Session 1 – Do we need a UK Bill of Rights?

1. Following some introductory remarks (see annex A for further information), a number of observations were made by participants in the course of a wide-ranging discussion:

Cultural context

2. It was suggested that the creation of a Bill of Rights was often used as a means of developing a country’s identity and culture. The current domestic culture, however, was, arguably, antithetical to human rights in many ways and not conducive to the development nor adoption of a UK Bill of Rights.

3. It was suggested that the motivation behind the Commission’s creation was a perceived need to address the current human rights culture. It was argued, however, that many critics of the Human Rights Act 1998 (“HRA”) were opposed to the development of any wider human rights culture. On that basis it was suggested that any departure from the status quo – irrespective of its merit - presented a risk to current standards of human rights protection.

4. The current culture might, it was suggested, be attributable in part to the transition from the utilitarian tradition to a rights based system in the UK.

5. It was argued that the rights of individuals had to be the cornerstone of any written constitution, with the institutions of the State providing the necessary foundation. The United States model was preferable in this context. It was suggested that the opposition in certain political quarters to the HRA was evidence that the HRA was in fact working in favour of individuals and not Government.
6. The purpose of the HRA, it was suggested, had been to change the previous culture. It had been hoped that the HRA would have a transformative effect whereby human rights and respect for individuals became central to policy making. It had not been the intention of the HRA for an adversarial relationship to develop between one or more of branches of Government. Instead it had been hoped that litigation would be rare. It was argued that both Government and Parliament had, since the enactment of the HRA, moved from a position where they had paid serious regard to rights in theory to one where they only paid lip-service to rights in practice.

7. In response it was argued that there should be less cause for concern towards the attitude within Government to human rights. From the perspective of Ministers, certain judgments of the Strasbourg Court had simply been considered obstacles to the effective discharge of their public duties. There was a need for those in Government and their advisors to have a thorough understanding of the legal framework; any additional instrument might add further complexity.

Process

8. The view was expressed that the process for considering the merits of a UK Bill of Rights was important. It was questioned whether and to what extent the Commission intended to engage with those critical of human rights more generally and if it did whether the outcome might be greater legal uncertainty and/or a diminution in rights protection. It was asked whether the current human rights 'culture' was hurt or helped by the fact that the Commission might engage with those displaying antipathy towards human rights.

9. Against that background, it was suggested that it might be most useful for the Commission to simply articulate the options and complexities that existed in respect of the current debate. In any event the Commission was urged to consult more widely on the issues falling within its mandate to ensure the issue was more firmly on the public agenda.

10. It was asked whether any UK Bill of Rights should be 'constitutional' – ie restricting the constitutional power of state institutions - or 'aspirational' – ie seeking to change the mindset of those who formulated policy. It was suggested that in theory a UK Bill of Rights had the potential to achieve both aims but that in reality neither would be achieved in circumstances where the debate was primarily adversarial in nature.

Arguments for and against a UK Bill of Rights

11. The view was expressed that the onus was on those who sought to change the current system to demonstrate the value in so doing. Many were wary of the claim that any reform would deliver meaningful benefit. Others argued that the UK already had a Bill of Rights in the form of the HRA.

12. By way of response, a number of factors in support of a UK Bill of Rights were put forward.

13. Firstly, there would be a presentational advantage in rights being seen to emanate from a national, rather than an international, document. Secondly, in a practical sense, references to Strasbourg jurisprudence in domestic proceedings would become questions of last resort rather than first resort.
Thirdly, certain rights additional to those currently protected under the HRA could be included. Fourthly, certain existing rights could be re-phrased in terms that more clearly dovetailed with the domestic system. For example, the current distinction in Article 6 ECHR between criminal and civil proceedings could be re-phrased to more adequately cover administrative proceedings or quasi-criminal proceedings. Fifthly certain existing rights could be re-balanced (for example Articles 8 and 10 ECHR) within the margin of appreciation left to the domestic courts.

14. Finally, it was suggested that one of the most powerful argument in support of a UK Bill of Rights was the educative role it might play for future generations in respect of the domestic civil rights tradition. It was argued that the replacement of ‘euro-prosaic’ words with more everyday language would counter current criticisms of the HRA and would constitute a valuable teaching tool.

15. It was suggested that the Commission needed to hear more detail from those whose support for a UK Bill of Rights was rooted in criticism of the HRA and of the current role of the Strasbourg Court. It was suggested that many were of the view that the Strasbourg Court had, at least in respect of certain judgments, exceeded its proper role and paid insufficient regard to the views of domestic legislatures. Others questioned the democratic legitimacy of the Court and argued that too much power lay in the hands of unelected foreign judges. Some felt that a UK Bill of Rights would remedy these and other problems.

16. The Commission was urged not to overlook the current political agitation in relation to the current system and the view held by many that the HRA was a charter for the ‘undeserving’. Public opposition to the HRA, it was argued, was not merely confined to certain parts of the UK. So widespread was this sentiment, it was argued, that there was a real risk that antipathy towards the HRA would gradually become antipathy towards human rights more generally. Some people believed that the human rights ‘brand’ was now irrecoverable in the eyes of the public and, as a result, reform was inevitable. There were, it was argued, limitations on what politicians might reasonably be prepared to accept faced with recent human rights jurisprudence; doing nothing vis a vis the current settlement was not, it was argued, a viable option.

17. In response to these points, the view was expressed that the perceived lack of political leadership on human rights issues should not be equated to a lack of public confidence in human rights more generally. It was not necessarily accurate to conclude that the public in general opposed the HRA. Recent public polling\(^1\) had determined that a significant majority\(^2\) of those questioned were of the view that it was important to have a law that protected rights and freedoms in Britain but that only a small minority\(^3\) of those questioned had recalled seeing or receiving information from the Government explaining the HRA. On this basis, it was necessary to consider how best to educate the public on the current system of human rights protection before advocating its abandonment.

---

\(^1\) The polling was conducted by ComRes on behalf of Liberty from 2008 at regular intervals and involved telephone interviews with over 1,000 adults.

\(^2\) 93-97% from 2008 onwards.

\(^3\) 9% in September 2011.
18. It was argued that the public debate often focussed on a small number of high-profile human rights cases. This had meant that the transformative element of the current framework was often overlooked.

19. A key question for the Commission was to determine how and to what extent, public opinion on this issue - ill-informed or otherwise – might be ascertained. To what extent should the Commission seek to educate the public on some of the issues? The Commission work, it was hoped, would be a helpful contribution to the wider debate.

20. The view was expressed that the current political tension in the UK was driven by firstly a desire for a more organic form of constitutional rights protection, and, secondly, a degree of hostility towards the ECHR. In being seen to question its ties with the Strasbourg Court, the UK, it was argued, risked damaging its own reputation internationally as well as the authority of the supranational system of human rights protection. On the other hand it was argued that the possible international implications of any action by the UK on these issues should not necessarily constrain the UK from exploring the relevant options and from taking decisions in the best interests of the country; such implications were relevant but not determinative.

21. Against that background, it was suggested that the most appropriate recommendation from the Commission might be to do nothing on the basis that any change to the current system would be worse than the status quo.

22. Irrespective of the merits of the arguments for and against its adoption, it was asserted that a UK Bill of Rights was not politically realistic at the present time in the light of the current devolution settlements and political landscape in Northern Ireland, Scotland and Wales. The views received by the Commission from those in Northern Ireland, Scotland and Wales had led some to conclude that there was already a form of emerging federalism within the UK that would, it was argued, preclude any UK-wide instrument. In response it was argued that the issues raised by the current devolution settlements were worthy of consideration although not determinative.

23. The view was expressed that the crux of the current debate was not whether a UK Bill of Rights was needed but whether an English Bill of Rights was needed; anything beyond that was not, it was argued, on the political agenda. It was suggested that the Commission had not adequately to date heard the views of those in England on these issues.
Session 2: Assuming there was to be a UK Bill of Rights

24. The Chair opened the session with some introductory remarks. A discussion followed amongst participants, in which a number of observations were made in response to some of these remarks, and on related matters:

Should a UK Bill of Rights set out our rights in a language different from the European Convention on Human Rights that reflected our own heritage? If so, how would these rights operate in practice?

25. A number of views were expressed on whether and the extent to which any UK Bill of Rights might build on the existing Convention rights by adapting them to better reflect our domestic heritage.

26. It was argued that it would be possible for domestic incorporation of the ECHR (the so-called ‘ECHR layer’) and a national constitution (the so-called ‘national layer’) to co-exist: all but one of member states of the Council of Europe had incorporated the Convention into their domestic law and many also had national constitutions, for example Germany. There were, however, differences between countries as to the ‘depth’ of their respective ‘national’ layers.

27. The UK, it was argued, already had a form of ‘national layer’ in the form of the common law. In reviewing the current and possible role of the HRA, the Commission was urged to consider how both layers might operate in the UK context and to maximise human rights protection across both.

28. It was, however, suggested that in countries where both ‘layers’ currently existed, this had, at times, led to a convergence in respect of the approach by the domestic courts, based on the standards put forward by Strasbourg. It was argued that this occurred for two reasons: firstly, because the quality of the jurisprudence from Strasbourg was viewed favourably; and, secondly, because there was a prospect that the case might proceed to Strasbourg in any event.

29. It was suggested that, while rights additional to those in the ECHR could be included in any UK Bill of Rights, it would be important for the UK to retain incorporation of the ECHR in domestic law.

30. It was argued that there was merit in considering whether the scope and meaning of Articles 5 – 7 ECHR could be more clearly expressed in any domestic instrument. One possible model for the Commission to consider was the Charter of Fundamental Rights of the European Union4. ‘A People’s Charter: Liberty’s Bill of Rights’5 was cited as an example of a previous attempt to redraft Convention rights using different language.

31. One advantage of such a move was that the concept of ‘constitutional’ rights might be less alienating for UK citizens than the concept of ‘Convention’ rights. This might lead to a greater sense of public ownership of human rights in the UK.

---

32. On the other hand, it was suggested that any UK Bill of Rights that contained rights expressed differently to the existing Convention rights would simply lead to difficulties with adjudication and to legal uncertainty. There needed to be good reasons for any departure from the current wording.

33. Furthermore it was argued that the HRA was a constitutional document and that its regular amendment (including reform in the manner under discussion) would undermine public confidence in it. It was further argued that any 're-packaging' of Convention rights might lead to more cases being referred to Strasbourg which would, in turn, further undermine public confidence in the human rights framework.

34. In any event it was suggested that the universality of human rights meant that the different ways in which rights were expressed did not, and would not, have any material impact on their realisation.

Should a UK Bill of Rights seek to change the duty on the courts in section 2 of the HRA to ‘take account’ of ECHR judgments? Should it modify the duties on the courts in any other way?

35. In the context of a wide-ranging discussion on section 2 of the HRA, a number of points were made on its meaning and operation to date:

36. It was suggested that Ministers in both Houses during the passage of the Human Rights Bill had resisted the opportunity to articulate the relationship between the domestic courts and the Strasbourg Court in more detail than is currently provided in section 2 HRA. It was argued that the meaning of section 2 of the HRA remained unclear. In any event, it was suggested that it had never been the intention of Parliament that domestic courts would decide cases by anticipating a possible future decision of the Strasbourg Court on the same issue.

37. The model adopted by section 2 of the HRA appeared to be inconsistent, it was argued, with the model adopted by sections 1 and 21 of the HRA, taken together. Tension had arisen when Courts and tribunals had been tasked with reconciling these two principles.

38. Section 2 had been effective, it was argued, in ensuring a dialogue between the domestic courts and the Strasbourg Court. The cases of R v Spear\(^6\) Doherity v Birmingham City Council\(^7\), R v Horncastle\(^8\) and R (Quila) v Secretary of State for the Home Department\(^9\) were cited as examples of where the domestic courts had declined to follow a decision of the Strasbourg Court.

39. There were a number of legitimate legal and constitutional questions to consider in respect of the relationship between the UK courts and the Strasbourg Court and various reformulations of the section 2 duty.

---
\(^7\) Doherity v Birmingham City Council [2008] UKHL 57.
\(^9\) R (Quila) v Secretary of State for the Home Department [2011] UKSC 45.
40. One option was for the duty in section 2 to be expanded to expressly require domestic courts to take into account the UK’s international obligations and/or jurisprudence from other common law jurisdictions. In response it was argued that the current system already allowed for this to happen.

41. Another option was to make clearer provision, than that currently provided by section 2 HRA, on the approach to be adopted by a domestic court when it disagreed with a relevant decision of the Strasbourg Court. Under the current system, the domestic courts, it was argued, tended to follow a relevant Strasbourg decision on the basis that any inconsistent decision would be challenged in any event at Strasbourg. It was argued that the domestic courts in such circumstances should pay less regard to the need for consistency with Strasbourg jurisprudence. The implications of such a move were, it was argued, a matter for the Government and Parliament.

42. Gibraltar was cited as an example of a jurisdiction where the Convention rights had been re-phrased in a domestic instrument. Section 18(8)(a) of the Gibraltar Constitution Order 2006\(^{10}\) provided identical provision to section 2 of the HRA. In the light of certain cases from Gibraltar\(^{11}\), it was evident that re-drafting the Convention rights to better reflect domestic circumstances did not necessarily affect the courts’ approach to interpretation of the Convention.

43. Against that background, it was asserted that an important design feature of any UK Bill of Rights would be not to be seen to be undermining the ECHR system. Removal of the requirement ‘to take account of’ Strasbourg decisions in section 2 would be viewed as an attempt by the UK to distance itself from Strasbourg.

The relationship between Parliament and the courts

44. In response to a suggestion that there was a need to address a ‘looming crisis’ in respect of the respective roles of Parliament and the courts and the alleged politicisation of the judiciary, a range of views were expressed on the possible role for a UK Bill of Rights in that context:

- the relationship between the courts and Parliament in a democratic society was constantly evolving in an organic and gradual manner. For that reason there was no need for express provision in any UK Bill of Rights on the boundaries of their respective roles;

- it would set an unhelpful international precedent if the UK Parliament were given an express power to disregard decisions of the Strasbourg Court. The current system was attractive in that it was implicitly permissive of constitutional defiance;

- the value in seeking to abolish the power to issue a declaration of incompatibility in section 4 of the HRA was challenged on the basis that the courts might seek to reinvent such a mechanism in any event;

\(^{10}\) Section 18(8)(a)(i) provided that a domestic “court or tribunal determining a question which has arisen in connection with a right or limitation” in the Charter “must take into account any… judgment, decision, declaration or advisory opinion of the European Court of Human Rights”.

\(^{11}\) For example, Rodríguez v Minister of Housing of Gibraltar [2009] UKPC 52.
there might be scope for greater involvement of Parliament under a UK Bill of Rights than that currently envisaged by section 19 of the HRA; and

finally, it was suggested that there was scope for Parliament, by passing a UK Bill of Rights, to direct the courts to ‘re-balance’ the way in which certain rights had operated in practice, e.g. Articles 8 and 10 ECHR.
Session 3: Assuming there were to be a UK Bill of Rights should it contain additional rights?

45. Views were invited from participants on the merits of any UK Bill of Rights including certain additional rights. A discussion on possible additional rights was prefaced by the following more general remarks:

- a comprehensive consultation process on any UK Bill of Rights was preferable, it was argued, to a brief discussion on a limited number of substantive rights. The Commission’s capacity to adequately address the issues falling within its mandate was questioned, in the light of the inevitable constraints on the Commission’s time and resources;

- advocacy for certain additional rights must not be allowed to undermine the case for retention of the HRA and its existing enforcement measures.

- a process whereby rights were identified for inclusion based on what might be acceptable to the majority (a political conception of rights) was questioned. The dilemma was whether rights pre-dated, or emerged from, any political consensus.

A right to trial by jury

46. There was qualified support for inclusion of a right to trial by jury in any UK Bill of Rights:

- the inclusion of a right to trial by jury in a UK Bill of Rights that contained identical levers to those in the HRA would require – as section 19 of the HRA currently required - an express Ministerial statement on the extent to which the proposed legislation was compatible with the right. It was anticipated that such a requirement might reduce the number of incursions into the substantive right;

- the importance of such a right would be affirmed by its new status in any UK Bill of Rights; it would arguably be important for the domestic body politic for the right to trial by jury to be recognised in such a manner;

- it was suggested that the task of drafting a right to trial by jury presented considerable challenges. The availability of the right should not necessarily be confined to those cases in respect of which a minimum sentence threshold might be satisfied. The right might also be available in cases where the outcome would cause significant reputational damage.

47. In seeking to enshrine a right to trial by jury in any UK Bill of Rights it was necessary to consider a number of factors including the following:

- the relationship between any such right and existing legislative provision on the use of jury trial;
• the scope of any such right in respect of the different legal jurisdictions within the UK. It would be necessary to take into account, firstly, the significant differences between Scots law and the law of England and Wales in respect of the use of jury trials; and, secondly, the extent to which the right should be qualified in respect of Northern Ireland to reflect the use of so-called ‘Diplock trials’.

• the extent to which inclusion of a constitutional right to trial by jury had protected the use of jury trial in other countries such as Ireland, Australia, Canada and New Zealand. In respect of Canada and New Zealand, it was suggested that the way in which the right had been expressed had led in practice to an increase in the number of defendants electing to waive the right to trial by jury.

• the meaning of such a right in both the domestic and supranational contexts. At the UK level a right to trial by jury would be seen as constituting, it was argued, a valuable form of civic participation with the involvement of local knowledge. In contrast, the Strasbourg Court had, it was argued, analysed the role of juries from the perspective of their accountability.

48. By way of historical comparison, reference was made to a previous attempt to enshrine the right to trial by jury in the Second Irish Home Rule Bill in 1893. Following a discussion in Cabinet, the then Prime Minister, William Gladstone, had considered that the complexity of its drafting precluded its inclusion.

A right to equality

---

12 The right to trial by jury was suspended in Northern Ireland for certain types of offences tried before so-called ‘Diplock’ courts. Such courts were created in response to the report submitted to the UK Parliament by a Commission chaired by Lord Diplock: ‘Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland’, December 1972, Cmd. 5185.

13 Article 38(5) of the Constitution of Ireland provides that subject to exceptions for certain offences, “no person shall be tried on any criminal charge without a jury”.

14 Section 80 of the Commonwealth of Australia Constitution Act provides that: “[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes”.

15 Section 11(f) of the Canadian Charter of Rights and Freedoms (Part 1 of the Constitution Act 1982) provides that: “[a]ny person charged with an offence has the right…to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment”.

16 Section 24(e) of the New Zealand Bill of Rights (No. 109) provides that: “everyone who is charged with an offence shall have the right…to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months”.

17 For example, in the Grand Chamber decision in Taxquet v Belgium (Application no. 926/05) the applicant had successfully argued that his conviction for murder violated Article 6 ECHR because it was based on a guilty verdict by a jury which had not included any reasons. The Strasbourg Court did not question the principle of the lay jury in the domestic context but held that there had been insufficient safeguards in the particular case for the applicant to have understood the reasons behind his conviction.

18 'The Papers of William Ewart Gladstone', British Library.
49. In the context of a discussion on the merits of a right to equality, the following points were raised:

- the concept of equality had emerged from labour law and not from any constitutional context; for this reason equality had only relatively recently been categorised as a human right. That said, it would be surprising were any modern Bill of Rights to omit such a right;

- there was a sophisticated system of equality protection in a number of existing sources: the common law; Article 14 ECHR; Article 26 of the International Covenant on Civil and Political Rights; Protocol 12 to the ECHR; the Equality Act 2010; and EU equality law. The value of additional protection for equality in a UK Bill of Rights would require careful consideration;

- any right to equality that covered indirect, as well as direct, discrimination would, it was argued, result in its scope and effect being the subject of protracted litigation. On the other hand it was argued that this had been avoided in other jurisdictions;

- there was a risk that inclusion of a right to equality in any UK Bill of Rights might render the provisions of the Equality Act 2010 open to challenge on the basis that they did not equate to the constitutional standard;

- it was important to consider international examples on how the right to equality had developed in other jurisdictions such as the United States19, Canada20 and South Africa21.

50. In conclusion, it was argued that the existence of certain unresolved issues in this area should not prevent the inclusion of a comprehensive right to equality in any UK Bill of Rights.

A right to administrative justice

51. In the context of a discussion on whether and how a UK Bill of Rights might contain a right to administrative justice, it was suggested that the following points would need to be considered:

- whether there was an appetite for such a right among the public and practitioners and whether its inclusion in any UK Bill of Rights might be politically acceptable;

- what the content of such a right might be?

i. in that respect it was suggested that a basic right to administrative justice might be too vague and indeterminate. Such a right would need to be composed of a number of component parts all of which were worthy of careful consideration. These included the right to a hearing; a duty of

19 14th Amendment ‘Citizenship Rights’ to the United States Constitution.
care in administrative proceedings, a requirement to give reasons; a right to procedural review, and a right of access to the file;

ii. Article 41 (right to good administration) of the Charter of Fundamental Rights of the European Union included “the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy”;

iii. a general right of access to the file prior to any decision being made currently existed in other continental jurisdictions;

• what the scope of such a right might be?

iv. It would be necessary to consider the range of institutional decision-making in respect of which such a right might apply;

v. it was argued that Article 6 ECHR did not provide adequate protection for the full range of administrative law proceedings. Strasbourg jurisprudence on the meaning of ‘civil rights’ and ‘an independent and impartial tribunal’ had arguably caused more problems than it had solved in respect of domestic law in the UK. A right to administrative justice in a UK Bill of Rights might be a suitable remedy.
Annex A

Do we need a Bill of Rights?

1. At the moment, I am agnostic on whether we need a UK Bill of Rights. The reason is that there are so many potential models possible that I find it impossible to say, even in principle, whether a Bill of Rights would be a good or bad idea until I know what type of model is on the table.

2. If I have a bottom line, it is that any proposals for a Bill of Rights should at least pass the test of ‘first, do no harm’. Only then, should it be assessed in terms of whether it would do any positive good. In these brief comments. I want to examine these various options.

Preliminary issues

3. There are four preliminary issues, however, that I put to one side. First, the constitutional implications of a UK-wide Bill of Rights for the devolution settlements in Scotland, Wales and Northern Ireland are problematic, and (rightly) the focus of some anxiety, but that isn’t what I want to consider today.

4. Second, there is debate, of course, on the United Kingdom’s relations with the Council of Europe and the European Union, and whether it should seek to leave or renegotiate the terms of engagement with either or both of these organisations, particularly in the context of the obligations that membership of both have for human rights protections. Again, I won’t dwell on that issue today. I shall simply assume that no significant alternations will take place in either of these relationships.

5. Third, I leave to one side the issue of parliamentary sovereignty, to the extent that that issue focuses on whether it is possible, or desirable to bind Parliament, and whether pure parliamentary sovereignty in the Diceyan sense actually exists any longer. I suggest leaving this to one side essentially because the Commission is conducting a separate seminar on these questions at All Souls in March.

6. Fourth, I know that some participants in today’s discussions are suspicious of the motivations behind the setting up of the Commission in the first place, seeing it as a Trojan Horse that will be used to dismantle existing rights protections. I’ll also leave this issue aside for the moment. Indeed, in general, I want to leave all aspects of the complicated contemporary politics of a UK Bill of Rights to one side.

7. What I want to focus on instead are the different models of a domestic Bill of Rights, because I think that the debate needs to move on if it is to be productive. The summary of the Commission’s discussions in December is a helpful starting point, although I’ll structure the issues raised there in a somewhat different way. I’ll first sketch out various possible ways in which a UK Bill of Rights might relate to the existing Human Rights Act, before suggesting various questions that need to be addressed in order to decide which relationship best meets one’s preferences.

Relationship with the existing Human Rights Act

8. A major imponderable in a UK Bill of Rights is its relationship with the existing Human Rights Act. There are, I think, four relationships.
9. The first is the status quo: leaving the Human Rights Act essentially as it is, with no significant additions or subtractions, and leaving it to ordinary legislation to address any additional rights or responsibilities that may require protection.

10. The second is, essentially, Human Rights Act Plus, in which the existing rights in the Human Rights Act are retained in form, in substance, and in method of enforcement. The issue in a Human Rights Act Plus model is what other rights to include in a UK Bill of Rights, to what extent the existing Human Rights Act is thought to be a good model for how these additional rights should be treated, and whether the HRA would be retained or repealed. I have used, and will continue to use the term ‘rights’, but in doing so I don’t intend to exclude the possibility that ‘responsibilities’ might be included, although what those might be seems at the moment somewhat ill-defined.

11. The third is, essentially, Human Rights Act Minus, where the substantive rights contained in the existing Human Rights Act is repealed or some existing rights deleted, or they are rebalanced. There is a significant difference in theory between reduction in rights and rebalancing but for the moment I’ll include them both in my Human Rights Act Minus model, as any rebalancing is likely to be perceived as reducing the protection that is accorded to one right, even if it gives rise to greater protection for another right.

12. A significant issue in the third model is whether it is compatible with the Commission’s terms of reference, which requires the Commission to investigate the creation of a UK Bill of Rights ‘that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extend our liberties.’

13. The fourth is, essentially, Human Rights Act Remodeled, in which it is not necessarily envisaged that there is a reduction in rights protection. There are three alternative makeovers that might be envisaged as possibilities:

   (i) a remodeling that retains the existing enforcement structure and redrafts the way in which the rights are expressed; or
   (ii) a remodeling that retains the existing drafting of the substantive rights and alters the enforcement structure; or
   (iii) a remodeling that encompasses both substantive redrafting of the rights and altering the enforcement structure.

   An important issue in the fourth model is whether unintentionally the existing level of rights protection would be compromised.

14. One further point strikes me as important. How one reacts to the various options I’ve sketched out will be affected by how well or ill one thinks the Human Rights Act is currently functioning. At some point, it is important to consider in some detail the workings of the existing Act. I won’t attempt that now.

15. Instead, I suggest that we step back a little from the detail and consider some broader issues. I want to suggest that what type of Bill of Rights you want will be affected by your response to four questions:

   (i) How do you think that a human rights culture can best be created and sustained?

   (ii) Do you want your Bill of Rights to be largely symbolic, or instrumental, or both?
(iii) Is it your aim to create an ‘autochthonous’ Bills of Rights that reflects essentially local interests and local history, or do you want a Bill of Rights that is outward looking and more ‘universal’ in its orientation?

(iv) Finally, is your preferred Bill of Rights one that is essentially conservative (small ‘c’), or transformative?

**How to create and sustain a ‘human rights culture’?**

16. We can usefully distinguish between three broad competing theories of what particularly affects the protection of human rights of the types we are considering.

17. The first theory identifies the values held by ordinary citizens as constituting the key underpinning. According to this theory, citizens must have ‘internalized a critical array of fundamental norms’. Without this, freedoms and rights will not be protected; with it, such rights and freedoms may be more likely to be protected. The awareness and support of ordinary citizens, according to this approach, is seen as a necessary and even, by some, as a sufficient condition. Thus, some have argued that ‘liberty flows only from democracy’. We can call this approach the citizens’ values theory. It depends either on a view that majoritarian democracy will produce a broadly human rights culture, or on a view that attempts to restrict majoritarian democracy will ultimately be unsuccessful.

18. The second theory considers that it is politicians, opinion formers, high-ranking public servants, and other elites (rather than the broad mass of the population) whose support is necessary to protect civil liberties and human rights. These elites are seen as acting to protect human rights from pressures from a public that may well be unsympathetic to such protection. We can call this the elite theory. Some have seen, for example, the abolition of the death penalty in the United Kingdom as arising more from elite concern than from the concern of ordinary citizens.

19. A third theory tends rather to concentrate on institutional and organizational features of our constitutional arrangements, such as the separation of powers, the rule of law, constitutional conventions, and other such mechanisms of constitutional checks and balances, as well as other constitutional traditions. We can call this the institutional theory.

20. Within the third theory, however, there has developed a powerful argument that one of the central features of any successful institutional theory is the institution of judicial review, and since the 1970s in Britain this aspect of the institutional theory has tended increasingly to dominate the development and interpretation of constitutional and human rights, with the Human Rights Act being only part of that development.

21. Of course, in the United Kingdom, we regard all three theories as important, and attempt to combine them, but it worth distinguishing them because the essential question becomes how they should be combined and, in particular, where they clash, which should have priority?

*Instrumental, symbolic, or hybrid?*

22. Following on from that, it is useful to distinguish also between two (overlapping but different) functions that a UK Bill of Rights might serve. The first approach, which I’ll call ‘instrumental’, views the advantages and disadvantages of a UK Bill of Rights primarily from the point of view of whether it can be used to advance or retard a
particular right or set of rights; what difference will it make in practice over the short to medium term?

23. There are, of course, variations within the ‘instrumental’ model: to whom it should apply (Parliament, the Executive?); where it should be enforced (centralized in one Court, or available in all courts?); and by whom (individual victims, quangos, ngos?), with a range of different possibilities evident from the comparative experience. To do only one example: if victims are permitted to enforce rights, will this apply to all victims or only those victims who are citizens?

24. The second approach, which I'll call ‘symbolic’, views the function of a Bill of Rights primarily from the point of view of the value a Bill of Rights has as an expression of a set of values, whether or not they address a particular substantive problem of ‘rights’ in the short to medium term. This symbolic function is more concerned with what message is sent by the Bill of Rights about how we view ourselves now, and how we should view ourselves in the future, rather than in the immediate payoff in terms of advancing particular rights or rights in general. Adopting this symbolic view is seen as expressing a view about existing and future national identity. I'll leave to discussion what that might mean in practice.

25. The difference between the two functions can be seen in how they affect views about the mechanics of enforcement: if one is interested purely in the ‘symbolic’ function, litigating issues in courts might be considered unnecessary, whereas few would consider that courts are not implicated in the functioning of an ‘instrumental’ approach to rights. Thus a symbolic Bill of Rights might be thought to strengthen the citizens or elite theories, whilst instrumental Bills of Rights are firmly in the ‘institutional’ theory of human rights protections.

26. Before dismissing the ‘symbolic’ function, it is worth remembering that (with the notable exception of the United States), the growth of Bills of Rights in domestic constitutions during the 19th Century was not regularly accompanied by judicial enforcement before Kelsen invented the idea of a Constitutional Court for Austria early in the 20th Century, and that France, for example, viewed its Declaration of the Rights of Man as not judicially enforceable until the early 1970s.

27. Of course, it is also obvious that there is a third model, which I’ll call ‘hybrid’, that combines both the ‘instrumental’ and the ‘symbolic’, for example with different rights being allocated to each. So, both the Indian and Irish Constitutions have a set of rights enforceable in court and a set of responsibilities placed on the state included in a set of ‘Directive Principles’ that are addressed to the legislature, which cannot be litigated directly in courts.

28. The ‘symbolic’ model might be formulated in different ways: with the principles being taken into account in the interpretation of judicially enforceable rights (effectively, the Indian approach), or with the courts being forbidden from even referring to them (effectively, the Irish approach). In the Irish context, the courts do not, in the main, concern themselves at all with the Directive Principles, whereas the Indian courts use the Directive Principles as providing a set of principles to be used in the interpretation of the enforceable rights. Thus the right to life has been interpreted in India to include the right to a minimum level of shelter, under the influence of the Directive Principles.

29. Another issue that arises is what criteria would determine which particular sets of rights would be included in either a ‘symbolic’ Bill of Rights, or an ‘instrumental’ Bill of
Rights, or in a ‘hybrid’ Bill of Rights, and whether the division between the two is sustainable.

An ‘autochthonous’ or a ‘universalist’ Bill of Rights?

30. Turning to the third question, I think it is uncontroversial that the increasingly dominant approach to the consideration of human rights in Britain since 1970 has been to see human rights essentially from a European (and less frequently an international) perspective. A UK Bill of Rights might further extend this ‘universalistic’ approach.

31. One possible criterion for selecting which issues to consider is whether a particular right is missing from the ECHR but is included in other international or European human rights treaties that the United Kingdom has already ratified. This criterion would indicate that, for example, children’s rights, migrant’s rights, rights of the disabled, and minority rights would be the focus of attention.

32. A different list still would be generated if the criterion adopted is what rights are currently included in Protocols currently attached to the ECHR that the UK government has decided not to ratify, such as Protocol No. 12 on discrimination.

33. I don't think that there should be any a priori assumption that international human rights obligations must simply be incorporated into a Bill of Rights in the same way that the ECHR has been, and that not to do so in some way minimizes their importance. In several instances, these obligations are not drafted in a way that is at all suitable for domestic incorporation in that form. If domestic action is thought to be necessary then ordinary legislation is far preferable, for example the Framework Convention on National Minorities.

34. All Bills of Rights, however, balance the universal and the local, and all Bills of Rights therefore have elements that attempt to deal with specific historical problems of that country and attempt to reflect local values. A significant question in the drafting of any Bill of Rights is how far the local dominates over the more ‘universal’. At one extreme would be a Bill of Rights which did nothing other than attempt to incorporate European or international standards.

35. At the other extreme is an essentially autochthonous Bill of Rights. Although the term is more often applied to constitutions as a whole, there is no reason why it can’t be applied to Bill of Rights. An autochthonous Bill of Rights would aim to achieve three main things in the development and interpretation of rights: autonomy, self-sufficiency, and a break in legal continuity (at least in so far as following the ECHR jurisprudence is concerned).

36. It is unclear to me whether anyone is actually proposing that a UK Bill of Rights should be entirely of this type, but posing the issue in this extreme way should stimulate us to think about the ways in which, and the extent to which, what is being sought is a greater degree of autochthonism, and of what type. Is the concern to ensure that the Bill of Rights deals with issues in a way that is recognizably British, through redrafting for example, or that the rights themselves should reflect local conditions and history?

37. Some of the models I’ve outlined earlier are relatively more autochthonous than the present Human Rights Act, perhaps particularly Human Rights Plus and Human Rights Remodeled.
38. Some have suggested that a UK Bill of Rights should aim to ‘rebalance’ rights currently included in the HRA and the ECHR that have been ratified by the UK. A list generated on this basis would be likely to focus on the relationship between particular existing rights: between freedom of expression and the right to private life, between the right to non-discrimination in Article 14 and freedom of religion, between the right to a fair trial and freedom of expression, and so on.

39. A different list could be developed if the relevant criterion was what rights were missing from the ECHR but are necessary in the British context. This might well result in a right such as that to administrative justice being included, on the basis that it is regarded as inadequately addressed in either under common law judicial review or the Convention.

40. But there is a potential problem with attempts to build more autochthonous elements into a UK Bill of Rights. The assumption is that if the drafting of a right is changed, that will lead to a change of interpretation by the courts, but that is a somewhat questionable assumption.

41. The experience of the interpretation by the Gibraltar courts and the Judicial Committee of the Privy Council interpreting the Gibraltar Constitution might suggest that the courts may carry on pretty much as before, using the jurisprudence of the European Court of Human Rights as highly persuasive precedents for the interpretation of the new rights as for the old rights. If the British courts now irrevocably committed to a more ‘universalist’ interpretation of rights, one that is both European and comparative, little may change.

42. If the problem with the existing Human Rights Act is not, however, thought to be the substance of the rights but the lack of popular buy-in, and unease with its European origins, then some thought might be given to how to ensure that there is sufficient buy-in of any replacement. What process would be appropriate to ensure that a UK Bill of Rights had greater legitimacy? A referendum, for example?

A transformative or a conservative Bill of Rights?

43. The final distinction I want to make is between ‘transformative’ as opposed to ‘conservative’ Bill of Rights. By ‘transformative’, I mean a Bill of Rights that aims to change an existing status quo, as compared to a ‘conservative’ Bill of Rights that means to preserve it.

44. There are many examples that illustrate what I mean. The South African Constitution is a classic ‘transformative’ constitution, in attempting to dismantle the institution of apartheid; the Indian Constitution is also transformative in attacking the caste system. In contrast, several of the Bills of Rights enacted at the time of the independence of former British colonies are ‘conservative’ in the sense that they attempt to preserve the existing status quo; one of the most prominent example is the Jamaican Bill of Rights which goes to far as to provide, in effect, that the Bill of Rights is only prospective.

45. Some Bills of Rights are, of course, both conservative and transformative. The first ten Articles of the US Bill of Rights were intended to be essentially conservative, for example in preserving and protecting property rights, whilst the post Civil War 13th, 14th and 15th Amendments are essentially transformative, prohibiting slavery and addressing its effects.
46. In the British context, a ‘conservative’ Bill of Rights might seek to preserve what is thought to constitute the rule of law, or entrench the mechanisms that are thought to have protected English liberties in the past. This would, perhaps, lead to a Bill of Rights that codified those rights that are largely based in common law or in ancient legislation but are thought to be under threat from Parliamentary override. This might generate a right to trial by jury, or a right to habeas corpus, or a right to judicial review of executive action.

Conclusion

47. I began by saying that I was agnostic about a UK Bill of Rights because my reaction would all depend on what type of Bill of Rights was on the table. I’ve suggested some alternative models and some questions that are likely to affect which of these models are likely to be attractive. If there is a message in what I’ve said, it is that the creation of a UK Bill of Rights is a formidable intellectual task, quite apart from its complicated politics.

Christopher McCrudden
22 February 2012