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A Bill of Rights for the UK

TWS Special Report

John Kwan (Chair)
James Abbott-Thompson
John Flesher
Becky Hadgett
Philip Macdonald
Samarth Patel
Joseph Sanderson

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Executive Summary

Despite criticisms of the scope and interpretation of certain rights, the current state of affairs under the Human Rights Act is not completely unsatisfactory. However, it is our belief that the UK could *benefit* from a Bill of Rights in terms of expanding and clarifying rights protection. For reasons of time and space, we are unable to examine all potential candidates for inclusion in the Bill of Rights and therefore must emphasise that our list is not meant to be exhaustive. Nevertheless, in making our choices, we are particularly influenced by considerations of practicality and universal acceptability of the proposed rights — an over-ambitious attempt to include too many rights at the outset may frustrate the whole process. We envisage that the Bill of Rights is susceptible to expansion in the future rather than being set in stone. Certain rights examined, clarified and proposed are outlined below.

Article 8 of the ECHR, committing Britain to the protection of the right to family life, should remain in a British Bill of Rights. The Bill of Rights commission should recognise that problems with the existing Article are due to a lack of clarity: thus a definition of 'family' should be provided, to reflect a broad, modern day conception of the term; and the right to family life should not apply exclusively to the UK, so UK authorities would not be committed to keeping foreign criminals here if their right would not be infringed abroad.

As for the relationship between Article 8 (right to privacy) and Article 10 (right to freedom of expression), there should be no prior restraint on freedom of expression, except to the extent absolutely required under the ECHR; and in all cases not involving prior restraint, there should be a presumption in favour of expression; but privacy should continue to be protected. Rights to healthcare and education are already protected *de facto* by legislation on the NHS and universal state education. Their formal recognition in a 'constitutional' instrument as rights, however, would encourage a change in attitudes toward acknowledgement of the fundamental nature of these social rights; and also a more positive reflection of the nature of any Bill of Human Rights and who it is designed to protect. The inclusion of these rights in an aspirational context will also pave the way for more extensive legislation in years to come, when better social conditions will allow the scope of those rights to be extended.

Furthermore, we propose the inclusion of rights for victims. The codification in a Bill of Rights of current good practice for dealing with victims would not only be valuable in itself; but also in countering the perception that human rights instruments are 'pro-criminal, anti-victim'. Victims' rights proposed include a right to be afforded reasonable protection from the defendant; a right to be informed of the defendant's escape or release; a right to restitution; and a right to victim-offender mediation so far as both parties consent.

In addition, the UK should recognise a right to Internet access as both a positive and negative right. As a negative right, it would protect Internet users from being arbitrarily disconnected from the Internet;

and as a positive right, the State would be under obligation to provide reasonable access to the Internet. This reflects public perception of the Internet as an indispensable source of information, medium of communication and tool for self-empowerment.

There is also a clear need for redrafting of limitations in any proposed Bill of Rights. A single limitation clause could eliminate repetitious and synonymous language, and would be preferable in order to embrace guiding principles behind the Bill of Rights.

Finally, the objection that social and economic rights should at all be included in a Bill of Rights is centred around the fear that too much power will fall into the hands of unelected judges who lack the legitimacy and expertise in making resource-allocation decisions. However the inclusion of such rights does not necessarily entail the expansion of the judicial role and there are other mechanisms through which their promotion can be encouraged and promoted, most notably by enhancing the role of Parliament and imposing corresponding duties on the Executive.

Overall, a British Bill of Rights would be an important tool both to clarify and to expand the human rights embodied in the ECHR and HRA; and to codify a set of rights uniformly acknowledged as British.

Do We Need a Bill of Rights?

Introduction

It is worth setting out the premises of our discussion at the outset:

1. The British Bill of Rights, if adopted, will contain no less rights protection than the Human Rights Act 1998 (HRA).

2. The UK will continue to be a party to the European Convention on Human Rights (ECHR)

3. The British Bill of Rights will protect human rights *qua* human rights — i.e. the core rights that it protects will be universally available.

4. The British Bill of Rights will be a lasting statement. It will outlive the present government and indeed our generation. The ECHR has been in force for over 50 years. We expect the lifespan of the British Bill of Rights to be at least as long.

There are a number of distinct but related matters under this heading, each of which serves as a rationale for adopting a British Bill of Rights. These will be considered in turn.

Rights and Responsibilities

As well as securing and protecting fundamental rights, a British Bill of Rights offers the chance to delineate the responsibilities of citizens to each other and to the state. One of the criticisms of the Human Rights Act 1998 (HRA) is that it fails to include such responsibilities, which is problematic because, in the eyes of some critics, rights are necessarily linked to responsibilities. A number of arguments can be made in favour of this approach:

(i) It enriches and promotes a sense of civic responsibility by defining a set of value-laden expectations, or simply by asserting that, in order to claim one's own human rights, a person must respect those of others;

(ii) It would enhances the legitimacy of the Bill of Rights by recognising the importance of behaviour which strengthens, and does not damage the community, and by making clear that certain rights are contingent on such behaviour.

However, such an approach has a number of drawbacks:

(i) It conflicts with the primary rationale of the Bill of Rights as a statement of human rights: human rights are universal and, as such, exigible by all human beings, regardless of whether they adopt, or conform to, community norms and expectations, or indeed respect the human rights of others;

(ii) It fails to recognise the conceptual distinction between civic duties and human rights; the former are specific to a locality, a period in time, and a socio-political context, the latter transcend such limitations; by linking rights to responsibilities we risk politicising the Bill of Rights — making relevant only to contemporary political conditions — thereby severely limiting its longevity.

(iii) It ignores the fact that most human rights as defined by the ECHR are qualified and '... in practical terms, depend on the responsibility of everyone in society to respect one another's freedoms (so that one party's right to freedom of expression does not impinge too far on another's right to a private and family life)' (*A British Bill of Rights*, Justice)

'Britishness' as Essential and Distinctive

The ECHR is a treaty that was drawn up by the Council of Europe, a body which is distinct from, and larger than, the European Union, and was created after the Second World War to prevent further armed conflict and the proliferation of dictatorship. Although British lawyers were involved in the drafting of the ECHR, there is nothing in the ECHR that is particularly reflective of British values, as distinct from those of liberal democratic nations generally.

In its response to the government's *Governance of Britain* Green Paper, the Constitution Unit at University College London argued that:

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

Making 'Britishness' a core aspect of the Bill of Rights has a number of potential benefits:

(i) If a reasonable consensus as to the concept of 'Britishness' can be reached, it could enhance the legitimacy of the Bill of Rights in the eyes of the public, and enable the public to take ownership of the protections it contains

(ii) It could promote a sense of national pride and provide an anchoring point for what is a diverse and arguably amorphous body politic.

(iii) could facilitate the creation of rights — additional to those contained in the ECHR, which reflect and respect the idiosyncratic and distinctive aspects of the British legal and political culture.

Attempting to import notions of 'Britishness' into the Bill of Rights carries with it some difficulties:

(i) 'Britishness' is an unstable concept. Defining it necessarily involves subjective assessment. Unlike

the USA, the UK does not have a codified statement of national values — our constitution is unwritten. Codifying 'Britishness' means describing it; describing 'Britishness' requires interpreting it; any such interpretation will be affected by the biases of the interpreter. Moreover, Britain encompasses a plurality of political, religious and social norms. These norms would have to be defined and refined, and a sub-set of norms would have to be selected. Even if a consensus as to a core set of values could be reached, that consensus would be a reflection of the socio-political conditions at the time it was reached, and so might not reflect the societal consensus in ten or twenty years time.

(ii) As with linking rights to responsibilities, the suggestion that rights are necessarily 'British' conflicts with the function of the Bill of Rights as a statement of human rights — rights that are universally available.

An Aspirational Document

Closely linked to the issue of 'Britishness', is the question of whether the British Bill of Rights should be aspirational or merely declaratory.

In its 2008 report *A Bill of Rights for the UK?*, the Joint Committee on Human Rights made the following recommendation:

> '...any new Bill of Rights should be both declaratory and aspirational. It should state and make fully enforceable all those fundamental rights which currently exist. But it should also look to the future by setting out a clear vision of the sort of society to which the country aspires. A preamble and an appropriate interpretative provision referring back to the preamble could provide the aspirational dimension which is missing from the HRA.'

In support of this view, it could be argued that this could help embed the Bill of Rights in the British cultural consciousness, thus enhancing its legitimacy.

It may well be possible to distinguish between declaratory provisions — which would in most cases be justiciable — and aspirational provisions — which would not. However, the question where to draw this line would be highly controversial; if the aspirational provisions were to guide the interpretation of the declaratory provisions, the content of those aspirations would be the subject of fierce debate and intractable disagreement.

ECHR-Plus

The ECHR is often conceived of as a floor — a statement of the bare minimum protections that signatories to the Convention must ensure. But this does not prevent those signatories from supplementing these rights with additional protections.

Arguably, this is where the proposal for a British Bill of Rights comes into its own. We now have the opportunity to design and adopt additional protections and entrench a culture of respect for human rights in the UK.

In the very act of defining and adopting additional protections, we can devise a scheme of human rights protections that is distinctively British — without limiting the scope of those protections; and one that indirectly emphasises the importance of responsibilities — i.e. having respect for the rights of others without making responsibilities the necessary antecedent of rights. Attempting to raise the threshold of human rights protection in the UK may be no less controversial than trying to define Britishness, but identifying what those rights might be — in light of the skeletal protections of the ECHR — is more straightforward than might otherwise be supposed.

Conclusions

The manner in which the Commission on a Bill of Rights has framed the first question of its discussion paper — 'Do we *need* a Bill of Rights?' (emphasis added) — is important.

To say that we *need* a Bill of Rights could suggest that the current state of affairs under the HRA is completely unsatisfactory. Without embarking on a wide-ranging assessment of the success and failures of the HRA, it can be stated that this is not the view of the authors.

However, if the question is interpreted as whether we could benefit from a Bill of Rights, the response of the authors is 'yes', particularly in terms of enhancing human rights protections. The rest of this paper will explore the options for doing so.

What Should the UK Bill of Rights Contain?

Introduction

Despite considerable controversy surrounding the proper interpretation and scope of rights contained in the European Convention on Human Rights (ECHR), we are of the view that all the rights contained therein[1] which are currently given domestic force by the Human Rights Act (HRA) should be included in the proposed UK Bill of Rights. We are driven to this conclusion not least because the Bill of Rights Commission's terms of reference require such rights to 'continue to be enshrined in UK law'. More importantly, we believe that the safeguard of such rights constitutes a hallmark of a liberal democracy and that they are essential to its proper functioning.

Nevertheless, we accept that there may be a need to re-phrase some of the rights, either to remove outdated language, to streamline the complex framework of limitations, or to expand or restrict the scope of some rights[2]. On this, we have singled out the right to freedom of expression, the right to privacy and the right to family life for more detailed examination as to how they can be better delimited.

In addition to civil and political rights, we believe the Bill of Rights should also contain certain social and economic rights. In particular, we endorse the inclusion of the right to education and the right to healthcare, which the UK is already under an international obligation to protect and on the desirability of which there exists a considerable degree of public consensus.

Finally, we propose to introduce two rights relatively novel to the UK: the right to access to the Internet and victims' rights. An article has been written for each right setting out their claims to being recognised as fundamental rights.

Rights Under the ECHR

Given domestic force through the enactment of the HRA in 1998, ECHR rights have been interpreted and applied by UK courts for more than 10 years and the original fear that their incorporation may spawn excess litigation has largely subsided. The enactment of the HRA enables individuals in the UK, whose protected rights are infringed, to seek redress in domestic courts rather than having to petition to the European Court of Human Rights in Strasbourg. It also helps promote a culture of rights and prompts public authorities to take cognizance of individuals' rights in carrying out their functions.

[1] Those contained in Schedule 1 of the Human Rights Act

[2] Chapter 2 of 'A British Bill of Rights: Informing the Debate' by Justice

However, enacted over 60 years ago, in various places the ECHR employs language which seems inappropriate and even discriminatory in a modern setting, one example of which is Art.16 ECHR which authorises States to 'impose restrictions on the political activity of aliens'. Also, the definitions of some rights are often followed by a long list of limitations, which not only make very difficult reading but also potentially diminish the rights by a greater extent than necessary. Given that the ECHR and the Strasbourg Court jurisprudence are only supposed to lay down the minimum level of protection of rights to be respected in all contracting states, there is room for such extensive limitations to be restricted in the proposed Bill of Rights when incorporating such rights.

Moreover, despite the beneficial effects of the HRA as a whole, the interpretation and scope of certain specific rights under the ECHR have proved controversial. In particular, the recent court cases involving the use of super-injunctions prompts an urgent re-examination of the relationship between the right to freedom of expression under Art.10 ECHR and the right to privacy under Art.8. Meanwhile, the United Kingdom has so far failed to implement the decision of the Grand Chamber of the European Court of Human Rights in *Hirst v United Kingdom*[3] almost six years ago regarding the prisoners' right to vote under Protocol 1 Article 3, in large part due to MPs' continued reluctance to end the blanket ban on inmates voting[4]. A further example of the contentious nature of ECHR rights is the (erroneous) assertion vividly put forward by the Home Secretary Theresa May that an illegal immigrant avoided deportation because of his pet cat in a decision under Art.8 of the ECHR[5]

While accepting that there may be force in the argument that some of the rights need redefining, we are unconvinced that disputes relating to the proper interpretation of ECHR rights constitute a strong enough case to exclude any of the existing rights. We believe that ECHR rights represent the minimum *types* of rights every liberal democracy should seek to uphold and that their protection is fundamental to its healthy functioning. The Bill of Rights therefore should include all of the existing ECHR rights, subject to changes proposed in the other articles.

Social and Economic Rights

The ECHR makes no reference to social and economic rights, which are sometimes termed 'secondgeneration rights', as opposed to 'first-generation rights' — civil and political rights — the majority of which are included in the ECHR. As a result, social and economic rights are not protected under the HRA and have never formally been recognised in the UK domestic legal system. This is all the more striking as the United Kingdom is a signatory to both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) which both contain provisions on such rights.

With limited exceptions, due to the largely dualist approach of the UK to international law, treaties ratified by the Executive do not have domestic force until incorporated as Acts of Parliament. This means that the UK can in theory be in contravention of all these international obligations it has signed up to without incurring any consequences within the domestic legal system. This would be very unsatisfactory particularly considering that human rights treaties are distinct from ordinary treaties due to their normative nature: they confer rights on individuals within national boundaries and impose duties upon states. A continued failure to recognise such rights in the domestic system would render individuals vul-

[3] (2006) 42 E.H.R.R. 41

[4] 'MPs reject prisoner votes plan', http://www.bbc.co.uk/news/uk-politics-12409426, 10/2/2011

[5] 'Theresa May under fire over deportation cat claim', http://www.bbc.co.uk/news/uk-politics-15160326, 4/10/2011

nerable to illegal (in the international sense) actions by the State in violation of what it publicly avowed to uphold at the international stage.

Countering the automatic incorporation of international human rights treaties however is the forceful argument that the Executive should not be allowed to introduce laws through the back door by ratifying international instruments with limited scrutiny by Parliament.[6] This is all the more so as the realisation of social and economic rights often impacts on the allocation of resources and such decisions should properly be taken only through the full involvement of the Parliament.

Nevertheless, at least in relation to certain social and economic rights, we believe the time has come to recognise their fundamental nature in domestic law. A cursory survey of the constitutions of a great number of countries[7] will show that the inclusion of such rights is a relatively common feature and we agree with Justice Albie Sachs of the Constitutional Court of South Africa (and the JCHR) that 'a country which does not include social and economic rights in some form is a country which has given up on aspiration'. The key here is the word 'aspiration' which emphasises that the fulfilment of such rights is contingent on the availability of resources and we believe such condition should be reflected in the wording of the definitions of such rights in the Bill of Rights.

Given the contentious nature of many of these rights, however, we are wary about including too many of them as the whole process may be hindered as a result due to a lack of consensus. We agree with the JCHR that the inclusion of rights broadly accepted as fundamental in the first place is the correct approach, with the possibility of adding other rights in the future. We would thus limit our proposal to the inclusion of the rights to health and education.

Further Proposed Rights

In addition to the above, we propose the inclusion of victims' right and the right to access to the Internet, which do not fall neatly into the above categories and are relatively unexplored in this country. Victims' right is enshrined in the constitutions of a number of US states and its purpose is to support victims of crimes, who often feel left out by the judicial system, and to counter the perception that human rights favour criminals over victims. The right to Internet access, on the other hand, is a response to modern information technology developments and the perceived indispensability of the Internet as a tool of information and empowerment. It straddles across a number of rights but has claims to being recognised as a separate right.

These rights will be explained in much greater detail in two separate articles.

Other Candidates

The category of rights known as 'third-generation rights' are defined by the JCHR as rights that 'have attained attained international recognition as human rights but which are not easily classified as either civil and political rights or economic and social rights'. [8] These include the right to selfdetermination,

[6] Formerly the Ponsonby Rule whereby international treaties had to be laid before Parliament 21 days before ratification; now see the Constitutional Reform and Governance Act 2010 which puts such rule on a statutory footing

[7] Some of the most prominent examples are the Constitutions of South Africa, India, Canada

[8] Part 6 of '*A Bill of Rights for the UK?*', Joint Committee on Human Rights

the right to participation in cultural heritage, the right to a healthy environment and the right to intergenerational equity and sustainability (the list is not exhaustive). With the exception of the right to a healthy environment, however, most of the others remain very vague and we are unconvinced their inclusion would be of any practical use.

As to the right to a healthy environment, we are impressed by the work of the JCHR and accept that it is capable of legal expression and thus gives rise to meaningful responsibilities. Because of its contentious nature, however, we are reluctant to include it in our proposal but accept it may be admitted into the Bill of Rights in the future should it be shown to have gained enough public support.

In its report, the JCHR also suggested the inclusion of equality as a free-standing right. We accept the underpinning arguments but feel that the overarching status of such principle can be further emphasised by its inclusion in the preamble to the Bill of Rights.

Existing Common Law Rights

In a number of cases, UK courts have come to recognise some rights as 'constitutional rights'. For example, in *R v Lord Chancellor, ex parte Witham*, the right to access to the courts was said to be a 'constitutional right which could be abrogated only by a specific statutory provision in primary legislation or by subordinate legislation whose vires in primary legislation specifically conferred the power to abrogate'.[9] Similarly, in *R v Secretary of State for the Home Department, ex parte Simms*[10], the importance of the right to seek access to justice was emphasised.

Some of these rights are ripe for inclusion in the Bill of Rights and we submit that the right to access to courts is a particularly suitable candidate. Even if they are not so included, we are of the view that the Bill of Rights should make clear that all existing common law rights will not be prejudiced by their non-inclusion as formal rights within it.

Conclusion

For reasons of time and space, we are unable to examine all potential candidates for inclusion in the Bill of Rights. We therefore must emphasise that our list is not meant to be exhaustive. Nevertheless, in making our choices, we are particularly influenced by considerations of practicality and universal acceptability of the proposed rights and this to a certain extent explains our relatively conservative approach. We fear that an over-ambitious attempt to include too many rights at the outset may frustrate the whole process. However, we envisage that the Bill of Rights is susceptible to expansion in the future rather than being set in stone.

[9] [1998] QB 575
[10] [2000] 2 AC 115

The Right to Family Life

Introduction

British public opinion against the Human Rights Act (HRA) seems to be centred around one particular clause: the so-called 'right to private and family life', which enshrines Article 8 of the European Convention on Human Rights (ECHR) into British law. Politicians and press on the right regularly cite cases in which judges have allowed illegal immigrants and foreign criminals claiming their right to family life to remain in the UK as the main reason why the Human Rights Act has to go.

The truth of the matter, however, is not to be found in the tabloid press or speeches to the Conservative Party conference. Indeed, there are numerous cases, most of which go entirely unreported in the press, in which judges reject foreigners' right to family life in the UK. The problem, then, is a lack of clarity in existing legislation that allows wide-ranging and unhelpful interpretations of Article 8, undermining the credibility of the HRA and stirring up reactionary public criticism in the right-wing press.

The prospect of a British Bill of Rights gives the government an opportunity to clarify the existing law on family life, to ensure that it is interpreted fairly and consistently, in line with the UK's obligations to the ECHR. This piece will look at the 'family' aspect of Article 8, setting out the problems with the existing law, and offering some ways in which it could be helpfully clarified in any future British Bill of Rights.

The Current Law

Article 8 of the ECHR as set out in the HRA is as follows:

(i) Everyone has the right for his private and family life, his home and his correspondence.

(ii) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The right to family life is also covered by Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of which the UK is a signatory. It states:

(i) The widest possible protection and assistance should be accorded to the family, which is the natural

and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

(ii) Special protection should be accorded to mothers during a reasonable period before and after child-birth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

(iii) Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 8 of the ECHR is enforceable in the UK through the Human Rights Act while the ICESCR offers some interesting specifics, which may be taken into account by courts in some circumstances. It is easy to see the problem with this part of the ECHR — it is 'limited' in 8.2 in the same way that most rights are in the Convention, but there is no mention of what is meant by 'family', and, crucially, there is no talk of a right to family life in the UK, only an obligation for the UK to ensure that the right to family life is protected. It is this vague wording that seems responsible for the varied interpretations that so anger some elements of the British public.

The Notion of 'Family'

The first significant problem that Article 8 presents is its lack of clarity on what is meant by the term 'family' — a loose term with no clarification, and one which most likely carried different connotations in 1950, when the ECHR was signed, to the modern day. There will always be a degree of subjectivity in any attempt to define 'family', but the lack of any such attempt is problematic, and a consideration of both the precise nature and the strength of so-called family relationships would be constructive.

One central issue here is, we believe, that of dependency. It is quite clear that the right to family life should be claimed by, for example, the children of divorced parents wanting to spend time with both their mother and their father, and thus any notion of family should protect the parent child relationship. Furthermore, there are many families in which the children might have a guardian other than their biological parents (grandparents, foster parents, aunts, uncles etc.) and the definition must also reflect this. This dependency relationship must also work both ways, in order that, say, the estranged husband may still see his children.

What about when dependency ceases? Should a thirty-year-old Mexican woman be allowed to reside in the UK just because her parents live here? The answer, most would argue, is no. What about if she were disabled and required constant care? Probably so. There clearly needs to be some sort of cut off point at which the generic term 'family' is separated from the notion of 'close family', and I believe the idea of dependency, not just of age, is a sensible and moderate way of limiting the notion of 'family'.

Additionally, the other crucial type of relationship encompassed by 'family' is the relationship between couples. The ECHR's signatories in 1950 would probably have seen this as referring to married hetero-

sexual couples, but it is quite clear that co-habiting and homosexual couples should enjoy equal status in the modern world. What is less clear is how to handle non-cohabiting couples, a situation in which 'family' is harder to prove. The default answer should, I believe, be not to regard them as a family, though judges may have to look at other factors in making such determination, such as the length of relationship and reasons for not co-habiting.

The Right to Family Life Where?

It should be noted that Article 8 of the ECHR commits its signatories to protecting individuals' right to family life, but it does not commit them to doing so in their own countries. This is a crucial point for clarification in any future Bill of Rights. Under this analysis, the protection of the right to family life would not hinder British immigration law in a significant way

In practice, then, this should mean that the Home Office should be able to deport foreign criminals and illegal immigrants to their countries of origin as long as this does not threaten their right to family life. The Home Secretary's rather ludicrous 'cat story' at this year's Conservative party conference detracted from the more salient issue of whether the Bolivian illegal immigrant in question would have had his right to family life impacted by returning to Bolivia. If his partner were able to return with him, it seems that Article 8 would not have been infringed.

There remain, of course, some countries to which the UK authorities would struggle to justify the return of foreign criminals pleading their right to family life and indeed bound by international human rights treaties not to do so e.g. if there is a risk they may be subject to persecution or even torture there. That is however a matter of substantive international refugee law to be separately applied and has no bearing on our analysis of the right to family life above.

Brief Words on Limitations

There are those who would argue, with some validity, that foreign criminals in the UK surrender their right to remain here under any circumstances when they commit a crime in a nation of which they are not citizens. Phrased in such an absolute manner, it is difficult to see how such a view could coexist with Article 8, unless Britain were to leave the ECHR, which is not up for question at this time.

However, the limitations set out in Article 8, though vague, are important. These include considerations of national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others many of the rights in the ECHR and clarifying them is not the purpose of this article. Despite this, it is clear from their inclusion that the right of family life is by no means an absolute one and may be curtailed. This fact should be emphasised in order to counter the erroneous perception that the right is affording criminals immunity from deportation. By way of example, where somebody poses an exceptional threat to the UK, the state is perfectly justified to deport him, as it is arguably proportionate to do so notwithstanding the person's right to family life.

Conclusions

1. That Article 8 of the European Convention on Human Rights, committing Britain to the defence of the right to family life, remains in a British Bill of Rights.

2. That the Bill of Rights commission recognises that problems with the existing article are due to a lack of clarity and the resulting contradictions in legal outcomes.

3. That the Bill of Rights clarifies three key aspects of Article 8.

   i That a definition of 'family' is provided, to reflect a broad, modern day conception of the term, whilst recognising the fundamental nature of dependency and amorous relationships, as opposed to those between extended family.

   ii That the right to family life does not apply exclusively to the UK, and thus the UK authorities are not committed to keeping foreign criminals here if their rights would not be infringed abroad.

4. That the commission considers the implications of the right to family life on the limitations as set out in Article 8.2, and looks at further clarification within the limits of the ECHR.

Balancing Freedom of Expression and Privacy

Introduction

Freedom of expression is the natural corollary to freedom of conscience: not only do individuals have the inherent right to believe whatever they choose, but they also have the right to persuade others of those beliefs. This right is of paramount importance in a democracy: for the people to be able to choose their rulers, the rulers should not be able to prohibit the people from discussing the facts and views which form the foundation for decision-making at the ballot box and in wider society. It is unsurprising, then, that freedom of expression is protected in many charters of rights.

This is a right deeply embedded in British history, growing in particular out of 18 th Century radicals' fights against prosecutions for sedition, suppression of peaceful assemblies and licensing requirements for publishers. It is therefore unsurprising that the English lawyers who drafted the European Convention on Human Rights included it, as Article 10. Like the rest of the Convention, this right now forms part of domestic law through the Human Rights Act 1998.

The problem that has arisen, however, is that the Convention does not recognise a hierarchy of rights (beyond the fact that some rights are qualified and some — such as the right to life — are not). Freedom of Expression has therefore clashed frequently with the right to a private life. Privacy law in the UK prior to the Human Rights Act can fairly be described as almost nonexistent. In *Kaye v Robertson*[11] (1991), a tabloid photographer entered a hospital room where a celebrity was recovering from surgery and photographed him in his bed and purported to interview him; the court held that there was no tort of breach of privacy. The development of protections for privacy are welcome. But in this age of super-injunctions and restraint of publication of true but embarrassing stories, the implementation of this right ought to be revisited.

Our recommendation is that in cases where there is prior restraint of expression, the right to privacy be confined to the minimum necessary to comply with the UK's obligations under the Convention. In cases where there is no prior restraint, there is more latitude for protection of privacy through damages after the fact, including perhaps by adopting the 'Privacy Torts' recognised in the United States. In all cases, there ought to be a strong presumption in favour of allowing expression.

[11] [1991] FSR 62

The Problem: Banning the Truth

Whilst the European Convention protects a right to privacy, the exact contours of the right are left to member states. The European Court sees its role as protecting minimum standards, not as legislating precise details. Thus, for example, the right to privacy does not necessarily include a right to abortion on demand[12]. Similarly, Max Mosley's request that the European Court mandate journalists disclose the fact that they are about to publish an unfavourable story to the subject of that story was rejected[13] on the basis that domestic authorities are better placed to provide the detailed protections of a right to privacy.

The European Court does recognise that in certain circumstances, privacy may override freedom of expression, particularly in cases involving:

> 'press reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life' (*Mosley*, ¶114)

This is exemplified by the case of *Von Hannover v Germany*[14], which involved paparazzi stalking the eldest daughter of the Prince of Monaco as she tried to go about her life, where the Court held that such intrusive behaviour went too far. The British courts similarly found the right to have been breached when paparazzi ambushed the model Naomi Campbell outside a Narcotics Anonymous meeting[15].

Some protection of privacy is reasonable, and the expansion of the English tort of breach of confidence to cover privacy cases is welcome. Nonetheless, English law has gone too far, resulting in strong public outcry against 'super-injunctions' obtained by the wealthy to suppress unfavourable press attention.

The most notorious example of this was the Trafigura case, where the Guardian was injuncted from reporting on very serious alleged wrongdoing involving the dumping of toxic waste in the Ivory Coast, and also enjoined from reporting on the existence of the injunction and even questions in Parliament related to the injunction[16]. Whilst leaked information via Twitter and blogs outside the jurisdiction eventually led to the information reaching the public, many considered it extremely concerning that a judge sitting in closed court could determine whether information relating to wrongdoing could reach the public. It has been rumoured that super-injunctions have also been issued in other case of public concern, including potential toxic paint in ships' water tanks, as well as information about government advisors and workplace sexual discrimination[17].

That concern resurfaced with the recent trend of celebrities seeking injunctions to prevent the publication of stories about marital infidelity. Numerous footballers — most notably Ryan Giggs — and TV personalities have obtained such injunctions, the cost of which puts them outside the reach of less wealthy unfaithful spouses. The remedy has been called 'rich man's justice'[18].

Whilst the extent to which disclosure of footballers' infidelities is in the public interest is open to debate,

[12] *A, B and C v Ireland* [2010] ECHR 2032

[13] *Mosley v UK* Application no. 48009/08

[14] Application no. 59320/00

[15] *Campbell v MGN* [2004] UKHL 22

[16] Some of the materials in the case appear in Hansard here: `http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/362we34.htm`

[17] These were reported by Private Eye

[18] `http://www.dailymail.co.uk/news/article-1380697/Super-injunction-backlash-Ian-Hislop-brands-Andrew-Marr-hypocrite.html`

there are worrying signs that British judges are interpreting the right to privacy so broadly that stories genuinely important in a democracy are suppressed. The Press Association has reported that an MP obtained a super-injunction[19]; given the possibility that an elected official might be blackmailed, or might be speaking about family values whilst himself or herself flouting them, or even cause a Profumo-esque disclosure of national secrets, this is obviously a story the public needs to know. The Trafigura case and many others involve the reputations of large companies, and customers ought to know if the businesses they use cause serious harm to the environment or mistreat employees.

It has become clear that, in the name of privacy, the Courts have gone too far in suppressing the dissemination of information which the public ought to know.

Righting the Right?

The minimum standards of privacy and free expression protected by the European Convention cannot be infringed. Nonetheless, it seems clear that the judiciary has often gone far beyond what is required, and have suppressed expression in the name of privacy.

To some extent, we already have legislation intended to prevent the grant of injunctive relief to the detriment of freedom of expression. Section 12 of the Human Rights Act 1998 requires a court to have particular regard to freedom of expression, and puts some limits on *ex parte* injunctive relief.

It is clear from recent events, however, that either the provision is insufficient, or is ignored by the judiciary.

The United States' model is one to which we ought to have regard. American law recognises a strong right to freedom of expression under the First Amendment, as well as a right to privacy (both in tort law and as an unwritten right found to be implicit in the constitution[20]). The US has found prior restraint of publication in almost all cases to be unconstitutional[21] — rather than having a judge decide what is important for the public to hear, the view taken is that the public can decide for themselves, but the publisher may be liable to pay damages after the fact. The Supreme Court famously rejected an injunction against publication of the Pentagon Papers in *New York Times v United States*[22].

Such a regime, whilst not providing perfect protection for privacy, still provides a deterrent against disclosing private information in that the publisher may be liable for a significant sum in damages. But given that the alternative is to give the same judges who have been so poor to date at protecting freedom of expression the right to censor *ex ante*, *ex post* liability appears to be the best system available.

We therefore recommend that a Bill of Rights contain a provision that provides that prior restraint on publication will only be permitted in English law to the extent absolutely required by the UK's commitments under the European Convention. This will catch the most obvious cases of paparazzi harassment, but not prevent the publication of apparently true information that it is in the public's interest to know.

[19] `http://www.independent.co.uk/news/uk/politics/mp-granted-superinjunction-2279400.html`
[20] *Griswold v Connecticut* 381 U.S. 479 (1965)
[21] *Near v Minnesota* 283 U.S. 697 (1931)
[22] 403 U.S. 713 (1971)

Protecting Privacy in General

It is necessary for privacy law to exist to avoid the situation in *Kaye*, where private settings are invaded for no compelling reason and to the great distress of the people involved. Where a case does not involve prior restraint, it remains a positive step for a right to privacy to be recognized. Harassment by photographers and reporters ought to be punished, and where there is no compelling reason to disclose the information, spreading rumours about what happens in the bedroom should be discouraged.

British law has improved in this respect, and Max Mosley was deservedly compensated for the News of the World's malicious disclosure of his consensual sexual behaviour. Nonetheless, it is worth embedding in the law a presumption in favour of free expression in all cases. Liability ought to be exceptional, rather than the rule; in a free society, we must all tolerate a little gossip.

In terms of the future development of privacy law, the four privacy torts recognized in the US have much to commend them. Those are, as codified by the leading tort academic Prosser: intrusion on seclusion (including by wiretaps or photography in a private place); public disclosure of private facts (akin to the post-*Campbell* view of breach of confidence in the UK); publicity placing the claimant in a false light; and appropriation of the claimant's image for the defendant's own purposes without permission. British law's reliance on the expanded notion of breach of confidence is a haphazard solution, and the more comprehensive and logical regime of the US torts has much to commend it.

We therefore recommend that privacy law not involving prior restraint continue to be develope, subject to a presumption in favour of free expression,

A Note on Libel Law

British libel law remains problematic, requiring the defendant to prove the truth of the allegations made in a highly expensive trial, even when the claimant is a public figure. The law remains in need of reform; however, in our view a Bill of Rights is not the best place to do this.

Summary

A British Bill of Rights should contain the following provisions related to freedom of expression and the right to a private life:

- There shall be no prior restraint on expression, except to the extent absolutely required under the European Convention; and
- In all cases not involving prior restraint, there shall be a presumption in favour of expression; but privacy shall continue to be protected.
- following current law should be reconsidered, but not in the context of the Bill of Rights: The law of libel and slander, to remove the aspects of it hostile to free expression and causing chilling effects on dissemination of true information; and

- The torts protecting privacy, in particular considering adopting the classification used in the United States, which appears to be more logical than the current UK law.

A Right to Healthcare and Education?

Introduction

The welfare state in the United Kingdom celebrates its centenary this year: among other provisions, the National Insurance Act 1911 created a medical benefits scheme. Since then, a fully-fledged national health service has developed, and state education has been made available to every child in the country. Rights to health and education must therefore be considered in light of the fact that those rights are already protected *de facto* by legislation. In order to be justifiable, any new enforceable right should improve the situation concretely. In this section we will examine the immediate situation in depth, and then consider ways in which affording rights to healthcare and education might improve their fulfilment

A Statistical Introduction to the Issues

I Healthcare

The WHO's statistics indicate that national healthcare in the UK is one of the best in the world. The UK's Government health spending as a proportion of overall health spending (82.6% in 2008) outstrips Sweden's (78.1%), Germany's (74.6%), and France's (75.9%), while 2009 life expectancy at birth was 80 in the UK and Germany, 81 in France and 82 in Spain. Cancer and cardiovascular mortality rates per 100,000 population in 2004 were, respectively, 147 and 175 in the UK, 154 and 123 in France, and 135 and 199 in Germany. In short, our NHS is competitive with the famously good public healthcare offerings in France and Germany, and are second only to countries such as Canada and Japan. Although there may be complaints about the NHS's tardiness and bureaucracy, it has been successful on a grand scale, and it is about as comprehensive as its counterpart in any other large industrialised state.

II Education

A comparison of the UK's statistics with those of other countries also demonstrates that, while not pre-eminent, the UK's public education is better than most: spend per secondary student in the UK ($8892 per annum at PPP) exceeds Germany ($7841), and is only slightly less than France ($9532) and some smaller European countries. Overall, the UK's education system is ranked by the OECD as 25th worldwide. Again, it is clear that public education in this country is not greatly lacking in comparative terms.

The Current Law

I Healthcare

Section 1 of the National Health Service Act 2006 provides that:

> (1) The Secretary of State must continue the promotion in England of a comprehensive health service designed to secure improvement —
>
> (a) in the physical and mental health of the people of England, and
>
> (b) in the prevention, diagnosis and treatment of illness.
>
> (2) The Secretary of State must for that purpose provide or secure the provision of services in accordance with this Act.
>
> (3) The services so provided must be free of charge except in so far as the making and recovery of charges is expressly provided for by or under any enactment, whenever passed.

On top of this, the Art.3 right to freedom from inhuman and degrading treatment has been held in the European Court to extend to egregious failures to provide adequate healthcare.

II Education

Education Act 1996, s.10:

> 'The Secretary of State shall promote the education of the people of England and Wales.'

Art.2 of Protocol 1 of the ECHR (incorporated by the Human Rights Act 1998, s. 1(1)(b)):

> 'No person shall be denied the right to education. In the exercise of any functions that it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.'

Are Further Protections Desirable?

It seems to us that there are three possible reasons for incorporating rights to healthcare and education above and beyond the rights and duties currently existing: first, to afford greater substantive protection of those rights; second, to change attitudes, and to increase recognition of those rights as fundamental, an exercise in social engineering; and third, to lay down aspirations for the United Kingdom in the future. We shall consider these three in order.

I Greater substantive protection

It is evident from the law as quoted above that there exists already some basic protection of the rights to healthcare and to education. In a later section ('How Should Social and Economic Rights Be Realised?'), we shall consider in depth to what extent it is appropriate and desirable to make social and economic rights enforceable in law and the alternative mechanisms whereby they can be enhanced. For the present purpose, it suffices to say that it is constitutionally problematic to allow fully enforceable social and economic rights; in that to do so is to give the courts authority over policy decisions, namely where to spend public money.

Healthcare and education are two areas that are particularly sensitive to policy, and an attempt to entrench the right to either would raise big questions as to the preservation of parliamentary sovereignty. Hence, greater substantive protection of the rights to health and to education can be difficult within the constitutional framework of the UK.

Further — considering the extent of the aforementioned protections, and the availability of the statutory action under s.8 of the Human Rights Act, it seems that more protection will not necessarily improve the NHS's offering. Indeed, further substantive protection of the rights to public healthcare and education, that is not so great as to compromise the British constitution, may nonetheless lead to a 'chilling effect' among administrators in those industries. Such a fear of litigation under the Human Rights Act has already been demonstrated to result in irrational and uneconomic decisions by prison officers and the police; we can expect nothing better from the rest of the public sector.

For those two reasons, then, we do not recommend a substantial extension of the scope of the rights to healthcare and education, although some modification thereof would not necessarily be harmful. The manner and extent of the modification proposed is outlined in 'How Should Social and Economic Rights Be Realised?'.

II Changing attitudes

It is unquestionably the case that, while legislation in a democratic state is a reflection of the will of the people, it also has the potential to influence the people — the significance of Magna Carta in the popular perception of the law to this day attests to that fact. Although the incorporation of healthcare and education rights into the Bill of Rights may not effect substantial increases in the extent or scope of those rights, it will almost certainly have the effect of sparking discussion. Eventually, the naming of the rights to healthcare and education as 'British rights' by the UK Government may change public attitudes to the nature and importance of those rights. Further, we believe that a common misconception is that many human rights protect only criminals. A recognition of rights such as health and education, which apply to every member of society, may reduce popular suspicion of human rights in general, and encourage their characterisation as a force for good in our society. We propose that these are positive results of the provision of healthcare and education rights in a Bill of Rights, even if those rights are only partially justiciable.

Relevant here is the idea of introducing unenforceable responsibilities balancing rights, in order to foster a feeling among the people of real involvement with human rights. For the reasons outlined earlier in this paper, we are skeptical of this idea; therefore we shall not discuss it further.

III Utility of aspirational rights

Many countries distinguish in their Constitutions between enforceable rights and aspirational rights, the latter intended to guide Government policy and public morality rather than to prevent specific abuses. The exposition of general rights to healthcare and education, even in purely aspirational form (*a fortiori* in partially justiciable form), could therefore affect Government policy in years to come, and inform parliamentary discussion of future Education and National Health Service Bills and White Papers. The influence that the inclusion of healthcare and education rights in the Bill of Rights could have on future Governments is perhaps the most potent long-term effect of such an inclusion.

Conclusion — The Case for Inclusion

In light of the above discussion, we can say the following: that, although more substantive protection of the rights to healthcare and to education would be at this point in time ill-advised and constitutionally inappropriate, we can expect significant beneficial effects arising out of the inclusion of those rights in a Bill of Rights. When they are made partly enforceable, as according to the last section of this paper, we think that the result will be a great improvement of the current situation. Inclusion of rights to healthcare and education will also pave the way for more extensive legislation in years to come, when better social conditions will allow the scope of those rights to be extended.

Rights for Victims of Crimes

Introduction

One reason for negative perceptions of the current codifications of rights is that they unduly favour the perpetrators of crimes (including serious violent crime) over victims. The tabloid press in particular has repeatedly raised this concern[23], and even quality newspapers occasionally object to invocations of the Human Rights Act and European Convention to protect criminals[24].

Whilst protections for defendants are vital and must be retained — and possibly improved[25] — recognising that police and prosecutors have certain obligations to victims of crime would be a valuable step towards countering the perception that human rights instruments are anti-victim. This is a proposal not to water down the guarantees of a fair trial to defendants, but to ensure that victims are properly recognised as stakeholders in the criminal justice system.

Our proposal, therefore, is that standards of good practice in dealing with victims in the criminal justice system be codified and recognised within a British Bill of Rights. The precise contours of such a rights are explored below.

The Problem: 'Rapists' Rights'

It is an unfortunate but true fact that much of the press and a significant proportion of the public regard the concept of human rights with distain because it provides protection of unsavoury individuals. A Lexis search of news archives reveals at least 1000 articles in national and local newspapers referring to 'human rights' and either 'criminals' or several named serious crimes ('murder', 'killers', 'rapists'). Checking a sample of these revealed that there were very few false positives: almost every one of these articles was describing human rights challenges by criminals, and the vast majority took an extremely hostile tone, and attacked the concept of human rights.

Public opinion alone is not a good reason to do something: after all, a large majority of the public would likely support hanging paedophiles from the nearest lamppost or tree without the formality of a trial.

[23] See, e.g., `http://www.dailymail.co.uk/news/article-2049811/Rapist-killer-foreign-criminals-using-Human-Rights-Act-fight-deportation.html` for a recent example. The *Mail* and *Sun* have both used the phrase 'rights for rapists' repeatedly.

[24] See, e.g., `http://blogs.independent.co.uk/2011/02/17/human-rights-for-rapists/`

[25] Article 6(3)(d) of the European Convention provides for defendants to '*to examine or have examined witnesses against him*', a codification of the traditional rule against hearsay evidence; it is highly doubtful whether the very broad exceptions that have since been created in English law comply with the natural meaning of this provision.

If rights did not apply in controversial situations, they would be worthless. Rights not to be returned to a country where one faces execution or torture, and rights to a fair trial are necessary and should continue to be protected.

Nonetheless, the belief that a human rights regime is a 'charter for criminals'[26] poses a danger to its continued viability. It is the nature of a democracy that a popular view held for a long enough time will usually begin to affect the law. A measure recognising that rights exist to protect victims of crime would be an important step in restoring balance.

What Are Victims' Rights?

The concept of victims' rights appears to have been popularised in the 1970s in the United States, culminating in a report by a commission in 1982 which has formed the basis for most victims' rights legislation in that country ever since[27]. The US federal government and every one of the states has adopted a statutory victims' rights code; approximately two thirds of the states include victims' rights in their state Bills of Rights or Constitutions[28].

A typical example of these rules is Article I, §30 of the Texas Constitution. This provides (in relevant part) that:

> (a) A crime victim has the following rights:
>
> (1) the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process; and
>
> (2) the right to be reasonably protected from the accused throughout the criminal justice process.
>
> (b) On the request of a crime victim, the crime victim has the following rights:
>
> (1) the right to notification of court proceedings;
>
> (2) the right to be present at all public court proceedings related to the offense, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial;
>
> (3) the right to confer with a representative of the prosecutor's office;
>
> (4) the right to restitution; and
>
> (5) the right to information about the conviction, sentence, imprisonment, and release of the accused.

Further statutory provision[29] details the implementation of these rights. The Federal Government, at 18

[26] According to a Lexis news archive search, this phrase has been used in newspapers at least 139 times, first used (in the domestic context) in around 1999–2000 by the *Scotsman*, shortly followed by the *Herald* and *Daily Mail*.

[27] Further details are available at `https://www.ncjrs.gov/ovc_archives/nvaa2002/chapter1.html`

[28] `http://www.victimlaw.info/victimlaw/pages/victimsRight.jsp`

[29] Texas Code of Criminal Procedure, Article 56.01

US Code §3771, provides for similar rights. As summarised by the FBI[30], these are:

- The right to be reasonably protected from the accused;
- The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or any release or escape of the accused;
- The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at the proceeding;
- The right to be reasonably heard at any public proceeding in the district court involving release, plea, [or] sentencing, or any parole proceeding;
- The reasonable right to confer with the attorney for the government in the case;
- The right to full and timely restitution as provided in law;
- The right to proceedings free from unreasonable delay, and
- The right to be treated with fairness and with respect for the victim's dignity and privacy.

Each of these rights would appear to be easy to translate into a British Bill of Rights. Protection, notice of hearings, presence at hearings, a right to be heard for the purposes of sentence and parole, restitution and fair treatment have the universality required of human rights. Each of these is already within what would be considered good practice for a prosecutor; the codified right would merely cement these standards.

More controversial is the idea of a right to victim-offender mediation, provided for by many states. The rationale appears to be that it aids catharsis for the victim (or, in homicide cases, the victim's surviving relatives) and rehabilitation for the offender. Given that formally providing for this may result in additional costs within the criminal justice system, it may not be appropriate to codify a right to mediation at this stage. As a policy option, it may be worthy of further study.

Given that, unlike the United States, this country has free universal healthcare, a right for victims to have priority in access to healthcare and counseling would appear to be a useful addition to the American lists of rights. This would further the idea that the state ought, so far as reasonably possible, to provide the best conditions to further the victim's recovery from the trauma of crime.

Enforceability and Limitations

Many US jurisdictions provide that victims' rights are not actionable for damages. A similar restriction in the UK would appear to be sensible. An exception for intentional breaches may be worthy of consideration.

Victims' rights exist to protect victims and their families. It therefore follows that other individuals — and in particular defendants — ought not to be able to bring any challenge on the basis of victims' rights having been breached.

[30] http://www.fbi.gov/stats-services/victim_assistance/victim_rights

The most important exception, however, is that to the extent that victims' rights conflict with the need for a fair trial, the latter should prevail. It is, after all, the defendant who is dealing with the power of the state seeking to deprive him or her of his or her liberty. Protection of victims does not override the need to ensure that a trial does not become a lynching, but to the extent that the protection of victims is compatible with a fair trial, victims should be protected by law.

Summary

A British Bill of Rights should contain a Victims' Rights provision, containing the following:

- A right to be afforded reasonable protection from the defendant;
- A right to be treated with fairness, respect and dignity;
- A right to be informed of all court and parole proceedings involving the defendant, and of the defendant's escape or release;
- A right to attend court and parole proceedings;
- A right to reasonable consultation with the police and prosecutors involved in investigating and prosecuting the case;
- A right not to be subjected to unreasonable delay;
- A right to restitution;
- A right to priority access to healthcare and counseling resources, so far as is reasonable.

The following ought also to be considered:

- A right to victim-offender mediation, so far as both parties consent.

The following limitations should be placed on the rights:

- A breach of these rights should not be actionable for damages;
- A breach of these rights should only be enforceable by the victim or the victim's close family;
- In particular, a breach of victims' rights should not be grounds for an appeal by a defendant;
- **These rights shall have effect only to the extent that they do not interfere with the requirements of a fair trial**.

Right to Access to the Internet

Introduction

A poll for the BBC World Service shows that 87% of Internet users across the globe felt Internet access should be the 'fundamental right of all people'.[31] This attests to the indispensability of Internet in modern life. At present, however, there is no formal recognition of the right to Internet access. Indeed, there is a growing trend towards stricter regulation of it on the part of governments. Particularly worrying in the UK is the enactment of the Digital Economy Act 2010 which envisages the possibility of imposing upon Internet Service Providers (ISPs) an obligation to take certain measures against users when online infringement of copyright is suspected.[32] These measures include written warnings, bandwidth throttling or even the blocking of access, reminiscent of the widely condemned 'three strikes law' in France[33]. Whilst mindful of the need to protect copyrights holders, this Act with its sweeping power pays insufficient regard to the almost universally perceived status of Internet access as a fundamental right. It is submitted that the time has come to accord positive recognition to such a right.

Bases of the Right

As with most rights, the proposed right to Internet access does not exist in a vacuum but is interlinked with other rights, most notably the right to freedom of expression. We will seek to show that the proposed right is already implicitly supported by traditionally recognised rights and is instrumental in promoting others. Also, we will discuss why it merits separate recognition rather than mere inclusion in and elaboration of existing rights.

I Relationship with other rights

Freedom of expression

Article 19 of the Universal Declaration of Human Rights states that the right to freedom of expression 'includes freedom to hold opinions without interference and to *seek*, *receive* and *impart* information and ideas through any media and regardless of frontiers (emphasis added).' This was given legal force by

[31] 'Internet access is 'a fundamental right', http://news.bbc.co.uk/2/hi/8548190.stm, 8/3/2010

[32] Digital Economy Act 2010, s.13–18

[33] 'France passes three strikes law against filesharers' http://www.guardian.co.uk/technology/blog/2009/may/13/france-three-strikes, 13/05/2009

Article 19 of the International Covenant on Civil and Political Rights, which specifies that such right is subject only to restrictions as 'provided by law and are necessary'.[34]

A restrictive reading of the treaties suggests only that the exercise of such right, whether in seeking or imparting information, should not be subject to arbitrary interference. On this understanding, there does not exist a positive obligation on the part of the State to enable the obtainment of information.

We submit however that the full realisation of the right cannot be achieved without everyone being afforded an adequate level of access to information. Just as the right to seek information requires the existence of channels for others to impart them in order to be meaningful, the right to express one's views will be hollow if the intended audience is not afforded the opportunity to listen to them.[35]

Moreover, one of the purposes of safeguarding the freedom of expression is to enhance informed civic participation in a democratic society. The proliferation of information and the ability to access them are both instrumental to a properly functioning liberal democracy. In this regard, the Internet plays an (increasingly) indispensable role, as a sole source of information for some and in many instances replacing other traditional means of communication.

Right to communicate with others

The right to communicate with others, related but distinct from the right to spread and receive ideas, is not explicitly recognised by the European Convention on Human Rights. A core purpose of the Convention however is the respect for human dignity[36]. As communication is widely recognised as a basic need and an essential part of being human, enabling us to maintain friendship and family life[37], the right to communication has a strong claim to be accorded fundamental right status.

For different reasons, the Internet has in recent years become the primary means of communication for many. However, there has not been a corresponding rights-based recognition of its central importance in this regard. Indeed, while telephone and mail services are available to prisoners as a matter of course, the Internet has so far been off-limits to nearly all prisoners.[38] The recognition of access to the Internet as a fundamental right will redress this inexplicable imbalance.

Realisation of other miscellaneous rights

The Internet is a powerful tool for the empowerment of individuals. Increasingly, certain information is no longer published in print and can only be accessed with a computer; these may include free educational materials, references and even job opportunities etc.. Promoting access to the Internet thus assists individuals in looking for jobs of their own choosing and improving themselves, indirectly helping realise their right to work[39] and education[40].

[34] Similar wording was used in Article 10 of the European Convention on Human Rights

[35] Michael L. Best, 'Can Internet be a Human Right?' (2004)

[36] Explicitly mentioned in the preamble to the Universal Declaration of Human Rights and Article 1 of the Charter of Fundamental Rights of the European Union

[37] Respect for family life and correspondence is protected by Article 8 of the European Convention on Human Rights

[38] 'Inmates may get internet access ', http://news.bbc.co.uk/2/hi/uk_news/england/london/6224693.stm, 2/1/2007

[39] Article 6 of the International Covenant on Economic, Social and Cultural Rights states, 'the States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.'

[40] Article 13 of the ICESCR protects the right to education

Furthermore, the paperless culture ushered in by the advent of the Internet fits in well with the more and more pronounced emphasis on environmental concerns in recent decades.[41]

II Why is it desirable to recognise Internet access as a separate right?

The Internet is a relatively modern invention. Since its creation, it has become a significant part of many people's daily life around the world. Despite its indispensability and gradual replacement of other means of communication, its use has been susceptible to more onerous regulation, rendering its use to be treated mere as a privilege than a right. While it is true that with new opportunities the Internet also brings novel dangers surpassing those posed by mail or telephone, this is not a sufficient reason to deny access to it fundamental right status as a right can always be conditioned by legitimate restrictions.

In 2010, a poll for the BBC World Service shows that 87% of Internet users across the globe felt Internet access should be the 'fundamental right of all people'.[42] This speaks volumes about the public perception of the Internet's special status. Rather than subsuming the access right under existing rights, we submit that its separate recognition accords with the popular mood and enhances the relevance of a modern Bill of Rights. Moreover, the endorsement of an environmentally friendly information source sends an important ecological message. On a more practical level, it also avoids the need to make specific references to the Internet repeatedly in various related rights and renders them overly wordy.

Content of the Right

There are two facets to the proposed right to access to the Internet — it is at the same time both a positive right and a negative right. As a negative right, it protects Internet users from being arbitrarily disconnected from the Internet and prescribes the need for proportionality analysis by the Courts even where disconnection is mandated by the law. As a positive right, the State is under a positive obligation to provide reasonable access to the Internet such that all citizens wishing to avail themselves of its services are given the opportunity to do so.

I Internet access as a negative right

Legislation purporting to restrict Internet access plays scant regard to the consequences of such actions. For instance, among the measures envisaged by the Digital Economy Act 2010 that Internet service providers may be obliged to take against online violators of copyright are bandwidth throttling or even the blocking of access. The Act however makes no reference to the need for the authorities to consider the impact on the freedom of expression or other rights the Internet promotes when exercising such sweeping power.

Entrenching the right to Internet access means that any restrictions on the right can only be determined by law 'insofar as these may be compatible with the nature of the right'[43]. This prevents the Government

[41] Article 37 of the Charter of Fundamental Rights of the European Union states, 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.'

[42] Internet access is 'a fundamental right', `http://news.bbc.co.uk/2/hi/8548190.stm`, 8/3/2010

[43] Article 4 of ICESCR which further adds that such limitations must be 'solely for the purpose of promoting the general welfare

from enacting legislation which derogates from the right absolutely without legitimate justifications. Also, the Courts will be required to assess the proportionality of measures restricting Internet access by examining whether they pursue an objective which sufficiently overrides the values protected by the right. Where the Courts are not satisfied disconnection is justified, they should order alternative penalties (if provided for the relevant legislation) or make a declaration of incompatibility.

II Internet access as a positive right

Among members of the European Union, Spain[44], Finland[45] and Estonia[46] have already pledged to provide every citizen with access to the Internet. In fact, the previous UK Government itself voiced its commitment to guarantee every home can get 2 Mbps broadband by 2012[47].

It is proposed that the Bill of Rights should prescribe that there be a 'progressive introduction' of broadband service reaching every household in the country. As almost 40% of the UK will have access to speeds up to 40 Mbps by 2012[48] and citizens in Finland may even gain universal access to 100 Mbps soon[49], this shows that universal access is an attainable goal and one which nations are all falling over themselves to realise.

Although the right is positive in nature, we are only proposing that as the ultimate goal no household in the UK shall be farther than a reasonable distance[50] from a connection capable of delivering at least 1 Mbps of data a second and that the service should be made available at an affordable regulated price.

Concluding Remarks

To conclude, the UK should recognise a right to Internet access which reflects public opinion within the country and beyond. This will put the UK in a strong position in any future discussion on a European-wide or even international Convention on the recognition of such right which seems inevitable.

in a democratic society'

[44] 'Spain Government to guarantee legal right to broadband', http://www.reuters.com/article/2009/11/17/spain-telecoms-idUSLH61554320091117, 17/11/2009

[45] 'Finland makes 1 Mb broadband access a legal right', http://news.cnet.com/8301-17939_109-10374831-2.html, 14/10/2009

[46] 'Estonia, where being wired is a human right', http://www.csmonitor.com/2003/0701/p07s01-woeu.html, 1/7/2003

[47] Government backs 2 Mbps broadband, http://news.bbc.co.uk/2/hi/technology/8012848.stm, 22/4/2009

[48] *Ibid.*

[49] 'Finland makes 1 Mb broadband access a legal right', http://news.cnet.com/8301-17939_109-10374831-2.html, 14/10/2009

[50] *Ibid.* 2 km in the case of Finland

Limitation of Rights

Introduction

The European Convention on Human Rights, as domesticated by the Human Rights Act 1998, employs a number of limitative devices which can restrict the rights under the Convention in certain situations. In this section, we hope to briefly evaluate specific limitations and the doctrine of proportionality[51]: specifically, we will question whether these limitative devices are clear. We will then consider whether a single limitation clause would meet needs for a clear and streamlined British Bill of Rights, by comparing the European Convention on Human Rights with instruments from other jurisdictions.

From the outset, we would suggest that the absolute rights, that is those not subject to any specific limitations, of Articles 3 (Prohibition of torture) and 4 (Prohibition of slavery and forced labour), should remain free from any restraints under a British Bill of Rights. In the over-50 years of international law-making since the European Convention of Human Rights was drafted, it is clear that any attempt to limit these rights has been adamantly rejected and condemned by the United Kingdom and the international community[52].

Specific Limitations

I Express Limitations on Limited Rights

Article 2(2) (the right to life) and article 5(1) both expressly state circumstances which limit the right in question. However, we would submit that the article provisions fail to unify the express limitations, when many of them can be linked by subject matter. This makes the body of these articles unnecessarily long.

For instance, Article 2(2)(b) establishes a limitation when 'in order to effect a lawful arrest or to prevent the escape of a person lawfully detained' a state agent uses force, which is no more than necessary, and yet infringes Article 2. Article 2(2)(c) applies in the same situation for 'action lawfully taken for the

[51] Some commentators feel that article 15 (derogation in a time of emergency) in the European Convention of European Rights would be a limitation on rights. We will only focus on specific limitations and the doctrine of proportionality; feeling that the temporary and extraordinary nature of an article 15 derogation needs additional consideration.

[52] Article 5 — Universal Declaration of Human Rights and Fundamental Freedoms (1948); Article 2 — United Nations Conventions Against Torture and Other Cruel, Inhuman or Degrading Treatment and Other Punishment (1984); Article 4.2 — International Covenant on Civil and Political Rights (1966)

purpose of quelling a riot or insurrection.' It would seem that both (a) and (b) fundamentally concern the use of force in situations where a state agent acts to maintain the peace, by extinguishing public disorder or the potential for it (in the case of the arrested individual from actual escaping).

Article 5(1) indicates that liberty can only be deprived in certain situations, with a procedure prescribed by law. These situations include:

1. The lawful detention of a person after conviction by a competent court;

2. The lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law

3. The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

Again, we would argue that it is possible to find a unifying structure to fit these stated situations under[53], because all seem to pertain to liberty deprived in the procedure of the criminal justice and sentencing process.

Any simplification of either of these articles would require careful drafting so as not to be overbroad. The rights in question are of fundamental importance, and we do not doubt the express limitations in the Convention reflect the initial concern party states had that without express limitations specific to articles 2 and 5, they could subject to abuse in the future. However, we would still suggest that careful unification should be considered for a British Bill of Rights, in the interests of clarifying the express limitations on limited rights into shorter clauses unified by subject matter

We also suggest that the language of both the articles containing express limitations on rights, is capable of being anachronistic. Justice have previously acknowledged[54] that the language in the article 5(1)(e) limitation, allowing for the detention of 'persons of unsound mind, alcoholics or drug addicts, or vagrants', sounds controversial to conventional ears. Indeed, it is agreed that depriving individuals of their Article 5 rights, based solely on their identification with one of the aforementioned groups, would contravene modern perceptions of criminality. On principle an individual should only be brought to justice on account of the behaviour which results from the mental state they are in. They should not be criminalised on their state alone[55].

II The Express Limitations Under Qualified Rights (Articles 8–11)

The scope of some of the articles under the Convention are qualified by the effect that their protection has on the rights on others, because their subject matter often raises a conflict between individual interests under the Convention, and those of society at large. The conflict between Articles 8 (the right to respect for private life) and Article 10 (the right to freedom of expression), as an example, has been duly noted in this paper[56]. This balancing is reflected in the drafted structure of the Convention. Articles 9 (Freedom of Thought, Conscience and Religion) and 11 (Freedom of Assembly and Association) follow a similar

[53] For the given examples; Article 5(1)(a)-(c) European Convention of Human Rights
[54] Justice — A British Bill of Rights: Informing the Debate (2007), p.26
[55] Ormerod — Smith and Hogan's Criminal Law (2008), p.59–60
[56] Balancing Freedom of Expression and Privacy, p 18

structure to Articles 8 and 10, with the present Convention broadly expounding the right in question in an initial paragraph before all articles follow a broadly similar second paragraph setting out specific circumstances where the respective rights can be restricted:

> 'to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'[57]

As with the express limitations on limited rights, the lengthier limitation clause under the qualified rights could be clarified. Firstly, the language in the limitation clauses is often superfluous to the ordinary reader. For instance, it would seem that limitations in 'the interests of public safety' could encompass 'for the protection of public order', because maintaining conformity helps ensure that the individuals' personal rights are protected. On a similar line, the use of the terms 'rights and freedoms' are conceptually unclear. Do 'rights' refer to those enshrined in the Convention, or to a broader (or narrower) conception of rights decided by the ruling ideology at the time? Similarly, 'freedoms' in this context is a fairly vacuous term, which potentially could be synonymous with the 'rights'.

We believe explicit reference to qualifying limitations to the needs of a democratic society is a beneficial addition to the limitation clauses, which helps ensure that judges consider rights in a broader and contextual framework. Conversely, the inclusion of 'morals' is questionable. Morality could ensure flexibility in judicial decision-making, ensuring the voices of conventional social norms and perceptions are heard. However, it also risks politicisation from the government of the day and ultimately depends on a majority opinion.

Fitting in the Proportionality Test

The doctrine of proportionality is fundamental to our application of the rights under the ECHR. Regardless of limitations, any actions taken to infringe or to vindicate rights must be proportionate responses in the interest of fairness and balance. A concept developed by the ECtHR, the doctrine of proportionality has been adopted within domestic judicial review proceedings[58]. The Justice report[59] suggests that a limitation clause could include reference to the doctrine and highlight its importance as a form of limitation. In light of the importance of the doctrine, we too believe it should be present in a British Bill of Rights. It is, however, submitted that this may not necessarily involve codification of the doctrine, as the Courts have developed a workable understanding of its application.

Limitation Clauses in Other Jurisdictions

After considerations above as to what limitations should exist in respect to the rights included in any proposed Bill, we turn to the question of how such limitations should be incorporated. There is no doubt that there is room for improvement upon the current limitations by way of more concise and tightly drafted wording. It is worth noting that many codified constitutions have incorporated such limitations within one single limitation clause. We should initially turn to the aforementioned codified constitutions

[57] Taken from Article 9(2) European Convention on Human Rights
[58] *R v Home Secretary, ex p Daly* [2001] UKHL 26
[59] Chapter 2, p.27, paragraph 32

and examine their approach to limiting fundamental rights.

The frequently cited examples in this area appear in the constitutions of Canada, New Zealand and South Africa. It is immediately apparent that the purpose of such a single limitation clause is to incorporate more general overarching concepts, which focus on guiding the judicial balancing act of competing rights within the frame of a liberal democracy.

In New Zealand, rights guaranteed by their Bill of Rights are subject 'only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'[60]. This is a provision mirrored perfectly in the Canadian constitution[61].

South Africa's Bill of Rights does shed a little more light on such vague concepts, stating that rights can only be limited

> '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:
>
> a) the nature of the right;
>
> b) the importance of the purpose of the limitation;
>
> c) the nature and extent of the limitation;
>
> d) the relation between the limitation and its purpose; and less restrictive means to achieve the purpose. Except as provided in subsection 1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'[62]

The general nature of such clauses may be at odds with the specific limitations to which are so familiar under the ECHR. The Justice report[63] acknowledges that whilst such clauses are beneficial in their emphasising of 'a culture of rights rather than the uncertainties and safeguards in the ECHR', the generalist approach incorporating overarching values 'effectively allows so-called 'absolute' rights to be weighed against other considerations'.

Indeed, none of the constitutions cited above place specific protections on absolute rights, such as those included in Articles 3 and 4 of the ECHR. Canada's Supreme Court has ruled that, as JCHR states, 'foreign nationals could, in certain circumstances, be sent back to their country of origin where they may face torture'.

Whilst rights to 'human dignity, equality and freedom' are indeed fundamental and are perfectly sensible concepts to which a court should have regard when placed in the position of balancing competing interests in this field, the South African model still possesses some shortfalls. For example, no guidance is given as to which specific rights are, due to their 'nature', more likely to withstand limitation. Nor is any indication given as to what limitations, due to their 'nature and extent', are likely to stand up to the fundamental rights guaranteed within the constitution.

With these factors in mind, we could take inspiration from the more appropriate of s.49 of the Model

[60] S.5 of New Zealand's Bill of Rights Act 1990
[61] S.1 of Canada's Charter of Rights and Freedoms
[62] Article 36 of South Africa's Bill of Rights
[63] Chapter 2, p.27, paragraphs 30 and 31

Constitution of Zimbabwe (2010), comprised by the Law Society of Zimbabwe:

1. Subject to this Constitution, the fundamental rights and freedoms set out in this Chapter may be derogated from or limited only in terms of a law of general application and to the extent that the derogation or limitation is reasonable, is recognised by international law and is necessary and justifiable in an open, just and democratic society, taking into account all relevant factors, including —
   (a) the nature of the right or freedom concerned;
   (b) the purpose of the derogation or limitation;
   (c) the nature and extent of the derogation or limitation;
   (d) the relationship between the derogation or limitation and its purpose; and
   (e) whether there are any less restrictive means of achieving the purpose of the derogation or limitation.
2. No law may derogate from or limit the following rights and freedoms, and no one may violate them —
   (a) the right to life;
   (b) the right not to be tortured or subjected to inhuman or degrading punishment or treatment;
   (c) the right not to be placed in slavery;
   (d) the right to equality;[64]

A Single Limitation Clause in a British Bill of Rights

In light of discussion above on the limitation clauses of other jurisdictions, it is submitted that a substantive list of factors which may legitimately limit the scope of ECHR rights is a necessity within any proposed Bill of Rights. Without such, discretion of the court in determining relevant circumstances and their weight would be too great. There is also the possibility that, without such guidance, the Courts would merely apply limitations as they have been up until now, defeating the purpose of modification and amendment.

The Joint Committee on Human Rights also does not appear to envisage such a wide, general limitation provisions[65]. It argues that a single clause could serve to demonstrate that rights 'can be limited in the general interest, but only if such limitations are shown to be justified by reference to the underlying values… [and] also spells out the relevant factors which are to be taken into account when carrying out the balancing exercise that the clause requires'.

It is submitted then that a Bill of Right should contain a list of relevant factors, which are to be considered

[64] Section 49 of the Model Constitution of Zimbabwe (2010), composed by the Law Society of Zimbabwe, accessed via Sokwanele, a Zimbabwean Civic Action Support Group, at `http://www.sokwanele.com/zimbabweconstitution/sections/511`

[65] Does the UK need a Bill of Rights? Annex 2, 5. P.115

in applying the general values, which is explicitly not exhaustive but in which reference to any additional considerations should only be invoked in circumstances that would otherwise be gravely contrary to general principles discussed in the general provision.

Conclusions

There is a clear need for redrafting of limitations in any proposed Bill of Rights. We have seen that the current limitation provisions in the European Convention of Human Rights are unnecessarily lengthy, albeit with best interests to ensure that limitations on the rights are carefully controlled. A single limitation clause could eliminate repetitious and synonymous language, which appears in most of the limitation provisions in the European Convention of Human Rights. Additionally, a single limitation cause may be preferable in order to embrace guiding principles, as is the case in many other constitutions, providing there is a substantive list of guiding factors to build upon.

A single limitation clause may well be the best course of action in a proposed Bill of Rights for the UK, if it:

- Adequately distinguishes types of limitation, including those of general underlying values, the doctrine of proportionality and specific limitations, which includes reference to 'resources' in the case of any positive rights
- Specifies certain rights which are completely absolute and are subject to no limitation
- Refers to general values, common to free and democratic societies, against which rights should be balanced
- Provides a clear and concise list of relevant factors to be taken into consideration when applying general values, though this list need not necessarily be exhaustive
- Places value on the developed doctrine of proportionality, but need not aim to codify the doctrine

How Should Social and Economic Rights be Realised?

Introduction

Since the European Convention on Human Rights covers only civil and political rights/first-generation human rights, UK courts are relatively unfamiliar with the issue of justiciability of social and economic rights/second-generation human rights. While the former rights are largely negative in nature, the realisation of the latter often entail positive actions on the part of the State. The notion that social and economic rights should be enforceable in courts is thus problematic as it appears to invite courts to make decisions regarding allocation of limited resources, traditionally the preserve of the democratic branches of government and a function which courts simply are unsuited for.

For the above reason, we agree with the Joint Committee on Human Rights ('JCHR') that it will be constitutionally inappropriate to make these rights fully justiciable[66]. At the same time, we are mindful that a total ban on enforcement would risk rendering the inclusion of such rights in the Bill of Rights meaningless. Therefore, we approve the JCHR's view that a middle position should be adopted. Nevertheless, while in principle accepting the courts may have a role to play in fostering their realisation, we are of the view that the judicial role should be more circumscribed than the JCHR suggested.

We believe Parliament should be the principal body responsible for monitoring the fulfillment of such rights and that the courts should be given no more reviewing power than currently afforded. To enhance Parliament's role, the Government should be placed under an obligation to report periodically to Parliament as to the measures taken to promote social and economic rights and respond to any observations made by the JCHR. Also, in introducing new bills, the minister responsible should be required not only to certify their compatibility[67] with human rights but also to explain how they might promote social and economic rights in order to facilitate parliamentary discussions.

Furthermore, the Equality Act 2010 provides a useful model[68] in that the Executive can be placed under a legal duty to have regard to the promotion of rights in exercising its functions.

[66] 29th Report of Session 2007–2008 '*A Bill of Rights for the UK?*', Joint Committee on Human Rights

[67] As required under Human Rights Act 1998 s.19

[68] Equality Act 2010 s.149 imposes a duty on public authorities to have regard to the advancement of equality in the exercise of its functions

Problems with Fully Justiciable Social and Economic Rights

It has been said that the doctrine of separation of powers is fundamental to the prevention of tyranny, and that enforceable social and economic rights run contrary to that doctrine by affording legislative powers to the judiciary. Montesquieu's essay, whence the term 'separation of powers' is derived, in fact identifies the judiciary as the most powerful and the most dangerous of the three institutions, and therefore the most important to keep in check.[69]

The allocation of the resources available to the State is a highly contentious issue, and therefore one that has long been considered the preserve of the democratically elected legislature, whose democratic mandate legitimises its decisions in that sphere.[70] On top of having more *authority* to make fiscal decisions than any other body or institution, it is also said that the legislature is more *able* to allocate resources properly, since (a) it has extensive experience in making such decisions and (b) it can, because of its diverse membership, determine the most deserving recipients of necessarily limited resources, in a State where there are many more worthy causes than there is money to fund them. In contrast, the Courts have neither the *authority* to make such decisions (being unelected and specialising in the interpretation and application of the law) nor are they sufficiently *informed* (having no information on which to base their decisions except the law, legal scholarship and the evidence presented in the case in question).[71]

The Case for Aspirational Social and Economic Rights

It seems in light of the above discussion that fully justiciable social and economic rights, along the lines of 'all citizens shall have the right to adequate healthcare', would most probably have a detrimental effect on the proper allocation of resources. A more sensible way of attempting to afford second generation rights to citizens, espoused by some nations, is to enshrine such rights 'aspirationally', typically in the Constitution, while prohibiting judicial enforcement of them. Such rights do not have immediate effect, but they act as a declaration of intent, inform public discussion of the law, and may eventually influence the development of the law by the judiciary.

Because social and economic policy is potentially the subject of great disagreement, if the Government is constantly challenged by the Courts as to what decisions it must make, the life expectancy of any obligatory second generation right can be very short in a country where entrenchment of legislation is impossible[72]. An enactment of second generation rights in aspirational mode recognises that fact, and also the fact that the resources of the State are not yet so abundant that it would be unreasonable to deprive certain groups of such rights in certain circumstances. At the same time, it sets out in concrete terms the desires and objectives of Government, and puts political pressure on Governments both present and future to abide by those rights.

Although the effectiveness of such approach would be much less than its fully enforceable counterpart, it would still go some way towards effecting social and economic rights, with few of the negative implications of a fully justiciable Bill of Second Generation Rights. We therefore shall adopt this model in

[69] Montesquieu, *De l'Esprit des Lois*, 1748

[70] Cf. Parliament Act 1911.

[71] For further dicussion of the utility of separation of powers, see White, *Separation of powers and legislative supremacy* (2011) 127 LQR 456

[72] For support for this contention, see Bingham (2010). *The Rule of Law*. London: Allen Lane.

relation to social and economic rights and elaborate the role of the three branches of Government under it below.

Proposals

I Courts' Role

'Wednesbury' and proportionality tests

Under the traditional 'Wednesbury' standard of judicial review, the task of the court is only to examine whether the measures taken by public authorities within their discretion are 'so unreasonable that no reasonable authority could ever have come to it' [73]. This was criticised by the European Court of Human Right as setting the threshold of reasonableness so high that it 'effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights' was proportionate[74].

Fortunately, following the Human Right Act's entry into force, where ECHR rights are concerned, the Courts have in general applied a proportionality test which requires 'the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions'[75]. This requires the court to weigh legitimate aims such as the safeguard of national security pursued by a legislative measure against the corresponding restriction of Convention rights resulted by the measure: the court has to be satisfied that the measure goes no further than necessary in attaining the legitimate aims.

We submit that the proportionality test, rather than the narrower 'Wednesbury' test, should be used in relation to social and economic rights under the proposed UK Bill of Rights, but only in the negative sense (where the rights are curtailed) — justiciability is thus restricted to assessing the proportionality of laws having the effect of reducing the enjoyment of social and economic rights. However, the nature of social and economic rights is such that virtually all decisions on the allocation of resources will have an impact on these rights and this may lead to an undesirable amount of litigation. To give an example, a measure enacted to enhance educational services may be challenged on the grounds that it neglects the promotion of healthcare.

Nevertheless, we believe an emphasis that positive rights are only to be 'progressively realised' in their definitions would doom any such challenges on non-allocation of resources to failure. We envisage that the proportionality test will only be fully applied if an enacted measure directly restricts the enjoyment of a positive right, the scope of such challenge in turn will be limited by the 'within available resources' clauses contained in the definition of such rights. Where a measure is found to be disproportionate, the court should issue a declaration of incompatibility and any change of the law should be effected by Parliament[76].

[73] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (CA)
[74] *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493
[75] *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 at 26–28 (per Lord Bingham)
[76] as is the case under s.4 of the Human Rights Act

South African case law and JCHR proposal

In its report 'A Bill of Rights for the UK' the JCHR viewed the case law of the South African Constitutional Court with considerable enthusiasm and lauded its ability in steering a middle path between full justiciability and non-justiciability[77]. It further commented that the South African Court in reaching its decisions borrowed techniques from UK administrative law i.e. 'Wednesbury reasonableness'.

We however believe the approach of the South African Court goes way beyond what is permissible under English administrative law and some of the decisions in fact came very close to making decisions regarding minimum standards of economic and social rights, which courts, as the JCHR notes, are 'ill-equipped' to make because of 'multiple social and economic consequences for the community'.

For example, in the case of *Government of South Africa v Grootboom*, concerning the right to shelter, the Court asserted that it was 'essential that a reasonable part of the national housing budget be devoted' to 'provide relief for those in desperate need' in order to satisfy the 'reasonableness' test[78]. It is inconceivable that any English court would come to that conclusion using the 'Wednesbury' test which constitutes a very high threshold, reflecting courts' reluctance to upset decisions of the democratic branches. Arguably, the Court also seemed to have implicitly stipulated a minimum level of protection by ruling that a budget should be allocated to help the homeless.

Elsewhere the Court emphasised that South Africa's constitutional obligations under the 'reasonableness' standard are only process requirements i.e. the Government should at least formulate some sort of plan for the 'progressive realisation' of the rights and that they do not entail minimum levels of protection[79]. We find this difficult to square with the conclusion stated above which the Court ultimately made. In any case, we believe a duty on the Government to report to the Parliament/JCHR periodically on the measures it has taken to realise the rights can achieve the same objective without the risk of judicial usurpation of democratic roles.

Informing the interpretation of other measures

The JCHR further proposes that social and economic rights should be justiciable to the extent that they are 'relevant to the interpretation of other legislation'. In principle, we accept this as it ensures the relevance of such constitutional rights in the interpretation of ordinary legislation while avoiding the problems associated with direct judicial enforceability of them.

We are however wary of the scope of abuse of such interpretive power by courts. In particular, in India, where the inclusion of social and economic rights in the Constitution are only supposed to act as directive principles of state policy and expressly stated to be unenforceable in courts[80], the Indian Supreme Court through judicial creativity nevertheless managed to effectively enforce these rights by holding their realisation to be essential to the 'right to life'(a right which is enforceable). Thus, the right to health was interpreted as integral to the right to a meaningful life and positive duties are imposed on the State to provide basic right to healthcare[81].

[77] supra note 1

[78] CCT 38/00 (21 September 2000)

[79] Griffey, 'The reasonableness test: assessing violations of state obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' H.R.L. Rev. 2011,11(2)275 at 314

[80] Part IV of the Constitution of India, particularly Art.37

[81] Para.99 of 'A British Bill of Rights: Informing the Debate' by Justice

Whilst agreeing that it should be possible to use social and economic rights in the Bill of Rights to aid the interpretation of other legislation, we find the find the sort of judicial activism displayed by the Indian Supreme Court unacceptable. We believe that the language used in the Bill of Rights must make it absolutely clear that the limited justiciability of positive rights by courts will not extend to the imposition of positive duties stemming from these rights on the State.

II Enhancing Parliament's Role

Duty to report to Parliament

Responsible for the day-to-day running of the country and for launching most legislative initiatives in Parliament, the Government/Executive is in a unique position in promoting social and economic rights. Without the threat of enforceability of such rights by courts (as would be the case under our proposal), however, there is a risk of the Government neglecting its duty to foster such rights under the Bill of Rights.

A duty imposed on the Government to report periodically to Parliament regarding steps it has taken towards the further realisation of rights would help address this problem. In practice, the Government would be under political pressure to show the Houses that it has devised some form of coherent and coordinated national plan in tackling health and education problems and that resources, if available, are allocated to its implementation.

Duty to respond to observations by the JCHR

Consisting of members from both Houses, the JCHR has established itself as a respectable committee with considerable expertise in matters concerning human rights. This lends weight to any observations they may have on how social and economic rights may be realised and indeed it has in the past make useful recommendations on the measures the Government can take to enhance human rights.[82]

Under our proposal, the JCHR should play two roles in monitoring the promotion of social and economic rights. Firstly, it should be tasked with examining the periodic reports of the Government. In particular, it should examine whether the Government is able to justify its proposed allocation of resources, or lack thereof, towards implementing a national plan in promoting and social and economic rights. Secondly, it should actively seek to identify the minimum core content in relation to the rights which should effectively be guaranteed by the State, with the exception of extreme circumstances such as during wartime.

The Government should be required to respond to any observations the JCHR may make and give written reasons to justify its position. While not a panacea to potential inaction by the Executive, this enforced dialogue between the Legislature and the Executive will constantly remind the latter of the need to consider the rights dimension of their decisions.

[82] Murray Hunt: 'Enhancing Parliament's role in relation to economic and social rights' 2010 EHRLR 242

Duty to certify compatibility with human rights and explain how measures may promote social and economic rights

The inspiration for this proposal comes from s.19 of the HRA which requires a Minister in charge of a Bill, before its second reading, to 'make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights' or 'make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill'.

We believe that in relation to social and economic rights, because of their progressive nature, a duty on the Minister responsible not only to certify a Bill's compatibility with human rights but also to explain how it may promote social and economic rights would be appropriate. We propose that all Bills will have to be subject to a certification of compatibility and that the certification of ability to promote will be restricted to measures which are likely to have a positive impact on such rights. The Minister will be under a duty to show Parliament how individual measures in the proposed Bill are likely to help enhance the realisation of the rights; this will in turn enable Parliament to scrutinise the adequacy of the measures and possibly replacing them with superior ones in amendments.

III Imposing Duty on the Executive in Carrying Out Functions

s.149 of the Equality Act 2010 lays down a 'public sector equality duty' which requires that a 'public authority must, in the exercise of its function, have due regard to the need' to 'advance equality of opportunity between persons who share a relevant protected characteristic (e.g. age, race, sex, sexual orientation) and persons who do not share it'. It is submitted that a similar positive duty can be imposed upon the Executive, including both central government and local authorities, to pay due regard to the advancement of social and economic rights in carrying out their functions.

The Courts would have a role to ensure the effectiveness of the provision here. However, consistent with our preference for minimal court intervention in this sensitive area, we believe a public authority would only fall foul of the provision if it totally neglects its duty to consider the rights implications of its actions. This is a weak duty but is complementary to the duty to report to Parliament examined above and is not meant to be sufficient by itself in promoting social and economic rights.

Conclusion

The objection that social and economic rights should at all be included in a Bill of Rights is centred around the fear that too much power will fall into the hands of unelected judges who lack the legitimacy and expertise in making resource allocation decisions. This article shows that the inclusion of such rights does not necessarily entail the expansion of the judicial role and there are other mechanisms through which their promotion can be encouraged and promoted, most notably by enhancing the role of the Parliament. This proposal accords with the constitutional traditions of this country whereby Parliament is the supreme body and has the ultimate authority to make decisions touching upon the daily life of citizens.

The Wilberforce Society — Contact Details

For queries or further information on this special report, please contact:

John Kwan Head of Legal and Constitutional Policy
legal-policy@wilberforcesociety.co.uk
Trinity College, Cambridge CB2 1TQ

For other enquiries about the Wilberforce Society, please contact:

Nick Crawford Chairman
chairman@wilberforcesociety.co.uk
Gonville & Caius College, Cambridge CB2 1TA

Justin Kempley Director for External Affairs
external@wilberforcesociety.co.uk
Homerton College, Cambridge CB2 8PH

Anna Stansbury Director for Policy
policy@wilberforcesociety.co.uk
St John's College, Cambridge CB2 1TP

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