concerns about duties were raised at a joint session of the Home Affairs and Constitutional Affairs Committees in 2006.<sup>106</sup> A particular issue which arose was whether rights could somehow be abated or qualified if and individual had not met certain duties.

The Joint Committee came down strongly against the inclusion of any duties or responsibilities in a Bill of Rights. They concluded that the Government's proposals on this were "motivated by a concern to educate the public" and stated that:

We cannot see what purpose is served by articulating a responsibility as general as the responsibility to obey the law, nor do we believe that a Bill of Rights is the place to set out legal responsibilities which are already legally binding on the individual. We do not accept that educating people about their legal responsibilities is an appropriate function of a Bill of Rights.<sup>107</sup>

The Government's response to the Joint Committee's report disagreed with the Committee's view. The Government stated:

Most rights must be exercised responsibly, bearing in mind the rights of others. Indeed, Article 7 of the ECHR specifies that: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

In addition, we owe each other, and the community in general, certain responsibilities which are key to the healthy functioning of civic society and a flourishing modern democracy. There is a worthwhile debate to be had over giving these more prominence in any new constitutional document.<sup>108</sup>

### ***Duties in other human rights instruments***

In their book, *International Human Rights in Context – Law Politics and Morals*, Steiner, Alston and Goodman indicate that the *African Charter on Human and Peoples' Rights* is "the first human rights treaty to include an enumeration of [and] give forceful attention to, individual's duties."<sup>109</sup> The Charter was adopted in 1981 and entered into force in 1986. It was the result of an agreement by the Assembly of Heads of States and Government of the Organisation of African Unity.

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<sup>105</sup> Uncorrected Transcript of Oral Evidence taken before the Joint Committee on Human Rights, To be published as HC 132-i, Q60

<sup>106</sup> Constitutional Affairs Committee and Home Affairs Committee, *Human rights legislation and government policy-making*, 31 October 2006, HC 1703-i and ii,. See particularly Q 14-16, 22-24 and available at : <http://pubs1.tso.parliament.uk/pa/cm200506/cmselect/cmconst/1703/6103101.htm> (last accessed 22 November 2007)

<sup>107</sup> Joint Committee on Human Rights, para 73

<sup>108</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK? Government response to the Committee's Twenty-ninth Report of Session 2007-08*, 19 January 2009, HL Paper 15 HC 145, 2008-09, p25

<sup>109</sup> Steiner et al, *International Human Rights in Context: Law, Politics and Morals*, 3<sup>rd</sup> Edition, Oxford 2007, p504-505

The text of the duties can be found at articles 27-29 of the Charter (Chapter II), which provides that:

#### Chapter II - Duties

##### Article 27

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

##### Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

##### Article 29

The individual shall also have the duty:

1. to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
2. To serve his national community by placing his physical and intellectual abilities at its service;
3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
7. to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

Steiner et al comment that “depending on their interpretation and their possible application within the African human rights regime, the duties declared in the Charter could constitute part of the deep structure of the society contemplated by the instrument” but go on to note the “problems raised by these provisions about individual duties”.<sup>110</sup> They note that what appear to be conventional terms of reference may have plural meanings (family, society). Another issue is how such duties can be enforced – the text states that, at present, the African Commission has taken no steps towards interpretation or general elaboration of the

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<sup>110</sup> *Ibid.*

provisions on duties, accordingly, the question remains open as to whether the articles can be seen be binding or enforceable.<sup>111</sup>

Other examples of references to duties in human rights instruments include Article 29 of the Universal Declaration of Human Rights, which provides:

Article 29.

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

The preamble of the *International Covenant on Civil and Political Rights* also makes reference to duties – the relevant passage states:

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant, Agree upon the following articles...<sup>112</sup>

Also of interest is the *Victoria Charter of Rights and Responsibilities Act 2006*. Its preamble states that:

On behalf of the people of Victoria the Parliament enacts this Charter, recognising that all people are born free and equal in dignity and rights.

This Charter is founded on the following principles—

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
- human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.<sup>113</sup>

#### 4.4 Involving the public

The *Human Rights Act 1998* was supposed to “bring rights home”, however, in practice, there are widely held misconceptions about the operation of the Act, and a great deal of hostility is evident in sections of the press about its interpretation.

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<sup>111</sup> *Ibid.*

<sup>112</sup> *International Covenant on Civil and Political Rights*, <http://www2.ohchr.org/english/law/ccpr.htm> (last viewed 20 December 2007)

<sup>113</sup> *Victoria Charter of Rights and Responsibilities Act 2006*, Preamble, <http://www.justice.vic.gov.au/humanrights/> (last viewed 20 December 2007)

In 2006 the Department for Constitutional Affairs (now the Ministry of Justice) published a detailed paper entitled *Review on the implementation of the Human Rights Act*. In that Review, the Department argued that:

So far as the wider public are concerned, there are three different types of myth in play. First, there are those which derive from the reporting (and often partial reporting) of the launch of cases but not their ultimate outcomes. This leaves the impression in the public mind that a wide range of claims are successful when in fact they are not – and have often been effectively laughed out of court. The most notable example in this category is the application made by Denis Nilsen in 2001 to challenge a decision of the Prison Governor to deny him access to pornographic material. The case is now often cited as a leading example of a bad decision made as a result of the Human Rights Act. In fact it failed at the very first hurdle.

Secondly, there are pure urban myths: instances of situations in which someone (often it may not even be clear who) is reported to have said that human rights require some outcome or other, and this is subsequently trotted out as established fact. A recent example is the case in which food, drink and cigarettes were supplied to Barry Chambers who, in the course of evading arrest, had taken refuge on a roof of a domestic dwelling. The suspect had, of course, no “human right” to receive food in these circumstances, but instead, as part of a police operational decision aimed at resolving a stand-off quickly and peaceably, his demands for food and other refreshments were met as part of a negotiating strategy aimed (successfully in the event) at coaxing him down from the roof without injury to himself or others.

Finally, there are rumours and impressions which take root through a particular case or decision, and which then provide a backdrop against which all subsequent issues of the type in question are played out. Examples here are false suggestions that the Human Rights Act would prevent the filming of school nativity plays, or prevent teachers from putting plasters on children who have cut themselves. Such stories have undoubtedly had an accumulative and corrosive effect upon public confidence both in the Human Rights Act and in the European Convention on Human Rights itself.<sup>114</sup>

Some commentators have linked this lack of public understanding of human rights to the manner in which the legislation was introduced and implemented. As Professor Robert Hazell and Dr Andrew McDonald have written:

Nine years on there is, inevitably, a new emphasis on implementation: it is one thing to establish new institutions and create new rights, but it is quite another to foster a new relationship between state and citizen. [Lord Chancellor between 1997 and 2003] Lord Irvine’s vision of empowered citizens living in an open, decentralised society cannot be realised by statutory draftsmen and policy makers in Whitehall. Citizens have to understand to use their rights...<sup>115</sup>

JUSTICE, the legal and human rights organisation, has recently published a paper, *A Bill of Rights for Britain*. In an earlier February 2007 document entitled *A Bill of Rights for Britain: Discussion Paper* they stated that:

Any move to introduce a British bill of rights must start with a comprehensive public education campaign and a major consultation process, as happened in Northern Ireland. This is essential to obtain sufficient public awareness and consensus over its content. We consider that the bill in its final form should also be confirmed by a referendum.

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<sup>114</sup> Department for Constitutional Affairs, *Review of the implementation of the Human Rights Act*, July 2006

<sup>115</sup> Andrew McDonald, *Reinventing Britain*, 2007, p27

In a speech made on 3 September 2007 to the National Council of Voluntary Organisations, Mr Brown announced that there would be a Citizens' Summit on a British Statement of Values:

...a Citizens Summit, composed of a representative sample of the British people, will be asked to formulate the British statement of values that was proposed in our Green Paper on the future government of Britain, a living statement of rights and responsibilities for the British people. It won't take root anyway unless there is a real sense that it has been brought forward by people themselves, and this will be part of the wider programme on consultation led by Jack Straw and Michael Wills on the British statement of values, the idea of a British Bill of Rights and Responsibilities, rights and duties, the components of the Constitutional Reform Bill. ...<sup>116</sup>

Following this, in a speech on liberty at the University of Westminster on 25 October 2007 Gordon Brown said that the discussion would focus on how to "entrench and enhance" individual freedoms while also detailing the responsibilities "that flow from British citizenship". The Prime Minister expressed his hope that the debate would be informed by all people and all viewpoints, regardless of their political affiliation:

The debate about a Bill of Rights and Duties would be of fundamental importance to our liberties and to our constitutional settlement and opens a new chapter in the British story of liberty. So it is right that the discussion should engage those of all parties and none who believe in our democracy and the importance of liberty within it in a constructive dialogue. And this debate is not just for one party or one year but for all parties and for this generation. I hope other political parties will join us in this dialogue.<sup>117</sup>

The precise details of the consultation exercise have not yet been announced.<sup>118</sup> However, the *Governance of Britain: One Year On* document published in July 2008 set out the broad elements of the consultation process:

The proposed model of engagement consists of the following components and is expected to last between six to nine months:

- A launch document setting out the context of the debate
- A series of town hall style events
- A significant online programme of engagement
- A toolkit to assist stakeholders to engage with the process
- A film competition
- A series of representative regional events
- A representative Citizens' Summit.<sup>119</sup>

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<sup>116</sup> Gordon Brown, *Speech to the National Council of Voluntary Organisations*, 3 September 2007, <http://www.number-10.gov.uk/output/Page13008.asp> (last viewed 4 October 2007)

<sup>117</sup> Gordon Brown, *Speech on Liberty*, 25 October 2007, <http://www.number10.gov.uk/output/Page13630.asp> (last viewed 20 December 2007)

<sup>118</sup> Information about citizens' juries and deliberative forums is available in the Library Standard Note SN/PC/4546, *Citizens' Juries* and information about Citizens' Assemblies is available in the Library Standard Note SN/PC/4482, *Citizens' Assemblies*

However, the Joint Committee on Human Rights set out the results of the Hansard Society's 2008 *Audit of Political Engagement* and concluded that, on the basis of the research, "the Government has an uphill task to stimulate and inspire public debate". The Committee then set out what it considered to be the "minimum requirements" of any process of drawing up a Bill of Rights for the UK. These requirements were:

- that children and other hard to reach group should be included, potentially through a number of difference processes run in tandem;
- that the consultation process should be deliberative – it would not be sufficient for people to be asked for their views once without any prior opportunity for thought and reflection;
- that the process should be independent of government in order to command public and political confidence. An existing specialist body or an ad hoc committee should appointed to conduct the consultation process and make recommendations to Government;
- that a time period of six months to one year should be allowed for consultation to take place;
- that the process should be adequately resourced; and,
- that the Government should set out its position at the outset on a key range of issues in order to be clear about what is realistically achievable.

#### **4.5 An additional instrument or a replacement to the *Human Rights Act*?**

A further issue which has emerged is whether a new Bill of Rights would sit alongside the *Human Rights Act* or whether it would act as a direct replacement. At a recent human rights conference, Jessica Simor of Matrix Chambers observed that it would be more helpful to have a single instrument which adds to the *European Convention on Human Rights*, noting that it would be unhelpful for people on the ground to have more than one document. If an additional document were introduced, there are some concerns that administrators and civil servants could have difficulties interpreting how the various rights interacted.<sup>120</sup>

#### **4.6 Is a Bill of Rights really needed?**

There has also been some scepticism amongst proponents of the *Human Rights Act* as to whether a new Bill of Rights is even necessary. In a recent article in *Public Law* Professor Francesca Klug (of the Centre for the Study of Human Rights at the London School of Economics) argued that:

The really difficult challenge is not to seek perpetually for the promised land, but to bed down what has already been achieved. This means liberating human rights from the law courts and lawyers and returning them to where they came from; the struggles of people in their every day lives from abuse of power and their quest for equality, dignity and fair treatment. It means rebutting false stories; promoting good ones and speaking about human rights in plain English. It means working with grass roots campaigns and sometimes for unpopular causes, building common ground through the values we can all share.<sup>121</sup>

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<sup>119</sup> Ministry of Justice, *Governance of Britain: One Year On*, July 2008, p22, <http://www.justice.gov.uk/docs/governance-britain-one-year-on.pdf>

<sup>120</sup> Human Rights Law Conference 2007, *Moving into a new era of rights?*, 30 October 2007

<sup>121</sup> Francesca Klug "A Bill of Rights: Do We Need One or Do We Already Have One", [2007] P.L. (Winter) 701-719

Neither Liberty nor JUSTICE (leading human rights organizations) have come out forcefully in favour of the proposals for a new Bill of Rights. In particular, they have given the impression that they are concerned that the perils of permanent constitutional revolution could lead to a Bill which did not fully encompass Convention rights, although JUSTICE has acknowledged that:

A British bill of rights which respects the minimum level of protection for fundamental rights afforded by the European Convention on Human Rights (ECHR) and which engages the British public in shaping its content is a potentially worthwhile and valuable project.<sup>122</sup>

During his November 2007 appearance before the Joint Committee on Human Rights Michael Wills was asked by the Earl of Onslow whether he was “yet convinced that a new Bill of Rights is necessary”. Mr Wills replied:

Mr Wills: I think our starting point is that it would be beneficial, yes, but if there is absolutely no appetite out there for it then obviously we will think again. Our starting point is yes, we always said that the Human Rights Act was, as it were, the first stage. I think the now Lord Chancellor said as the then Home Secretary that the Human Rights Act was a floor, not a ceiling, and we now want to build on that. We think there are a number of good reasons to do so, but, as I say, we are going to consult on all these issues.<sup>123</sup>

## 5 Towards a written constitution?

The relationship between Bills of Rights and written constitutions is explained by JUSTICE which has written that:

The question arises whether Britain can work towards adopting a strong version of a bill of rights without at the same time making a decisive step towards a written constitution. While there is a logical connection here, there is no necessary tie between a bill of rights and a written constitution, since several jurisdictions have a bill of rights instrument without a written constitution (such as Israel and New Zealand) and vice-versa (Australia, at the national level). That said, a bill of rights would clearly be one of the centrepieces of any written constitution and could undoubtedly be a major step towards one. In the context of rights protection, an important value of a written constitution is that it enables citizens to understand the rights and duties of citizenship and service important aims in terms of national identity and understanding of basic constitutional rights. The debate on a written constitution will therefore merit scrutiny as ideas on a bill of rights are developed.<sup>124</sup>

*The Governance of Britain* appears to acknowledge this relationship, but is cautious in its approach:

...there is now a growing recognition of the need to clarify not just what it means to be British, but what it means to be the United Kingdom. This might in time lead to a concordat between the executive and Parliament or a written constitution.

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<sup>122</sup> JUSTICE, Submission to the Joint Committee on Human Rights, 30 August 2007, available at: <http://www.justice.org.uk/inthenews/index.html>

<sup>123</sup> Joint Committee on Human Rights, Uncorrected evidence given by Michael Wills MP (Human Rights Minister) and Edward Adams (Head of the Human Rights Division, Ministry of Justice), To be published as HC 132-i Session 2007-08, q47

<sup>124</sup> JUSTICE, *A Bill of rights for Britain? A Justice consultation paper*, February 2007, para 65

It is clear that neither a Bill of Rights or Duties nor a written constitution could come into being except over an extended period of time, through extensive and wide consultation, and not without broad consensus upon the values upon which they were based and the rights and responsibilities which derived from them...<sup>125</sup>

In his statement to Parliament, Gordon Brown explained that any move towards a written constitution:

...would represent a fundamental and historic shift in our constitutional arrangements. So it is right to involve the public in a sustained debate about whether there is a case for the United Kingdom moving towards a written constitution. Because such fundamental change should happen only when there is a settled consensus on whether to proceed, I have asked my right hon. Friend the Secretary of State for Justice to lead a dialogue within Parliament and with people across the United Kingdom, by holding a series of hearings, starting in the autumn, in all regions and nations of the country, and we will consult with all the other parties on this process.<sup>126</sup>

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<sup>125</sup> Ministry of Justice, *The Governance of Britain*, Cm 7170, July 2007, paras 212-213

<sup>126</sup> HC Deb 3 July 2007 cc819-820