

a JUSTICE discussion paper

# A BILL OF RIGHTS FOR BRITAIN?



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**JUSTICE Constitution Project**

***A Bill of Rights for Britain?***

**Discussion Paper**

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## JUSTICE and the constitution

JUSTICE has a history of involvement with constitutional issues and has been a major contributor to discussions over the Constitutional Reform Act 2005, House of Lords reform, the role of the Lord Chancellor and the appointment of judges.

JUSTICE has particular experience on the question of a bill of rights for Britain, having been closely involved with the passage of the Human Rights Act 1998 (HRA). We published briefings on the HRA and launched a series of JUSTICE publications focusing on its history and impact. We were also a member of the government's Human Rights Task Force, assisting government departments and public authorities to prepare for implementation of the HRA.

### The JUSTICE Constitution Project

The purpose of the JUSTICE Constitution Project is to promote an informed debate on the best way to protect fundamental rights in Britain through law, and to indicate, in particular, the range of issues to be considered in any proposal for a modern and enforceable bill of rights.

We recognise that, prior to its enactment, some viewed the HRA as a first stage, paving the way for a 'home grown' British bill of rights which would enhance the rights incorporated from the European Convention on Human Rights (ECHR). However, in discussing any reform, we also recognise that the HRA is crucial to the protection of rights in Britain. We do not wish to see any erosion of the protection it affords.

We consider that a bill of rights would require a considerable degree of political and public consensus. If this is achievable, we are in favour of it.

This paper was written by Emma Douglas, Legal Officer, JUSTICE Constitution Project. It has been produced in consultation with a committee chaired by **Professor Kate Maleson** and comprising the following members:

- Professor Vernon Bogdanor
- Professor Anthony Bradley
- Professor Ross Cranston QC
- Lord William Goodhart QC
- Professor Carol Harlow
- Professor Robert Hazell
- Professor Jeffrey Jowell QC
- Lord Christopher Kingsland QC
- Professor Francesca Klug
- Lord Anthony Lester QC
- Professor Andrew Le Sueur
- Alexandra Marks
- Professor Martin Partington
- Professor Alan Paterson
- Jessica Simor

While committee members differ in their opinions on specific points, they are in agreement on the importance of this debate and have contributed their expertise accordingly. The paper aims to set out the issues involved in the debate over a British bill of rights and to invite responses. Where we have formed a preliminary opinion on a matter, this is indicated in the text. You are invited to respond to the paper by emailing **edouglas@justice.org.uk** by 30 April 2007.

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# Executive summary

This paper consults on our interim findings concerning a modern and enforceable British bill of rights. We are aware of developments for a bill of rights in Northern Ireland, which provide helpful pointers for our research, but we are primarily addressing the current debate in British national politics, which excludes Northern Ireland from its scope. We will publish a final report later in the year. In the meantime, we would welcome any submissions on the matters we are considering. To encourage response, we have set out some preliminary views. We have also posed specific questions, which can be found at the end of the paper.

The Human Rights Act 1998 (HRA) significantly increased rights protection in the UK. However, some originally intended the HRA to be only the first stage in a process of constitutional reform. The second stage was to be a bill of rights. A number of issues concerning a possible bill of rights have been raised in the political arena in recent months. We wish to inform the debate by setting out those which we regard as the most important. At this stage we make no judgment as to the process of drawing up the bill itself. We are seeking only to draw out the implications of the proposals.

## Purpose

We see the purpose of introducing a British bill of rights as including all or some of the following:

- to give greater constitutional protection to fundamental rights;
- to increase the scope of rights provided for in the HRA;
- to emphasise the constitutional principle of the rule of law;
- to build public awareness of constitutional rights' protection and enhance its legitimacy through public consultation; and
- to draw attention to the rights and duties of citizenship and the positive duties of the state towards all individuals in its jurisdiction.

## Content

Sources for the content of any British bill of rights include:

- rights protected in the European Convention on Human Rights (ECHR);
- common law constitutional rights which strengthen ECHR rights, such as the right to a trial by jury, or to access to the courts, which have developed within a specifically British context;
- rights 'additional' to those in the ECHR: eg rights protected in domestic legislation in relation to equality; economic and social rights; rights in international treaties and rights identified in other countries' bills of rights.

Any bill of rights must provide at least the rights protection already afforded by those articles of the ECHR incorporated by the HRA. It is politically inconceivable that we could re-negotiate our membership of the Council of Europe and its convention, the ECHR. There is, however, scope for enhancing the protection of existing rights as well as protecting rights not previously recognised. We need to consider all the above sources to see what rights we might want to add.

## **Amendability**

We need to decide whether and how a British bill of rights might be amended. This depends on its legal status. Options include a bill of rights which takes the form of:

- a declaration of rights with no direct effect;
- an ordinary statute subject to amendment in the usual way;
- a ‘constitutional’ bill which is procedurally entrenched. This could be done in a number of ways, eg by amendment to the Parliament Acts requiring consent of both Houses of Parliament, by a requirement of a special Parliamentary majority or a majority vote in a referendum.

Alternatively, the bill could contain a simple declaration against subsequent amendment, although the practical force of this would be unclear.

We consider that a British bill of rights should have a higher degree of permanency than ordinary legislation. According greater constitutional protection to fundamental rights would have both a direct and symbolic effect. We accept that derogations may be required in extreme circumstances of emergency but these should be no more than absolutely necessary and should require a special majority in Parliament.

## **Enforcement**

A key issue is whether and how a bill of rights is justiciable, ie whether courts have power to enforce its provisions. The various models include:

- judicial enforcement with a power to strike down offending legislation;
- judicial enforcement subject to the subsequent right of Parliament to override the court’s decision;
- judicial declaration of incompatibility with the bill of rights and an opportunity for the legislature to respond.

Alternatively, the bill may operate only to guide judicial interpretation of legislation but without any independent effect.

Parliamentary sovereignty is a long-standing principle in British constitutional arrangements. While some other legal systems have successfully employed the judicial strike-down power, the HRA mechanism, allowing for ‘declarations of incompatibility’, has struck a balance which allows for constructive ‘dialogue’ between Parliament and the judiciary. The question is whether a stronger judicial role is needed. In respect of rights under the ECHR, the European Court of Human Rights will retain its supervisory jurisdiction and thus provide a judicial framework within which any bill of rights would operate.

## **Process**

Any move to introduce a British bill of rights must start with a comprehensive public education campaign and a major consultation process, as has 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.

Any new bill of rights will significantly change the British constitution. It will affect the relationship between Parliament, the government and the courts. Agreement on its terms would be a significant advance towards a written constitution, should the country wish to adopt one in the future.

# Introduction

1. The need for a British bill of rights was keenly debated during 2006 and looks set to remain on the political agenda in 2007. JUSTICE's Constitution Project, timed with our 50th Anniversary Year, is focused on this issue and our findings will be published in a final report later this year. As a prelude to this, and with the aim of promoting debate, we have produced this Interim Paper. It outlines the key issues under consideration, makes some preliminary observations and arguments, and invites comment and response.
2. The question of a British bill of rights made the headlines last year following David Cameron's call for a 'British Bill of Rights and Responsibilities'. Meanwhile, Gordon Brown has hinted at a new 'constitutional settlement' and emphasised the importance of British identity, both of which might be encapsulated in some form of bill of rights. But the idea is not new. Liberty published a draft bill of rights in 1991 and the Institute of Public Policy Research (IPPR) included a bill of rights in its proposals for a written constitution the same year.<sup>1</sup> It has for a long time been on the Liberal Democrat agenda and, indeed, was Labour party policy in the 1990s in the run-up to enactment of the Human Rights Act 1998 (HRA).<sup>2</sup> Yet, whilst the issue has received cross-party attention, we believe that the question of how best to protect fundamental rights in Britain should *not* be a party political issue. It is a concern for all those in Britain who wish to exercise their rights and ensure that a robust system is in place to guard against violations of those rights.
3. Our rights are currently protected by the common law tradition of civil liberties; by certain specific items of legislation, eg on equality; and, more recently, by the HRA, which incorporates into domestic law the core provisions of the European Convention on Human Rights (ECHR). JUSTICE believes that the HRA has worked well in the courts. We welcomed the assessment of the Department for Constitutional Affairs (DCA), which confirmed this and which sought to counter unfounded press criticism of the HRA and to dispel certain myths surrounding it.<sup>3</sup> It is clear, however, that political and cultural entrenchment of rights has been mixed. Sections of the media have been hostile, though it should be noted that there is evidence from opinion polls suggesting that the British public – while not fluent in the rights parlance of lawyers – is in favour of protecting its rights.<sup>4</sup>
4. The power of the executive, in recent times, has expanded to cope with increasing pressures in the areas of crime, asylum and immigration, and the threat from terrorism. Vigilance against the executive's increasing power therefore becomes even more important, not only for those who are outside of the electoral process, such as asylum seekers and other foreign nationals, but also, in relation to issues such as privacy and freedom of expression, for us all. Indeed, we consider that any move to alter the HRA model must be to *increase* rights protection, in particular for vulnerable (often unpopular) minorities and not to regress from current standards. We explicitly take this as our starting point. On this basis, a bill of rights has the potential to provide greater protection for rights. However, constitutional arrangements, particularly rights instruments, ultimately depend on their cultural and political support. Widespread public consultation and support across the political parties are, therefore, pre-requisites to any British bill of rights.

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<sup>1</sup> IPPR *The Constitution of the United Kingdom* (1991)

<sup>2</sup> Labour's 1993 policy review concluded that while 'the incorporation of the ECHR is a necessary first step... it is not a substitute for our own written Bill of Rights... There is a good case for drafting our own Bill of Rights'.

<sup>3</sup> Review of the Implementation of the HRA, July 2006: [http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full\\_review.pdf](http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf).

<sup>4</sup> Joseph Rowntree Reform Trust, *State of the Nation Poll* (2006) – 77% believe the UK needs a bill of rights to protect the liberty of the individual; Disability Rights Commission Poll (2003) – 64% support legislation to protect human rights in the UK.

5. JUSTICE hopes that its project will encourage debate and foster greater understanding of British constitutional arrangements. We wish to facilitate informed public discussion on whether the HRA is the best instrument for protecting our rights, or whether it is time to adopt a British bill of rights which, with the ECHR as its minimum content, seeks to entrench British values and articulate an appropriate balance of constitutional powers for the 21st century.
6. Importantly, this enquiry does not seek opinion on the desirability of human rights themselves. JUSTICE believes in the value of the rights incorporated in the HRA and we are concerned only with the question whether Britain should move above and beyond the protection afforded by the HRA.

### **What is a bill of rights?**

7. We adopt the following definition of a bill of rights:

*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 and can be overridden, if at all, only with significant difficulty. Some form of redress is provided in the event that violations occur.*<sup>5</sup>

8. A bill of rights serves several functions. It sets out fundamental rights of individuals which are protected by law. It expresses the fundamental principles of a democracy and the values of the state in question. In addition, as a highly symbolic instrument, a bill of rights can serve as a mechanism for unifying the population, and may persist as the symbol of a nation's aspirations, even when the reality of rights protection falls short of its legal provisions.
9. Bills of rights in different countries tend to share a number of distinctive features. For example, they are commonly presented as a set of broad and purposive statements of fundamental rights. There is usually room for judicial interpretation, since courts flesh out the meaning of each provision. Rights holders tend to be individuals, though some bills of rights make special provision for minority groups. Those against whom the rights are held tend to be governmental bodies and public authorities or private bodies carrying out public functions.<sup>6</sup> Furthermore, bills of rights are often part of a codified constitution which establishes procedures for good governance and sets out the institutional framework designed to protect rights, thereby signalling which branch of government has the final say on matters of fundamental rights.
10. Today, the vast majority of countries have bills of rights.<sup>7</sup> Even before the waves of new constitutions were created following World War II and the process of decolonisation, bills of rights (including dedicated chapters in constitutions) were commonplace. Their enforcement provisions are now significantly more elaborate, far-reaching and potentially effective and their relationship with the international human rights regime gives them a coherence and momentum not enjoyed in previous eras. Given the prevalence of bills of rights, and their increasing importance as factors in international relations and domestic

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<sup>5</sup> Philip Alston, *Promoting Human Rights through Bills of Rights*, 1999 OUP, p10.

<sup>6</sup> Though in some countries eg Ireland and South Africa, rights provisions are applicable as between individuals. In the UK there is currently debate in Parliament (and see the recent *R (Johnson & others) v Secretary of State for Constitutional Affairs & another* [2007] EWCA Civ 26) as to which bodies should be regarded as a public body for the purposes of s6 HRA, which prohibits bodies performing public functions to act incompatibly with human rights. There are already proposals to amend this section, as noted in the Joint Parliamentary Committee for Human Rights 7<sup>th</sup> Report of Session 2003-4 (HL 39/HC 382).

<sup>7</sup> Philip Alston, 1999 OUP Introduction

legal orders, any proposal for a British bill of rights has much to learn from comparative models.

### **What is a ‘British bill of rights’?**

11. The meaning of a bill of rights in a British context will be determined by what it is seeking to achieve. We must take the features of what many consider to be our current bill of rights – the HRA – and ask whether we could build on those rights incorporated from the ECHR. We must ask whether a different model of procedural entrenchment would be preferable and whether we are satisfied with its mode of enforcement. We must also look at the issue of public support for the current HRA: we should ask how any new bill of rights could use a genuine public consultation process to achieve social and cultural acceptance of its provisions and give it a fresh source of legitimacy.
12. The concept of a British bill of rights can be traced from Magna Carta in 1215, which limited the power of the monarch by written grant; the Petition of Right in 1628, which set out civil liberties to be honoured by the monarch; and the Bill of Rights in 1689, which set out the expectations and rights of citizens and the obligations of the Crown and Parliament. All these followed defining constitutional ‘moments’ characterised by pressure for explicit recognition of certain constitutional principles and guarantees. The UK’s signature to the ECHR in 1950 marked a further progression in its system of rights protection, as did the relatively recent enactment of the HRA. The question now is whether the HRA is sufficiently embedded in British constitutional arrangements and sufficiently comprehensive to constitute a bill of rights for Britain.
13. There are particular questions raised by the current model of the HRA which our final report will address in more detail. For example, aside from the key issues of content, amendability, enforcement and process, there is the question of applicability. Should a bill of rights bind private parties and, if so, to what extent? The issue is one on which to consult and on which we therefore welcome views.
14. In discussing the features of a British bill of rights, we must bear in mind its underlying purposes. A bill of rights must be progressive, aiming to enhance the human rights culture facilitated by the HRA. In particular, a modern and enforceable bill of rights could enliven interest in the rights and duties of British citizenship and underpin public understanding of the constitution as a whole, including the obligations of the state in relation to every individual under its jurisdiction. Indeed, the government and its agents must not only refrain from interfering unnecessarily with human rights and freedoms, but have a positive obligation to secure and implement these rights by means of legislative and administrative measures, as well as legal remedies. All three branches of government are bound by such duties under the ECHR and other legally binding human rights instruments to which the UK is a party.
15. With these considerations in mind, we now turn to the key features of a British bill of rights.

## Part I

# Content

### Options for inclusion in a British bill of rights

16. In drawing up the contents of a British bill of rights, there are a number of options to address and limitations to consider. These include:

#### a) Rights enshrined in the ECHR

17. JUSTICE views the UK's relationship with the Council of Europe and its ECHR as a matter of political reality and as non-negotiable. Moreover, our continuing membership of the European Union is effectively conditional on compliance with the ECHR.

18. It follows that any proposed model for a British bill of Rights must be 'ECHR-plus'. Proposing a bill of rights with more limited scope ('ECHR-minus') cannot be the opportunity to detract from any of the rights in the ECHR. We are aware of the argument that adopting a British bill of rights would mean that the European Court of Human Rights (ECtHR) would give greater freedom to Britain than it does currently under the 'margin of appreciation' allowed to individual countries. This would certainly not be the case with a more limited bill of rights. Regardless, however, we are not aware of the evidence to back up the argument and therefore grant it little credence.

19. A specific source of contention has been the decision by the ECtHR in *Chahal*<sup>8</sup>, that under no circumstances can an individual considered to pose a threat to national security be deported to a country where they may face a real risk of torture, contrary to Article 3 ECHR. The decision pre-dates the HRA and shows the delicate compromise with which the UK lives as a signatory to the ECHR and subject to the jurisdiction of the ECtHR.<sup>9</sup> However, it should be recognised that the UK could not, in any circumstances, use a bill of rights unilaterally to reverse a ECtHR decision.

#### b) Common law constitutional rights and 'strengthened' ECHR rights

20. The ECHR, along with the International Covenant for Civil and Political Rights (ICCPR), has been tried and tested as a broad common denominator in bills of rights both within and outside the Council of Europe. However, whilst the extent of its protection is a necessary starting point for a British bill of rights, the language of the ECHR's provisions is not perfect and could be improved in the drafting of a modern charter of rights.

21. We suggest that there is scope for extending and sharpening the focus of the ECHR in a British bill of rights in several ways.

- First, some of the limitations in the ECHR which may be dated and no longer appropriate could be removed.<sup>10</sup>

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<sup>8</sup> *Chahal v United Kingdom* (1996) 23 EHRR 413.

<sup>9</sup> The UK has currently joined litigation designed to reverse or limit the effect of *Chahal*. (*Ramzy v UK and Netherlands* (2006) No.25424/05). We agree with the Parliamentary Joint Committee on Human Rights (19<sup>th</sup> Report of Session 2005-06) HL 185 I/HC 701-I) that such a move is not only worrying for the status of basic human rights in the UK but also potentially ineffective given our other international obligations, eg under the UN Convention against Torture.

<sup>10</sup> Such as the power to imprison vagrants without trial. As with many modern bills of rights, there could be one general "limitation" clause which applies to all rights, instead of emphasising limitations for each individual right (eg Article 10(2) ECHR limiting freedom of expression in Article 10(1) etc).

- Second, rights could be updated in line with social and technological progress. For example, changes in our moral and social values have affected views on issues such as the scope of anti-discrimination, while developments in science and technology have impacted on views over privacy. To adapt to such changing perspectives that the ECtHR has developed the doctrine that the ECHR is a ‘living instrument’. However, as a consequence, there remains a risk of confusion, particularly for the public, between the wording of the ECHR and the position as developed by the courts.
- Third, there is scope for putting a particularly ‘British’ interpretation on certain rights provided for in broad terms by the ECHR. Most often cited in the UK context is the archetypal British ‘right’ – trial by jury. While British judges can shape to UK specifications the entitlement of a ‘fair trial’ under Article 6 ECHR, trial by jury is not such a protected right as we might think – over 95 per cent of criminal cases in the UK are not heard by juries. The right is limited to more serious cases, yet the government has sought to restrict it still further. This has triggered public support for its protection in a British bill of rights,<sup>11</sup> to which we would add our own.

22. In recent years, independently of the ECHR and the HRA, the common law has increasingly recognised the existence and implications of basic human rights. Most importantly, such rights are capable of being characterised as ‘constitutional rights’.<sup>12</sup> At the forefront of these constitutional rights are those to equal treatment before the law and access to the courts.<sup>13</sup> Certainly, the right of access to the courts is repeated in numerous human rights instruments, most recently Article 47 of the EU Charter of Fundamental Rights. It presents a strong case for inclusion in a British bill of rights, since it is the right through which all other rights may be protected.

### c) Rights additional to those in the ECHR

#### i) Rights contained in UK legislation

23. Some rights currently protected by UK legislation have arguably acquired a quasi-constitutional importance. Most obvious are equality rights. Already the EU issues Directive Principles on Equality, we have Article 14 ECHR on non-discrimination and the common law has seen some development of notions of equality.<sup>14</sup> However, it is commonly seen as a gap in the protection afforded by the ECHR that, unlike Article 26 of the ICCPR, it does not contain a free-standing provision guaranteeing equality without discrimination.

24. Constitutions with explicit equality provisions include South Africa, Canada and India.<sup>15</sup> Obviously, at the time of enactment, these countries faced particular cultural and ethnic

<sup>11</sup> The Joseph Rowntree Reform Trust *State of the Nation Poll* (2006) found that 89% of people would include right to trial by jury in a bill of rights. However, difficulties are immediately apparent over how, and by whom, the issue (of which types of case would be covered) would be negotiated and decided.

<sup>12</sup> See eg. *R v Lord Chancellor, ex p Lightfoot* [2000] QB 597, 609B, a concept traced back as far as *R v Secretary of State for the Home Department, ex p Leech* [1994] QB 198, 210A. As was said in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) [2003] QB 151 at [62]: ‘In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional...’

<sup>13</sup> *R (on the application of Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2003] 3 WLR 252 at [26] per Lord Steyn: ‘the right of access to justice ... is a fundamental and constitutional principle of our legal system.’

<sup>14</sup> See *R (Carson) v. Secretary of State for Work and Pensions* [2005] HRLR 23.

<sup>15</sup> The South African constitution gives explicit protection to equality, subject to a ‘reasonableness’ requirement in its ‘progressive realisation’. In Canada, equality is protected to a lesser extent through an equality provision. In India, directive principles are employed to deal with matters of equality.

divides. Yet only last year a charter of rights containing provisions on equality was enacted in the state of Victoria, Australia.<sup>16</sup> Including a right to equal treatment without discrimination in a bill of rights would enable the UK to ratify the equality protocol (Protocol 12) to the ECHR.<sup>17</sup> Moreover, any updating of our legal statement of rights would go beyond considerations of legal protection, serving also to create an official point of reference and a set of principles to permeate the work of government and public life more generally, as well as signalling the fundamental nature of democracy in Britain.

*ii) Economic and social rights*

25. Economic and social rights present appealing options for inclusion, especially as the UK courts are arguably beginning to develop jurisprudence which sees a merger between legal rights and the welfare state in terms of ensuring minimum standards of living.<sup>18</sup> South Africa has been a leader in terms of economic and social rights and is an instructive source of reference. There are also examples from Europe.<sup>19</sup>
26. Supporters of incorporating economic and social rights argue that they fit with civil and political rights as two parts of an interdependent whole.<sup>20</sup> Further, economic and social rights facilitate the advancement of a rights culture by protecting the most basic day-to-day needs such as food, clothing, housing and health. Opponents argue that they are merely aspirational rights and place an obligation on government to expend resources in accordance with judicial rulings, which undermines the separation of powers and the democratically elected legislature's expertise in allocating funds.
27. Yet, economic and social rights should not be dismissed out of hand, especially since the Parliamentary Joint Committee on Human Rights (JCHR) has voiced tentative support for their incorporation<sup>21</sup> and opinion polls weigh heavily in favour of their inclusion in a British bill of rights. For example, there is strong support for a right to free medical care on the NHS.<sup>22</sup> Such rights need not be made directly enforceable, but could be set out in Directive Principles to serve as guidance for government policy<sup>23</sup> and/or as encouragement for their progressive realisation both inside and outside of the courts.

*iii) Rights contained in international treaties and other bills of rights*

28. International treaties such as the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and instruments such as the EU Charter of Fundamental Rights (EU Charter), offer a multitude of rights which might be included in a British bill of rights. In particular, and to complement any provision on trial by jury, a number of procedural and defence rights in the criminal justice system might be ripe for inclusion. Further, provisions on just administrative action and

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<sup>16</sup> The Victoria Charter of Human Rights and Responsibilities 2006.

<sup>17</sup> Which strengthens the ECHR's ability to protect against discrimination, but which will only take effect after 10 Member States have ratified it.

<sup>18</sup> *Limbuella v Secretary of State for the Home Department* (2005) HL(E), 396.

<sup>19</sup> For example, Belgium's constitution protects the right of choice of education, including moral or religious education, with public funding.

<sup>20</sup> The view is that the philosophical division between civil and political rights and economic, social and cultural rights derives from the competing ideologies of the West and the Soviet Union post-WWII when the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) were created.

<sup>21</sup> 'Providing the [economic, social and cultural] rights with legal status in UK law would broaden and strengthen the developing culture of respect for human rights in the UK, and make clear that human rights address essential human needs...JCHR, 21<sup>st</sup> Report of Session 2005-06 (HL 201/HC 1216).

<sup>22</sup> *State of the Nation Poll* (2006) – 89% believe a Bill of Rights should include the right to hospital treatment on the NHS

<sup>23</sup> As is the practice in numerous countries such as India, Ireland, Sri Lanka, Namibia and Bangladesh.

access to independent and impartial tribunals<sup>24</sup> would underline commitment to due process as part of the rule of law.

29. Also worth considering are certain 'third generation' rights such as the right to a clean environment. The latter, included in the South African constitution, and developed as a fundamental right in some jurisdictions (often under the heading of the right to life), has the advantage of being not only universally relevant but also increasingly central to the Britain's domestic concerns.
30. Importantly, comparative experience also sounds a warning as to over-inclusiveness of bills of rights. In particular, the Northern Ireland bill of rights consultation process has attempted to secure support for women's and children's rights as well as cultural (language) rights, but repeatedly failed to gain consensus. Indeed, the advice of the chair of the recent consultation process in Victoria, Australia is that it is crucial to maintain an appropriate and achievable objective for the particular society in question.<sup>25</sup>

### **A bill of rights and responsibilities?**

31. Some argue that, in addition to rights, further emphasis should be placed on people's responsibilities. A range of different responsibilities can be identified; for example, to respect the rights of others (often dealt with in a balancing clause); to exercise the right in question (such as the right to vote); and to perform other duties (such as military service).
32. Historically, the aim of a bill of rights was to counter the duties on individuals already extensively laid down in statutory legislation. The point was to ensure that certain human rights, to which everyone is entitled on account of their common humanity, were guaranteed and protected against the state's legislative omnipotence, and could only be limited to the extent necessary to protect the rights of others and the common good. Indeed, many rights already require balancing with other rights and with public policy implemented in the interests of the community as a whole. Most bills of rights already include limitations clauses which clearly articulate community values and interests to weigh against individual rights. Some bills of rights contain a general limitations clause, while the ECHR qualifies each right separately.<sup>26</sup> However, to argue that the enjoyment of rights should be legally contingent on the exercise of responsibilities is to misunderstand the concept of human rights.<sup>27</sup>
33. The Victoria Charter of Human Rights and Responsibilities 2006 addresses the issue of responsibilities with a preamble setting out the community values underpinning it, and stipulates that 'human rights come with responsibilities and must be exercised in a way that respects the human rights of others'. This provision was a direct result of community

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<sup>24</sup> Particularly strong in the Canadian and South African constitutions, as well as in the EU Charter.

<sup>25</sup> George Williams, MLR 2007.

<sup>26</sup> Thus, Article 10(2) ECHR stipulates that the right to freedom of expression, '...since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, the protection of the reputation or rights of others...' etc. One example of a general limitations clause is found in the South African Constitution – s36 (1) provides that 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any rights entrenched in the Bill of Rights.'

<sup>27</sup> Article 18 of the German constitution (the 'forfeiture' provision) has been cited as an example of the 'balance' to be struck between rights and duties, with negation of the latter impacting on entitlement to the former (see Jonathan Fisher, Conservative Liberty Forum, 'A British Bill of Rights and Obligations?' 2006). Yet Article 18 gives a misleading comparison. No application for forfeiture of a right before the Federal Court has ever succeeded. The German constitution knows only one genuinely justiciable duty/obligation: national service for men (Article 12a). Other 'duties' are merely declaratory.

consultation,<sup>28</sup> which revealed positive support for the idea of a document recognising (at least in symbolic terms) the inter-related nature of human rights and responsibilities. Indeed, it reflects the preambles of other international human rights instruments, such as the ICCPR, which also include the notion of responsibility. Our provisional view is that while the responsibilities already implied in bills of rights could be included in a preamble, they should not be included within the legally justiciable provisions. Inclusion of responsibilities may well gain public and political support. Their inclusion should not, however, be used to appease those who are sceptical of bills of rights, or those who do not accept that basic rights are given without pre-conditions.

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<sup>28</sup> People perceived this as a way of addressing community problems beyond more 'individualistic' conceptions of human rights. Some argued in favour of both a right and a responsibility to vote, as recognised in Australia's system of compulsory voting.

## Part II

# Amendability

34. Should a British bill of rights be entrenched? How amendable should it be and what status should it have in domestic law? Below is a range of options which draw on examples from overseas and from proposals put forward in the run up to the devolution and HRA legislation. Notably, the fact that rights deriving from the ECHR remain enforceable through the mechanism of the ECtHR means that they retain a protected status, regardless of the model of amendability.

### Amendability – the options

#### a) A ‘declaration’ or ‘code’ of rights

35. The weakest, unentrenched model of bill of rights would be a declaratory statement of principles, the most famous example of which (in the international context) is the Universal Declaration of Human Rights. Such a declaratory code for Britain would have a symbolic role only.

#### b) Ordinary statute conferring rights

36. A stronger model would be found in a regular Act of Parliament, capable of amendment following a simple majority in the House of Commons. However, judicial and academic opinion has tended to accord a special (de facto) constitutional ‘status’ to certain Acts, most obviously to the European Communities Act 1972 (ECA) and indeed the HRA, so that amendment would prove politically extremely difficult.<sup>29</sup> The HRA, like the New Zealand Bill of Rights Act 1990, contains no express provision preventing ‘implied repeal’ by subsequent incompatible legislation, although this may be the effect of its key provisions. Judges have required express intention to repeal its provision in the case of later, inconsistent legislation.<sup>30</sup>

#### c) Procedurally ‘entrenched’ bill of rights

37. Procedural entrenchment of legislation is problematic in the UK system owing to the principle of Parliamentary sovereignty.<sup>31</sup> There is some doubt about ways in which Parliament might bind its successors in order to restrict subsequent repeal or amendment. The following are mechanisms that might be used, alone or in combination, in order to control direct amendment of the provisions of a bill of rights:

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<sup>29</sup> Political will aside, amendment of the HRA could technically be achieved as easily as for any statute. In terms of repealing the HRA, there would be legal implications in terms of jurisdiction over ECHR matters, which would have to go back to the ECtHR.

<sup>30</sup> This is clear from the framework of the HRA itself, which requires a statement of compatibility for each new bill (s19), requires judges to construe legislation, so far as possible, to be compatible with the HRA (s3) and, where this is not possible, allows for a judicial declaration of incompatibility (s4); and from discussion in case law, eg *Ghaidan v Godin-Mendoza* [2004] UKHL 30. Comparison can also be drawn with the effect of the ECA – the case of *Thoburn* ruled that the common law had created exception to the doctrine of implied repeal; there were certain circumstances in which the legislature could only enact what it desired if it did so by specific provision. There was a difference between ordinary statutes which could be impliedly repealed and constitutional statutes such as the ECA, which could not.

<sup>31</sup> According to which Parliament may legislate on any matter and cannot bind its successors.

*i) Amending the Parliament Acts*

38. The Parliament Acts allow the House of Commons, in certain circumstances, to overrule the House of Lords.<sup>32</sup> A requirement of approval by both Houses of Parliament for all proposed amendments to a bill of rights might represent the closest to constitutional entrenchment possible under British constitutional arrangements. It would also enhance the constitutional authority of the House of Lords.<sup>33</sup> Drafting a provision in a bill of rights that future amendments will require the consent of both Houses of Parliament should be straightforward, requiring a reference to the 1911 Parliament Act excepting amendments to the British bill of rights from the terms of its provisions.

*ii) Requirement of special process for amendment*

39. No existing precedents for special majority voting in Parliament exist. However, the UK has included special majority voting in amendment processes of many Commonwealth constitutions for its former colonies and dominions,<sup>34</sup> and a two thirds majority in both legislative chambers is commonly found abroad as part of the constitution alteration process.<sup>35</sup> Moreover, a notable provision was included in the Northern Ireland Constitution Act 1973, stating that ‘in no event will Northern Ireland ... cease to be part of the United Kingdom without the consent of the majority of the people of Northern Ireland voting in a poll held for the purposes of this section’.

40. Some theorists maintain that such an entrenchment provision is legally inoperative because a sovereign Parliament cannot bind its own future actions. However, this logic may be misplaced in the political context of enacting a constitutional bill of rights. In any case, the better view may be that Parliament can bind itself as to the manner and form of future legislation. There is no logical reason why Parliament should be incompetent to redefine the procedure for enacting legislation on any given matter. If Parliament can make it easier to legislate by passing the Parliament Acts, it can surely make it harder to legislate.

*iii) A simple declaration against amendment*

41. Examples of such declarations are found in the Acts of Union 1707 (which merged the Scottish parliament with the already conjoined parliament of England and Wales) and the Act of Union 1800 (which united the kingdoms of Great Britain and Ireland), both purporting to be in effect ‘for ever after’. Writing on what might be termed ‘soft’ entrenchment, the great nineteenth century jurist, Professor Dicey, took the view that the Acts of Union may not be strictly legally entrenched but, for practical purposes, they could be described as such. The nature of this entrenchment can be put in terms of the supremacy of fundamental constitutional *values*: in relation to the Acts and Treaty of Union of 1707, certain core values of the union agreement are effectively constitutional values entrenched within a modern-day constitution.<sup>36</sup>

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<sup>32</sup> Exceptions are made for bills extending the life of Parliament and money bills, which the House of Lords may delay for up to one year in two consecutive Parliamentary sessions.

<sup>33</sup> Which currently under the Parliament Acts only possesses a power of one year’s delay over legislation of any kind, except bills to suspend general elections and approval of statutory instruments. Any reform of this kind might need to entail wider modernisation of the functions and powers of the UK’s second chamber, eg over scrutiny of emergency derogations and consideration of administrative and legislative compliance with human rights generally.

<sup>34</sup> Note that in New Zealand, s268 of the Electoral Act 1993 entrenches six ‘reserved provisions’ which can only be amended by a 75 %majority of all members of Parliament, or by public approval in a referendum.

<sup>35</sup> As in Canada, Germany and South Africa (in addition to support in six out of nine of the provinces); the same was supported by IPPR and Liberty in their draft Bills of Rights in the 1990s; while a Parliamentary majority also suffices in New Zealand and Australian jurisdictions, where the Bills of Rights are ordinary statutes, the recent enactment process in Victoria explicitly envisages amendment by providing that there be a review of the Act four years from its enactment and again in eight years.

<sup>36</sup> Elizabeth Wicks, *Evolution of the Constitution*, (2006) OUP

42. Since the object of introducing a British bill of rights would, in part, be to give greater constitutional protection to fundamental rights, it follows that some form of robust entrenchment would be preferable. This would prevent, as has happened with the HRA, threats of amendment or even repeal by a simple majority in Parliament. Arguably, the more layers of entrenchment the better, though concerns may arise over the resulting inflexibility, which may reduce the capacity of government to respond to an emergency.
43. As outlined above, procedural entrenchment can be achieved in a number of ways, including (a combination of): special-majority voting in both Houses of Parliament; a referendum in order to bring the bill into force; and provision contained in the bill regarding amendments. All would ensure not only symbolic strength, but also significant democratic endorsement of a bill of rights. However, the issue of how Parliamentary sovereignty could be modified so that the doctrine of implied repeal would no longer apply and the bill of rights could be amended only by special majority (or other requirement) remains problematic. Its resolution is a matter for consultation.

## Derogations

44. Most bills of rights, including international human rights treaties, confer powers on the executive to suspend certain obligations in a crisis or emergency. This presents a potential gap in the judicial guarantee of human rights against oppressive acts of government, especially since times of crisis are precisely when civil liberties are most at risk.<sup>37</sup>
45. As a further safeguard against excessive use of executive power, a similar voting procedure might be used for derogations as for amendments. Such a procedure would further entrench the rule of law in the legislative process and ensure the role of a bill of rights as a permanent check on constitutionality as well as a long-stop in the event of breaches. In our view, it would be desirable for a bill of rights to state precisely the duration for each derogation, up to a maximum of one year, with any extension of time requiring agreement of both Houses.<sup>38</sup>
46. As to the conditions of a derogation, we would suggest that they be no less stringent than provided for in the ECHR ie ‘in time of war or other emergency threatening the life of the nation’. However, we are open to suggestions for alternative language.<sup>39</sup> In terms of human rights standards, it is helpful to recall the Civil Contingencies Act 2004, which Parliament amended during its legislative passage to enable emergency regulations to be challenged under the HRA, thus demonstrating the importance of legality even – indeed especially – in times of crisis.<sup>40</sup>

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<sup>37</sup> Notably, the UK is the only member of the Council of Europe to have derogated from Article 5 ECHR (right to liberty) since 9/11.

<sup>38</sup> There should, in addition, be express clarification over judicial review proceedings to deal with any challenges concerning the validity of procedures under which the derogation came into effect.

<sup>39</sup> The IPPR Constitution for the United Kingdom (1991) gives a good example. Clause 128 (Suspension of the Constitution) provides that: ‘Where, in the opinion of the Prime Minister, in the United Kingdom or any part of the United Kingdom – 1) a grave threat to national security or public order has arisen or is likely to arise; or 2) a grave civil emergency has arisen or is likely to arise, the Head of State may, by Order in Council, make provision, to the extent strictly required by the exigencies of the situation and reasonably justified in a democratic society, suspending, in whole or in part, absolutely or subject to conditions, [a specified group of] provisions of this constitution...’

<sup>40</sup> In the same vein, it is useful to look to the approach to derogation in Article 37 of the South African bill of rights, which protects certain core rights even in times of emergency

## Part III

# Enforcement

47. The mode of enforcement of a British bill of rights goes to the heart of the inevitable tension between the branches of the constitution and the respective role that each plays in relation to rights protection. The key question is whether a British bill of rights should be justiciable, ie enforceable by the courts. The role and powers of the judiciary vary widely across constitutional democracies: at one end of the spectrum allowing courts the ultimate say by way of strike-down powers for unconstitutional (or non rights-compatible) legislation; at the other, leaving judges with a limited role in relation to a sovereign Parliament. Convention rights are subject to the ultimate determination of the ECtHR, whose judgments member states are pledged to implement. In this context, the mechanism of the HRA, allowing the higher UK courts to make a declaration of incompatibility but not to strike down legislation, can be seen as particularly appropriate.

### Models of enforcement

48. It is helpful to identify four general modes of enforcement:

#### a) **Judicial entrenchment with Supreme Court strike-down power**

49. Under this system, the courts have the ultimate power over interpretation of legislation and are entitled to strike down legislation which they consider incompatible with the rights instrument. Thus, judicial review equates with judicial supremacy. The US bill of rights is subject to a stronger form of judicial entrenchment as the legislative instrument from which these judicial powers derive is the federal constitution – superior in legal status to Acts of Congress. This is the model in most Council of Europe countries, including Germany, which also provides for judicial enforcement of its own constitution. Clearly, judicial entrenchment operates most effectively in the context of a written constitution. Such a system only allows a subsequent political decision to reverse the outcome of a judicial decision to strike down legislation via the mechanism of changing the constitution through designated procedures.

#### b) **Judicial entrenchment subject to legislative override**

50. A variant on the above approach is the use of a ‘notwithstanding clause’ procedure, effectively providing for judicial power to declare legislation invalid, but enabling the legislature to override the application of a right to particular legislation in specified circumstances. Canada’s Charter of Rights and Freedoms 1982 is enforced in this way. As a supreme law it prevails over all existing and future legislation which may conflict with it. Parliamentary sovereignty is limited to an extent as the validity of laws passed through Parliament can be tested before the courts to assess compliance and the courts may declare legislation ultra vires. However, s33 allows the federal Parliament or any provincial legislature to declare, for renewable five-year periods, that legislation should be given effect by the courts notwithstanding the fact that it infringes certain (prescribed) rights.<sup>41</sup> In this way, Parliamentary supremacy and judicial supremacy coexist in the charter and the Supreme Court must strike a proper balance between them.

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<sup>41</sup> In fact, however, the political stigma attached to the use of s33 has ensured that the Federal Parliament has never employed it.

### **c) Judicial declarations with legislative response**

51. This is the modified system employed in the UK in relation to the HRA. During the legislative process, a minister presenting a bill in Parliament must state in writing that a bill is compatible with the ECHR (s19 HRA). If, however, the courts find the subsequent legislation to be incompatible, they can make a 'declaration of incompatibility', which leaves to Parliament the task of considering its position. Of 17 such declarations made so far, each one has either triggered new legislation or been overturned on appeal. However, Parliament could decide to ignore such a declaration. In the case of ECHR rights, the matter would then face appeal to the ECtHR. This, no doubt, is why the government has been open to re-legislation. However, the government could choose to take its chances before the ECtHR. In relation to non-ECHR rights in a bill of rights, there would be no further appeal to another court. An advantage of the HRA model is that it belongs to the interactive 'dialogue' analysis of rights protection, whereby rights protection is seen as a joint responsibility of all constitutional branches; the judicial process is used as a mechanism for establishing the best possible interpretation of rights, with Parliamentary sovereignty ultimately remaining intact.

### **d) Interpretative tool only**

52. Some bills of rights simply share the status of ordinary legislation and operate solely as a tool of interpretation, as in New Zealand. The political difficulties associated with any form of entrenchment are absent, but the disadvantage is that it can be seen as little more than a symbolic gesture. The judicial strike down power was removed from the original draft bill in New Zealand to leave courts able only to overturn decisions and not legislation (such as that denying prisoners voting rights). Again, however, the New Zealand courts have recently started to imitate the UK model by issuing 'declarations of inconsistency'.<sup>42</sup>

### **Choosing a model to fit the UK**

53. There is much literature on the relative merits of the traditional 'judicial' bill of rights model, influenced by US-style judicial review and adopted in many Western European countries since 1945, and the newer 'parliamentary' or 'statutory' model, as found in the HRA. Generally academic opinion favours the HRA approach which has also formed the basis for recent models such as those bill of rights instruments newly enacted in Australia. The mechanism contained in ss3 and 4, providing that where legislation cannot be construed as rights compatible, a declaration of incompatibility may be made by the judiciary, following which it is for Parliament to re-legislate, is said to have facilitated a judicial-parliamentary 'dialogue' process. Judges apply legal principles and propose that the elected branches re-think their legislation where it appears not to comply with rights standards. Parliamentary sovereignty remains intact, if slightly modified due to the elevated responsibility conferred on judges under the HRA to set the parameters of rights compliance, and the modification of the doctrine of implied repeal.

54. The defining features of the newer 'parliamentary' bill of rights model are, first, that it emphasises pre-legislative review in Parliament, aiming to correct rights abuses from actually occurring, rather than correct them after the fact.<sup>43</sup> In the UK, this process is enhanced by the Parliamentary Joint Committee on Human Rights, which examines every

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<sup>42</sup> The first such declaration arose in a case concerning the right to freedom of expression, *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9,17. The Court of Appeal said that 'New Zealand as a whole can rightly expect that on appropriate occasions the Courts will indicate whether a particular legislative provision is or is not justified thereunder.' (para 20)

<sup>43</sup> Indeed, following the UK's example, the Victoria Charter of Rights and Responsibilities has been designed not so much to transfer power to judges but to try to ensure inconsistencies can be dealt with early in the process.

bill that passes through the legislative process, aiming to ensure that the rule of law is adhered to at an early stage. An important role is also played in this regard by the House of Lords Constitution Committee, which both examines public bills for matters of constitutional significance and carries out inquiries into wider constitutional issues. Second, it facilitates legitimate political dissent from judicial interpretations, allowing for a broader range of perspectives on the appropriate interpretation of rights. These features mean that the model is readily accommodated by British constitutional traditions and workable within our current arrangements.

### **Enforcement of rights in relation to international law**

55. Given the proliferation of international human rights law and the increasing convergence of international human rights standards, an important aspect to consider is the relationship of a British bill of rights to international law. While ‘monist’ systems typically apply international treaties automatically in domestic law, in ‘dualist’ systems like the UK the state is usually bound to comply with ratified international treaties but the courts are not bound to apply them in the absence of incorporating legislation. Notably, the South Africa constitution provides that, in interpreting its bill of rights, courts ‘must’ consider international law and ‘may’ consider foreign law<sup>44</sup>. Given the UK’s broad network of international obligations, and their increasing importance in domestic law, the debate over a British bill of rights presents an opportunity to consider some form of judicial duty to take international law into account in decision making.<sup>45</sup>

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<sup>44</sup> Article 39 (1) b) and c). See also the following: Article 231(4), which provides that any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament; Article 232, which provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament; and Article 233, which states that every court must, when interpreting any legislation, prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

<sup>45</sup> Examples include the recent torture cases, in which there was discussion as to whether the prohibition of torture has become a customary rule of international law and thereby become part of UK law.

## Part IV

# Process

### Importance of process

56. Social acceptance is crucial to constitutional stability. Since the effect of giving constitutional protection to certain rights is to draw them out of ordinary political debate and contest, such a step requires broad and enduring social agreement.
57. Comparative experience of constitutional consultation is highly instructive, particularly in jurisdictions similar to the UK. Major consultation exercises undertaken in both Australia and New Zealand in recent years have reported broadly similar patterns regarding public knowledge of constitutional arrangements and public opinion on constitutional reform procedures. While the committees of inquiry found a worrying lack of public knowledge over constitutional arrangements, informed debate led to clear majorities in favour of extensive consultation prior to major reform and the use of referendums following independent and impartial information campaigns.<sup>46</sup>
58. Bills of rights in particular merit thorough public consultation, as illustrated by both negative and positive comparative experience. For example, the persistently controversial Basic Laws of Israel were passed with a bare majority of the Knesset (with tensions high over individual rights threatening religious values); recently in Northern Ireland there has been a widespread consultation process, including participation by a huge network of NGOs, yet little public support or consensus has yet materialised. Canada's consultation process was thorough both within the legislature and among outside pressure groups – though there was little 'on the ground' consultation, the Canadian Charter of Rights and Freedoms now (after initial unease) has strong public support.<sup>47</sup> The most positive and recent example lies with Australia and the genuine, ground level consultation which generated both public understanding and enthusiasm for the Victorian Charter of Rights.

### Stages of the constitutional reform process

59. There are a number of stages typical of constitutional reform in a democracy:<sup>48</sup>

#### a) Initiation of reform proposals

60. Constitutional reform tends to be put on the political agenda via three methods: party election manifestos; cross-party Parliamentary consensus leading to some form of Parliamentary inquiry; or, more usually, through public demands or popular activism. While the issue of a bill of rights has attracted a degree of cross-party support, the essence of such a document is that it detracts from the power of the ruling party. It remains a matter for speculation whether the enthusiasm for a bill of rights shown by the opposition

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<sup>46</sup> The Australian Constitutional Centenary Foundation assisted public debate on the constitution during the 1990s and included in its findings: a worrying lack of public knowledge and understanding of constitutional issues; overwhelming public support for referendums as part of the process for constitutional change; the importance of establishing public trust through reliable, independent and readily available information; and the importance of any body overseeing discussion process to be connected with wide range of population and be linked to parliamentary and political process and have good funding base to maintain independence. In New Zealand, the House of Representatives' Constitutional Arrangements Committee undertook extensive public consultation in 2005 and reported that major change should not be made hastily and without broad public support; further, most people believed major changes should be made only if supported at referendum and much of the population favoured a super-majority of 75% in referendum or Parliamentary vote or both.

<sup>47</sup> An opinion poll marking the Charter's 20<sup>th</sup> anniversary found over 80% of Canadian strongly in its favour.

<sup>48</sup> As identified by the New Zealand Constitutional Arrangements Committee 2005.

parties would be maintained in government. In any case, continued lobbying will be needed in order to keep up momentum.

## **b) Public consultation and consensus**

61. Most codified constitutions provide for amendment procedures that in practice are enhanced by public consultation. Furthermore, recent developments in international law are helping to move the debate over public participation in constitutional reform from whether it is desirable to whether it is a 'right'. Indeed, the UN Committee on Human Rights has interpreted the right granted in the ICCPR of public participation in public affairs as extending to constitution-making. Meanwhile, new techniques for consultation are emerging: establishment of prior agreement on principles as a first phase of constitution-making; civic education and media campaigns; creation and guarantee of channels of communication; local discussion forums; and open drafting committees. Efforts to consult with the public differ in their degrees of formality and the extent of their engagement, from a format which requires deliberation to one which merely seeks public response to specific proposals (such processes are implemented by bodies including royal commissions, commissions of inquiry or constitutional assemblies).<sup>49</sup>

## **c) Government or legislative process**

62. Whereas many countries make constitutional provision for reform processes, typically in the UK (as in New Zealand), executive and legislative process tends to take care of constitutional reform. Indeed, significant constitutional changes in the UK have been made without public debate.<sup>50</sup> While current arrangements give considerable latitude for transforming rights and powers relatively imperceptibly, top-down enforcement is likely to have a negative effect and public engagement remains crucial. Ideally, the consultation and legislative processes for a bill of rights would be linked, with any special advisory body created collecting evidence and consulting widely before using its recommendations to prepare the way for a government-sponsored Parliamentary bill.<sup>51</sup>

## **d) Referendum process**

63. Referendums are now an established part of constitutional reform processes.<sup>52</sup> Arguments in favour include: their reinforcement of the democratic process; the stamp of legitimacy given to the most important political questions of the day; their educative value; and the modern day benefit of participants who are much better informed and able to gain access to unmediated and authoritative information. Conversely, arguments against referendums include: their simplification of complex and interrelated constitutional questions; their dilution of the role of representative government whereby decision makers weigh conflicting priorities and negotiate compromises on behalf of the people; the disproportionate power ceded to contemporary majorities; the divisiveness generated in setting (necessarily opposing) terms of constitutional debate; the influence of relative resources on outcomes; and the risk of the referendum being influenced by extraneous considerations such as the unpopularity of the government at the time. Countries have

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<sup>49</sup> The former was put forward by Labour in its 1993 policy document; the latter by the Liberal Democrats in their 1997 manifesto.

<sup>50</sup> Note the infamous 'press release' reforms concerning the creation of the Supreme Court and abolition of the office of Lord Chancellor in June 2003.

<sup>51</sup> R Blackburn, *Towards a Constitutional Bill of Rights for the UK?* OUP 1999 .

<sup>52</sup> In the 17 major democracies of Western Europe only three (Belgium, the Netherlands, and Norway) make no provision for referendums in their constitution and only five advanced democracies, the US, Japan, India, Israel and Germany (where referendums are unconstitutional) have never held a nationwide referendum.

had mixed experiences with referendums;<sup>53</sup> high profile failures of referendum proposals include those in the Netherlands and France, which rejected the EU constitution after years of negotiation.

64. One particular lesson for Britain includes that noted by the New Zealand Constitutional Arrangements Committee in 2005: to hold a referendum in a timely fashion, within 6 months to a year of the consultation process, while public consensus still holds.<sup>54</sup> Referendums have not been widely used in the UK (devolution being the most recent example), though the process has been formalised with the Political Parties, Elections and Referendums Act 2000. Some commentators have advocated the development of a constitutional convention that would require national referendums to be held in cases of constitutional change. While in the UK, the decision whether to hold a referendum remains ‘largely one of political expediency rather than any constitutional principle’,<sup>55</sup> we suggest that it would be of great benefit in ensuring popular support for rights protection.

### **Bill of rights as a logical prelude to a codified constitution?**

65. 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 serves 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.

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<sup>53</sup> Australian voters in particular seem to be averse to proposals put to them in referendums, having rejected 34 of 42 proposals for constitutional reform. Ireland, however, has had a greater success rate on such reform proposals.

<sup>54</sup> This ties in with the intense process undertaken in Victoria: 6 months’ consultation followed by a 6 month legislative passage.

<sup>55</sup> Nicole Smith, *Human Rights Legislation*, The Constitution Unit 1996.

# Conclusion

66. We recognise that there is no single recipe for a successful bill of rights. Moreover, comparative experience shows that there can be no inevitability as to the effectiveness of bills of rights in guiding, channelling or reinforcing the broader push towards the rule of law and the promotion of good governance, despite the extent to which such an association may be made. Yet, if a bill of rights is to be seen as a source of legitimacy for the constitutional order, it must have an ‘internal coherence’ and have come into being in accordance with ‘right process’. It must be tailored as far as possible (and permissible by applicable international norms) to reflect the specific needs of our domestic culture, which the broadly framed ECHR necessarily cannot take into account. While many lessons from comparative case studies are unlikely to be capable of easy application in Britain, there are strong reasons to conclude that the evolution of the international human rights regime has generated a variety of pressures which encourage convergence in approaching some of the issues addressed by bills of rights and highlight the importance of the international.
66. A bill of rights is both a legal and a political document. This creates a tension between a necessary precision and the need to be intelligible to a wide public. Bills of rights resolve this in different ways and to different extents, though some solution might be found by separating a clear statement of rights from some form of commentary or limitation.<sup>56</sup> Those promoting a bill of rights would need to identify those rights which might be included and devise a strategy for selection. This would be a difficult exercise owing to the potential range of views on this matter. We therefore welcome proposals both for the rights to be included and the process by which they might be identified.
67. The question of enforcement is closely linked to that of amendability and the legal status of a bill of rights. It is a matter for consultation whether the doctrine of Parliamentary sovereignty could or should be modified so that, in relation to amendability, Parliament could to an extent bind its successors. There is a view that the effect of this, in relation to enforcement, would be to limit the extent of Parliament’s authority, due to increased judicial power to declare legislation invalid as ‘unconstitutional’. However, we welcome other views on this.
68. In terms of process, we are in favour of a community-based consultation, which is well-managed in order to keep up momentum to find a sound and achievable model for Britain. We believe that the debate should be located in values and good governance and communicated in a language that will facilitate vital public interest and participation.
69. Finally, any constitutional reform on this scale would inevitably affect the relationships between the executive, legislature and judiciary. As our project continues, we will be considering possibilities for regulating these relationships, for example through formal communication channels or ‘concordats’ and would be pleased to receive views on this matter.

## Next steps

70. We encourage formal or informal response to this paper. We are aware that our project is on a tight deadline and therefore the consultation period is short. We will report fully by the end of the summer. There is no doubt that the debate will continue for some time to come.

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<sup>56</sup> For example, The EU Charter is a readable document, understandable by schoolchildren. However, its articulation of basic rights was so simplified that it had to be read subject to the gloss of references to a range of other documents, notably the ECHR. It was then criticised as being simplistic.

**Table 1: Selection of comparative bills of rights**

	<b>Canada</b>	<b>Australia</b>	<b>New Zealand</b>	<b>South Africa</b>	<b>Israel</b>	<b>Germany</b>	<b>Northern Ireland (as proposed)</b>	<b>UK (including Northern Ireland)</b>
<b>'Bill of Rights'</b>	Canadian Charter of Fundamental Freedoms 1982	HRA 2004 (ACT); Charter of Human Rights and Responsibilities 2007 (Victoria)	Bill of Rights Act 1990	South African Constitution 1996 (Chapter IV)	Basic Laws (1992 & 1994)	Basic Law 1949	Northern Ireland Bill of Rights	HRA 1998
<b>Scope</b>	Civil and political rights	Civil and political and some cultural rights	Civil and political rights	Civil and political and economic and social rights	Civil and political rights	Civil and political rights	Proposed civil and political, economic and social (language, children etc)	Civil and political rights, as contained in the ECHR
<b>Amendment</b>	2/3 majority in both houses	Simple majority in Parliament	Simple majority in Parliament	2/3 majority in National Assembly + 6/9 provinces	Absolute majority (Freedom of Occupation); simple majority (Human Dignity)	2/3 majority in each house	Simple majority in Parliament	Simple majority in Parliament
<b>Limitations and Derogations</b>	Limitations clause and notwithstanding clause	Limitations clause and Parliamentary override clause	Limitations clause	Limitations clause & detailed states of emergency provision	Limitations clause	'Restriction' and 'forfeiture' provisions	General limitations clause & emergencies provision (in addition to Art 15 ECHR)	Art 15 ECHR derogation provision
<b>Supreme Court strike-down power</b>	Yes	No	No	Yes	Yes	Yes	No	No
<b>Status in relation to international law</b>	International law must be incorporated	New HRA / Charter have strong international focus; treaties must still be incorporated	ICCPR focus but treaties must be incorporated	Strong international focus	Minimal international focus	German constitution is supreme over international law	State bound by ECHR; other international law may be considered	State bound by ECHR; other international law may be considered
<b>Public consultation process</b>	Fairly intense	ACT - minimal; Victoria - intense	Minimal	Intense	Minimal	Minimal	Current consultation intense	Minimal

# Consultation

While JUSTICE continues its work towards the final report, we welcome submissions on the issues raised in this paper.

Below are the key questions which, as illustrated in this paper, we are seeking to address. We invite responses to be submitted before 30 April 2007. JUSTICE will take submissions into account in the course of producing the final report.

- 1. Is there need for a British bill of rights which gives additional constitutional protection to the ECHR rights currently incorporated into UK law under the HRA 1998?** (paras 1-15)
- 2. Which rights (additional to those contained in the ECHR) should a British bill of rights protect?** (paras 16-33)
- 3. a) Should a British bill of rights contain social and economic rights?** (paras 25-27)  
**b) If so, should they be contained in directive principles rather than the main provisions?**
- 4. a) Should a British bill of rights contain further provisions referring to responsibilities?** (paras 31-33)  
**b) If so, what responsibilities should be specifically mentioned?**
- 5. What should be the procedure adopted for amendment of a British bill of rights?** (paras 34-46)
- 6. Do you agree that the HRA 1998 has struck the appropriate model of judicial and legislative enforcement of human rights? Is there any other model which merits detailed consideration?** (paras 53 and 54)
- 7. How might a public consultation process be launched and what form might it take?** (paras 56-65)
- 8. Should a bill of rights itself be enacted following a special procedure, eg a special majority in Parliament or a referendum?** (paras 62-64)

*Please send responses by post to:*

**JUSTICE (Bill of Rights Consultation)**  
**59 Carter Lane**  
**London**  
**EC4V 5AQ**

*or by email to:* [edouglas@justice.org.uk](mailto:edouglas@justice.org.uk)

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*A Bill of Rights for Britain?* is a discussion paper. It is published by the JUSTICE Constitution Project. The purpose of the project is to promote an informed debate on the best way to protect fundamental rights in Britain. This paper consults on JUSTICE's interim findings concerning a modern and enforceable British bill of rights.

JUSTICE sees the purpose of introducing a bill of rights as including all or some of the following:

- to give greater constitutional protection to fundamental rights
- to increase the scope of rights provided for in the Human Rights Act 1998
- to emphasise the constitutional principle of the rule of law
- to build public awareness of constitutional rights' protection and enhance its legitimacy through public consultation
- to draw attention to the rights and duties of citizenship and the positive duties of the state towards all individuals in its jurisdiction.

We will publish a final report later in 2007. In the meantime, we would welcome any submissions on the matters we are considering. To encourage response, we have set out some preliminary views. We have also posed specific questions, which can be found at the end of the paper.

The JUSTICE Constitution Project is funded by the Joseph Rowntree Charitable Trust.

## ALLEN & OVERY

JUSTICE is grateful to Allen & Overy LLP for its assistance in the production of this report



JUSTICE is a British-based human rights and law reform organisation dedicated to advancing access to justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists. For more information, visit [www.justice.org.uk](http://www.justice.org.uk)

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