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A response to the Commission on a Bill of Rights Second Consultation

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About the authors

David Radlett has been interested in constitutional issues since first reading Harold Wilson's "The Labour Government" in 1974. He studied law at the LSE, and has worked in local government, in the private sector, and he is presently employed as a lecturer in law at his local university. He was smug about the fact that he tried to defend democracy in our submission to the Commission on a Bill of Rights without once taking a pop at the profoundly undemocratic politicians' ramp otherwise known as the European Union. Sadly, that has not been possible this time around.

Susan Radlett is a lecturer in law employed by the leading provider of HE in London. She has also been an associate lecturer with the University of Kent. Her background is in private legal practice. It remains her view that the Human Rights Act 1998 was a profound error (even when her co-author thought otherwise) and she takes pride in the fact that her principled and practical opposition to the proposal for a Bill of Rights is fully consistent with this approach.

Amongst the articles they have co-authored are *Resources v Statutory Obligations in Education Law* [1998] Fam Law 618-619, and *Dietschmann and Diminished Responsibility*, (2003) June L Ex 22.

The views expressed herein are their own.

A. Introductory thoughts

A.01 We concluded our original response to the Commission's consultation with the observation that the proposal for a Bill of Rights for the UK was fundamentally misconceived. We noted that it had its origins in the project to judicialise the UK constitution, a project which we say is both theoretically and practically undesirable. We said it was theoretically undesirable as it amounted to an attenuation of democracy that should be dismissed as one would dismiss a rabid dog, for if the dog bit, then the way would be left open for kritarchy - the rule of judges. That in turn would lead - quite rightly - to a demand for democratization of judicial appointments. The practical undesirability turned on our objection to empowering the judges to make statements on human rights issues that would be capable of enduring against democratic reform, and our recognition of the futility of wasting public time and money pontificating about the terms of a tool that would not be capable of generating enduring statements of this sort.

A.02 We stand by our conclusion that it is time to kick this daft idea of a British Bill of Rights firmly into touch. We are hearted by the fact that the Commission reports in its Second Consultation that just under half of the respondents to the first consultation opposed a UK Bill of Rights, and a mere 25% supported the idea. We are as equally dismayed by the fact that the Commission has chosen to press on in a typically European Union style¹, apparently seeking the answer that it wants rather than accepting the one that it has obtained.

A.03 We view with incredulity the opinion in para 15 of the second consultation document to the effect that public disquiet with the Human Rights Act will be assuaged by the enactment of a UK Bill of Rights. There appears to be no understanding of the actual problems for the public – the inexplicable mollycoddling of terrorist suspects and the pandering to people serving terms of imprisonment, for example – [which] will continue. They will probably be joined by equal lunacies in the future.

A.04 To make matters worse, the misreporting of some sound decisions will continue (whilst most of the sound cases will, of course, be unreported). That is not the fault of the human rights industry, but it does undermine the absurdity of the contention that creating a UK Bill of Rights will restore public faith in the project. In truth, there is probably little desire to address the real problems for the public.

A.05 For all these reasons it is time to disenthral ourselves from the whole kit and caboodle of the human rights industry, not pander to it further.

1. The Commission asks: [Q1]: What do you think would be the advantages or disadvantages of a UK Bill of Rights? Do you think that there are alternatives to either our existing arrangements or to a UK Bill of Rights that would achieve the

¹ We have in mind repeat referenda like the ones in Ireland in June 2008 and October 2009 on the Lisbon Treaty.

same benefits? If you think that there are disadvantages to a UK Bill of Rights, do you think that the benefits outweigh them? Whether or not you favour a UK Bill of Rights, do you think that the Human Rights Act ought to be retained or repealed?

1.01 We do not propose repeating the submissions we made in our first Response, but we did draw attention to what we perceived to be examples of case law that showed the judges (and the lawyers) cannot be trusted with the power to dictate to the rest of society over and above the power that they have largely arrogated to themselves already. We remain faithful to democracy, and in a democratic society people may reasonably disagree about the substantive outcomes towards which public policy should aim. Like Richard Bellamy, we find “[t]he democratic process is more legitimate and effective than the judicial process at resolving these disagreements.”²

1.02 We do not see benefits from the existing arrangements beyond those that accrue to an elite group (judges and lawyers) who are empowered to decide what should, and what should not be public policy, and to be paid handsomely (and usually from the public purse) for the enjoyment of that privilege. Our desire to defend what is left of, and indeed recover what has been lost of, our democratic heritage, drives us to the conclusion that any balance tips decisively towards reviewing the existing arrangements with a view to:-

- (i) the repeal of the Human Rights Act 1998,
- (ii) abandonment of the proposal for a UK Bill of Rights and
- (iii) a return to the pre-2000 era of wake-up calls from Strasbourg which the UK could (and usually did) act upon, but retaining the freedom to ignore the more bizarre and damaging of those calls³.

2. The Commission asks: Q2: In considering the arguments for and against a UK Bill of Rights, to what extent do you believe that the European Convention on Human Rights should or should not remain incorporated into our domestic law?

2.01 This is an outrageous question that the Commission must be aware has no basis in legal reality. The European Convention on Human Rights (“ECHR”) has not been incorporated into domestic law. There is a clear distinction to be drawn between European Union law, which has been incorporated (albeit contingently) into UK law, and the ECHR, which has not. The distinction was explained very clearly by Supperstone J in *Morgan –v- Ministry of Justice*: ““The [European Communities Act 1972] expressly incorporated the law of the EU into British law. By [s2(1)] ‘All such

² Bellamy, Richard; “Political Constitutionalism”; Cambridge University Press; 2007 at p4.

³ If we remember correctly, only *Saunders v. UK* was not properly acted upon, and it has been joined (quite rightly) by *Hirst v. UK*.

rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties ... shall be recognised and available in law, and be enforced, allowed and followed accordingly...'. ***There is no comparable provision in the [Human Rights Act – “HRA”] in relation to the Convention*** [emphasis added]. The rights created by the Convention are not themselves enforceable in domestic law.⁴

2.02 In *In Re McKerr*⁵ Lord Nicholls emphasised the need to keep clearly in mind “the distinction between (1) rights arising under the Convention and (2) rights created by the 1998 Act by reference to the Convention. These two sets of rights now exist side by side. But there are significant differences between them. The former existed before the enactment of the 1998 Act and they continue to exist. They are not as such part of this country's law because the Convention does not form part of this country's law.” Lord Hoffman spoke with even greater clarity in the same case: “It should no longer be necessary to cite authority for the proposition that the Convention, as an international treaty, is not part of English domestic law. In *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 and *R v Lyons* [2003] 1 AC 976 are two instances of its affirmation in your Lordships' House. That proposition has been in no way altered or amended by the 1998 Act. Although people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter for domestic courts, not the court in Strasbourg.⁶” The Commission's observation in para 19 of the 2nd consultation is inaccurate, and putting the word incorporation in quote marks does not remedy this.

2.03 We are compelled to ask: why is the Commission continuing to use the “misleading metaphor” of incorporation? We are reminded of the maxim that “[w]hoever can persuade the members of a society that law is inevitable or to take “law as a given”, and that the legal interpretation of a particular social situation is the only possible one, controls an important if not vital source of power in that society,⁷” and the warning given by the great American historian, Howard Zinn: “If those in charge of our society - politicians, corporate executives, and owners of press and television - can dominate our ideas, they will be secure in their power. They will not need soldiers patrolling the streets. We will control ourselves⁸. ”

⁴ [2010] EWHC 2248 at para 55

⁵ [2004] 1 W.L.R. 807 at para 25

⁶ [2004] 1 W.L.R. 807 at para 63

⁷ Paterson, Alan; “Judges: A Political Elite” [1974] 1 BJLS.

⁸ Online lecture available from www.emusic.com – it was probably an oversight that he left out judges and lawyers: they featured prominently in much of his speaking and writing in this context.

2.04 Our point is this: in the context of this Consultation, Question 2 could be seen as an attempt to persuade respondents that “incorporation is a fact, so get on and think of the best way of living with it.” To the extent that this is so, the validity of the whole Consultation is seriously, if not fatally undermined from this point onwards.

2.05 There is a dearth of authoritative statements supporting the incorporation myth⁹.

2.06 It is a fallacy of modern times that every change is progress, and a restoration of the *status quo ante* is regressive. It is also a fallacy that opponents of further change have to prove their position, whilst proponents of change can rely on the claim, however baseless, that change is progress.

3. The Commission asks: Q3: If there were to be a UK Bill of Rights, should it replace or sit alongside the Human Rights Act 1998?

3.01 There should not be a UK Bill of Rights. There should not be a Human Rights Act 1998. All the while that there is a Human Rights Act, at least its relationship to the ECHR has been authoritatively settled (please see para 2.02 above). Creating a triangulation of ECHR-HRA-UKBoR seems like an exercise in futility, save insofar as it would increase the opacity of the law in this area (and, of course, the need for sacerdotal assistance in its unravelling).

3.02 There is no role for symbols in matters concerning freedom, especially when such symbols will be subverted by the unelected, unrepresentative and unaccountable judiciary as with the symbolic “ever closer union” statement in the original Treaty of Rome¹⁰. Our comments at para 6.04 below on the South African experience of symbolic rights is equally apposite here.

4. The Commission asks: Q4: Should the rights and freedoms in any UK Bill of Rights be expressed in the same or different language from that currently used in the Human Rights Act and the European Convention on Human Rights? If different, in what ways should the rights and freedoms be differently expressed?

4.01 Our constitutional heritage was captured by Sir Ivor Jennings when he wrote that there is “a simple principle, common to all political systems, that it is lawful to do anything which is not unlawful”¹¹. Bills of Rights and Human Rights Acts reverse this proposition: a person has to identify a right rather than assert their freedom. If it is not

⁹ We use Lord Steyn’s comment in *R (Jackson) v, AG* [2005] 4 All ER 1253 (“We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts. In the European context the second Factortame decision [1991] 1 AC 603 made that clear. The settlement contained in the Scotland Act 1998 also point to a divided sovereignty. Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act 1998, created a new legal order”) as a teaching aid to illustrate implausible assertions like the purported one that he seeks to criticise. It is not a sound statement of the law.

¹⁰ See, for example, Mancini & Keeling - “Democracy and the ECJ” 57 MLR 175: “The preference for Europe is determined by the genetic code transmitted to the Court by the founding fathers, who entrusted to it the task of ensuring that the law is observed in the application of a Treaty whose primary objective is an ‘ever closer union among the peoples of Europe.’”

¹¹ “The Law and the Constitution”; University of London Press; 3rd ed; 1943 at p40.

in the BoR or the HRA then it is not a right, as smokers, and others have found out to their cost. Indeed, there are examples of issues being rights as defined by ECHR but not protected¹². This is the opposite of our constitutional heritage.

4.02 Another part of our constitutional heritage was captured by Michael Pinto-Duschinsky when he wrote of parliamentary sovereignty: “the underpinning of our system of government, because if all law emanates from Parliament and all power ultimately resides in it, then the line of accountability can easily be traced by the electorate back to those who take the decisions that govern their lives.¹³” There is not much point being able to trace back responsibility to the unelected, unrepresentative and unaccountable judges in Strasbourg or in north Parliament Square. This, too, amounts to the opposite of our constitutional heritage.

4.03 There should not be a UK Bill of Rights. Judges at both national and European level have shown themselves (too) well-able to read new and/or non-existent rights into the ECHR, so there is no need to amend the language in which the rights and freedoms are expressed. We certainly do not wish to create the additional space for judicial activism which would exist as soon as it became necessary for the judges to compare different uses of words. Take away the framework of pragmatic concepts and shared language that characterise proper judicial activity, “and what judges do does not merit the word ‘law’¹⁴”.

4.04 It might be worth encouraging the governments of the High Contracting Parties to consider drawing up a list of matters about which the European Court of Human Rights (“ECtHR”) and by extension the national courts is debarred from giving judgment, so that focus can return to the core values that the ECHR/ECtHR were intended to protect, and away from the political lunacies – “no matter how dangerous or undesirable”¹⁵ – that have recently devalued the whole Human Rights project. An amending Protocol would be required to give effect to such a list.

4.05 It might also be worthwhile reminding the ECtHR via an amending Protocol to the ECHR that Article 1 ECHR is simply the contract between the High Contracting Parties

¹² We have in mind the wearing of religious paraphernalia, walking away from Oxford Street (*Austin v UK*), not being fined without a trial (the ECtHR’s unforgivable endorsement of the so-called “civil penalty”) and so on.

¹³ Pinto-Duschinsky, Michael: “Bringing Rights Back Home” available on-line at:

<http://www.policyexchange.org.uk/images/publications/bringing%20rights%20back%20home%20-%20feb%2011.pdf>

¹⁴ Richard Posner notes that “Legal pragmatism is disciplined by a structure of norms and doctrines, commonly expressed in standards such as negligence, good faith, and freedom of speech, that tells judges what consequences they can consider and how ... Take away the framework and what judges do does not merit the word ‘law’ (“How Judges Think” Harvard University Press; 2008 at p362).

¹⁵ The infamous phrase from *Chahal v. UK* (1997) 23 E.H.R.R. 413

and was not intended to extend the writ of the ECtHR to control the private conduct of citizens, an example of European “through the looking glass” reasoning¹⁶.

5. The Commission asks: Q5: What advantages or disadvantages do you think there would be, if any, if the rights and freedoms in any UK Bill of Rights were expressed in different language from that used in the European Convention on Human Rights and the Human Rights Act 1998?

5.01 It is difficult to take this question seriously. The domestic courts have struggled from time to time to deal with differences in approach between domestic and ECHR law¹⁷, but there appears to be a degree of success in identifying what the Supreme Court has referred to as the “mirror principle”. This work would be undone to an extent which would only benefit pockets or pouches of lawyers if different modes of expressing what ought to be the same ideas are introduced.

5.02 For the avoidance of incorporation-style doubt, the mirror principle acknowledges that section 2 of the HRA requires courts to "take into account" ECtHR decisions, but not necessarily to follow them¹⁸. However, “[w]here ... there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line.¹⁹”

5.03 Nothing in the preceding paragraphs should be taken as implying for a nanosecond that we believe that there should be a UK Bill of Rights.

6. The Commission asks: Q6: Do you think any UK Bill of Rights should include additional rights and, if so, which? Do you have views on the possible wording of such additional rights as you believe should be included in any UK Bill of Rights?

6.01 We believe very strongly that rights such as the right not to be tortured by a High Contracting Party, not to be enslaved by a High Contracting Party, and not to be denied liberty except in accordance with the express provisions of Article 5 ECHR by a High Contracting Party, should be taken seriously by the courts. There is evidence that they were willing to do so, and could do so again. For example, in *R v Secretary of State for the Home Department, ex p Brind*²⁰ Lord Bridge said that the courts were: “perfectly entitled to start from the premise that any restriction of the right to freedom of

¹⁶ Making the High Contracting Parties responsible not only for their actions, but for the actions of third party states (*Othman (Qatada) v UK* [2012] ECHR 56) and for failing to regulate its own citizens as in *A v UK* (1998) Case No 100/1997/884/1096).

¹⁷ See, for example, the perceived need for reversal of majority decisions in *Harrow v. Qazi* [2004] 1 AC 983 and *Kay v. Lambeth LBC* [2006] 2 AC 465 by the old House of Lords in *Manchester City Council v. Pinnock* [2010] LGR 909.

¹⁸ Lord Mance in *Doherty v Birmingham City Council* [2009] 1 AC 367 at para 126..

¹⁹ Lord Neuberger in *Manchester City Council v. Pinnock* at para 48.

²⁰ [1991] 1 AC 696

expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it” – in effect that they did not need the ECHR (or by extension the ECtHR) to tell them to protect core human rights.

6.02 We are conscious of the fact that the actual decisions in *ex p Brind* (the government’s absurd and offensive ban on the simultaneous broadcasting of certain people’s voices and images was upheld by both the House of Lords and the ECtHR) were disappointing, to put it mildly. That being written, there are equally egregious examples of betrayal of core values by the UK Supreme Court and the ECtHR: see by way of example *Austin & Another –v- Commissioner of Police for the Metropolis*²¹ which became *Austin & Others v. UK*²² to no particular effect. The joke remains:-

Q: When is a denial of the right to liberty not a denial of the right to liberty?

A: When it is a restriction of liberty.

- and could be followed by another:-

Q: When is a fine not a fine?

A: When it is a civil penalty.

6.03 Our point is this. If the courts in Strasbourg and Parliament Square are not capable of handling existing rights properly, it seems extraordinarily unwise to burden them with less familiar ones. The law should not move outside these core human rights, for as we have already indicated here and elsewhere, to do so debases the whole concept – at least outside the sheltered world of the sacerdotal elite referred to in para 1.02 above and thereafter. As Lord Hoffman said: “The devil is in the detail: in the interpretation by the courts of the high-minded generalities of the written instrument. It is these interpretations, which often appear to people to bear little relation to the values that they think really important in the way our country is governed. Since 9/11 there have been enough real and serious invasions of traditional English freedoms to make it tragic that the very concept of human rights is being trivialized by silly interpretations of grand ideas.”²³

6.04 There is a cautionary tale from the South African post-apartheid constitution. This is rightly praised for its attempt at an advanced theoretical treatment of human, economic and social rights, but the reality is sobering. For example, in *Government of the Republic of South Africa & Ors v Grootboom & Ors*²⁴ it was held that section 26 of the South African constitution obliged the state to devise and implement a coherent, co-ordinated housing programme, and that in failing to provide for those in most

²¹ [2009] UKHL 5

²² Application Nos 39692/09, 40713/09 and 41008/09, Judgment 15th March 2012.

²³ In the foreword to Michael Pinto-Duschinsky’s “Bringing Rights Back Home” available on-line at: <http://www.policyexchange.org.uk/images/publications/bringing%20rights%20back%20home%20-%20feb%2011.pdf>

²⁴ 2000 (11) BCLR 1169

desperate need the government had failed to take reasonable measures to progressively realize the right to housing. Eight years later it was reported that the claimant Irene Grootboom had died, still homeless and in abject poverty. Such is the reality of the sort of additional rights of the economic and social kind that one might otherwise be inclined to support.

6.05 There should not be a UK Bill of Rights; it should not contain new rights. The so-called right to administrative justice mentioned in the 2nd Consultation document is simply another way of extending the reach of the unelected, unrepresentative and unaccountable further into the democratic area. Using the language of human rights discourse “is not a justification for a hyper-active judiciary, but merely a redefinition of it.”²⁵

6.06 Turning to “equality”, one of the authors believes in the principle “from each according to their ability, to each according to their need.” However, both authors believe that this principle is a political, and not a legal one. Questions relating to its existence, scope and application have to be decided by political discourse, not legal diktat.

6.07 It would be an act of the utmost folly to encourage judicial authorities to pronounce in even greater depth on essentially political matters. Arming them with an open-ended ban on discrimination would have just that effect.

6.08 In any event, anti-discrimination legislation appears to work quite robustly enough already, unless one’s religious views are in issue and on the protection of religious rights we can say no more as we do not agree between ourselves on the point.

7. The Commission asks: Q7: What in your view would be the advantages, disadvantages or challenges of the inclusion of such additional rights?

7.01 Any UK Bill of Rights would be either useless or destructive of democracy or, quite possibly, both. It should not exist, and therefore should contain nothing, old or new.

7.02 That being written, there is actually not a shred of evidence that peripheral legal rights can be adequately protected by the law. Notwithstanding all the hot air huffed and puffed about rights, be they human, economic or social, the plain fact is that the rich grow richer and the poor grow poorer. This is a world-wide phenomenon. We actually believe that matters relating to social and economic status are rather central in political discourse, but should be expressed as social and economic **claims**. To endow them with the label of “rights” would, if unsuccessful, hinder discourse and, if successful, would deny those who disagree with our view on the political necessity of promoting social and economic claims the power to pursue that dissent²⁶.

²⁵ Posner, p364

²⁶ In fact they have the upper hand at the moment.

7.03 The linking of children's rights with the UKBoR is abhorrent for the reasons given by James Heartfield²⁷. Children's rights do not empower children: they empower those who, for good or ill, take it upon themselves to speak for children. Most of these are employees of the state, and many of them might be regarded as spouting nonsense. The appropriate way to determine such claims is by way of political discourse, not legal diktat.

7.04 Ronald Dworkin famously described rights as "political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them *what they wish*, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them."²⁸ Children should not be expected to operate in this arena, either on their own account or through agents of the state: amongst other things, what they wish might very well be extraordinarily damaging for them.

7.05 Nor can inspiration be taken from the EU's Charter of Fundamental Freedoms. For example, the reference therein to workers having a right to industrial democracy (Article 27), the right to environmental protection "in accordance with the principle of sustainable development" (Article 37) and "a high level of consumer protection" (Article 38) has produced the following comment: "The one thing that these and other provisions of the draft Charter have in common is that they are not, on any sane understanding of the issues at stake, fundamental rights at all"²⁹.

7.06 Claims for industrial democracy, sustainable development and a high level of consumer protection are not rights in this sense either. It is not clear what collective goal stands in opposition to any of them. In proclaiming them as rights the EU Charter is seeking "to enshrine mere political aims, about which there may well be intense and genuine disagreement"³⁰, and to that extent it is an affront to democracy and freedom. A UKBoR enshrining similar non-rights would be an equal affront to democracy and freedom.

7.07 All of the proposals for new rights reported in the Commission's 2nd consultation document represent nothing more than an attempt to win an argument – over children's rights, over environmental rights, over industrial democracy and so on – by closing that argument down. This is not democracy; it is elitism.

8. The Commission asks: Q8: Should any UK Bill of Rights seek to give guidance to our courts on the balance to be struck between qualified and competing Convention rights? If so, in what way?

²⁷ "Why children's rights are wrong" in 'Living Marxism' issue 60, October 1993.

²⁸ Dworkin, Ronald; "Taking Rights Seriously"; Duckworths; 1977 at p xi, emphasis added.

²⁹ Radlett, David; "On Fundamental Rights"; European Journal Vol 8 No 2 at p32.

³⁰ Radlett, David; "On Fundamental Rights"; European Journal Vol 8 No 2 also at p32.

8.01 There should not be a UK Bill of Rights, so guidance on balances to be struck should not be needed.

8.02 If any were given, it is likely to go the way of phrases like “take account of” in section 2³¹ or “as far as possible” in section 3 HRA 1998: in other words, the judiciary are likely to twist the meaning of the guidance to suit its collective purpose.

8.03 For example, we note that the phrase of guidance “as far as possible” in section 3 HRA 1998 has been interpreted by the judges as requiring the judges to rewrite legislation in cases like *R v. A (No 2)*³² rather than the intended meaning, which was that the judges should accept that it would not always be possible to interpret – as opposed to rewrite – legislation so as to be ECHR-compatible³³.

8.04 This was particularly pernicious in the context of section 41 of the Youth Justice and Criminal Evidence Act 1999³⁴ as the effect of the rewriting was to restore to trial judges a discretion regarding the cross-examination of alleged victims, which the section took away because of their failure to use that discretion judiciously.

8.05 It is well-known that the popular press is howling at its collective leash over the alleged conflict between the right of individuals to privacy, and the right of the popular press to make money out of their follies. A clear pro-press lobby is growing which will, ironically perhaps, if successful see off one of the few obvious benefits of the HRA regime, namely the inculcation of greater respect for the idea of privacy³⁵. If this was the cost of restoring the status quo ante HRA 1998, then it would be a price worth paying. It is not a price worth paying for any other reason.

³¹ But see footnote 9 for a more positive take on section 2.

³² [2001] UKHL 25

³³ A rather neat analogy was put to us by a law student (Andrew Radlett): imagine a person (the judge) standing in front of, and facing a brick wall (the sovereign will of Parliament). That person is told to walk in the direction of the wall as far as possible (by Parliament). When she reaches the wall, she has to stop. The instruction is not to walk around the wall; to climb over it, or to rebuild it. It may be that further instructions are needed, unless they have already been provided. In fact, the HRA does provide further instructions: make a declaration of incompatibility thereby putting the matter back into the political arena.

³⁴ The provision in issue in *R v. A (No 2)*.

³⁵ Demonstrated at Strasbourg by the thoughtful decision in *Von Hannover v Germany* (2005) 40 EHRR 1, and in the UK by cases like *Mosley v News Group* [2008] EWHC 1777 (QB).

9. The Commission asks: Q9: Presuming any UK Bill of Rights contained a duty on public authorities similar to that in section 6 of the Human Rights Act 1998, is there a need to amend the definition of ‘public authority’? If so, how?

9.01 We would rather presume that the proposal for a UK Bill of Rights will be kicked into touch.

9.02 However, if this is not so, and if the HRA 1998 is not repealed, then at the very least the narrow reasoning of the majority in *YL (by her litigation friend the Official Solicitor) v. Birmingham City Council*³⁶ and others needs to be disapplied to all privatisation projects, and not just to care homes³⁷.

10. The Commission asks: Q10: Should there be a role for responsibilities in any UK Bill of Rights? If so, in which of the ways set out above might it be included?

10.1 We think the Commission must be jesting. By definition, any Bill of Rights is about rights. As the courts at both national and European level have shown themselves to be congenitally incapable of considering the meaning of Article 17 ECHR and applying it in, say, cases involving “dangerous and undesirable” rights-claimants, there can be no faith put in the proposition that they would be able to comprehend the meaning or import of responsibilities on the law-abiding individual.

10.2 Insofar as claiming rights can engage the need to evince respect for the rights of others, the Convention was well-written but is sometimes poorly interpreted. That is the fault of the reader, not that which is being read. The other examples given in the Consultation document are, with respect, a little naive. Take, for example, obeying the law. It sounds like an obvious proposition – especially to lawyers - but as Howard Zinn once observed: “Historically, the most terrible things - war, genocide, and slavery - have resulted not from disobedience, but from obedience³⁸.” He also commented that “Protest beyond the law is not a departure from democracy; it is absolutely essential to it.”

10.3 These are important and powerful thoughts that, by their very nature, cannot be legislated. They must never be stifled out of existence.

10.4 We note that certain religious groups have suggested that there should be something in a UKBoR regarding restraint. We cannot agree. If those groups are speaking on their own account, then there is no need: all they have to do is actually exercise the restraint that they call for. If they are purporting to make other groups exercise restraint through a UKBoR then they are surely missing the point.

10.5 Further speculating upon possible ways in which responsibilities might be included is an exercise in futility, given our opposition in principle to the idea.

³⁶ [2007] UKHL 27

³⁷ As was done by s145 of the Health and Social Care Act 2008.

³⁸ In the essay “Law and Justice”, taken from “The Howard Zinn Reader”; Seven Stories Press (1997) at p389.

11. The Commission asks: Q11: Should the duty on courts to take relevant Strasbourg case law ‘into account’ be maintained or modified? If modified, how and with what aim?

11.1 The reasoning of the majority in *Manchester City Council v. Pinnock* on the mirror principle, if applied in its entirety, deals with this question in all possible scenarios – from the worst case (the creation of a UK Bill of Rights, through the maintenance of the status quo, to the best case, namely the restoration of the pre-HRA position³⁹.

11.2 For the record, the proposition that “Parliament is effectively bound by the judgments of the Strasbourg Court” is a legal nonsense. Lord Hoffmann put the legal position in a nutshell: “Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights⁴⁰.” We do not propose rehearsing the arguments already put about the non-incorporation of the Strasbourg treaty. There is no argument: it has not been incorporated. The Human Rights Act 1998 does not bind Parliament. A fortiori, the ECHR does not do so.

11.3 Of course, there may well be political costs incurred for not complying with a judgment of the ECtHR. Ultimately the UK could find itself expelled from the Council of Europe. This would inconvenience politicians – principally, reducing the number of stages upon which they can strut and fret for their allotted hour - but the citizen in the street is unlikely to notice any difference to the quality of her life if that were to happen. The point here is that political costs are for politicians and those that they represent to decide, not the unelected, unrepresentative and unaccountable judiciary in Strasbourg or Parliament Square.

11.4 We are aware of the elephant in this room, though. The effect of eroding the difference between the ECHR and EU law set out in the Lisbon Treaty may well lead to enforcement of the former through the latter. When the Lord Chief Justice, Lord Judge, gave evidence to the Joint Committee on Human Rights in November 2011, he commented that: “If the European Court of Justice says that it will apply the European Convention on Human Rights … then down the line we will find ourselves being forced to, at least, consider that we are obliged to follow it because Luxembourg is following it. That is a very important political question and, if I may say so, you need to be alert to it.⁴¹” There seems to be little interest in provoking public discussion about further subjection to the will of the ECJ in Luxembourg, which puts all other courts – even the ECtHR - to shame in its willingness to make the law up as it goes along. Arbitrary government of this sort is the very antithesis of freedom, and it is no less arbitrary because it is wrapped in a mantle calling itself law⁴².

³⁹ See para 5.02 above and footnote 14 thereto.

⁴⁰ In *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115 , at p131.

⁴¹ We are grateful to Joshua Rozenberg for bringing attention to this in his column “Jurisprudence” in Standpoint magazine, Jan/Feb 2012 at p 25.

⁴² Please see footnote 14 and the comment to which it refers.

11.5 Our point is this: with this great imponderability of the ECHR/EU law relationship looming in the future, with two international courts, both equally unelected, unrepresentative and unaccountable, potentially falling over themselves to tell the citizen in the street what she should and should not be doing, should and should not be thinking and so forth, the last thing that is needed is a further domestic obfuscation of the implications of that relationship for the continuation of even the attenuated form of democracy that is enjoyed at the moment.

12. The Commission asks: Q12: Should any UK Bill of Rights seek to change the balance currently set out under the Human Rights Act between the courts and Parliament?

12.1 We have thought very hard about the appropriate form of words to use to respond to this question, and we have returned time and again to the following: over our dead and rotting corpses⁴³. Parliament needs to reassert its legal sovereignty (and in so doing, the political sovereignty of the electors), if need be by the selective sacking of judges who insist on pressing the claims of judicial supremacy over democracy.

12.2 It is sad that such a lesson or lessons in humility (or deference or, as we prefer, an appropriate sense of the judicial place in a democratic constitutional order) may need to be taught. We drew attention in our first submission to the words of wiser judges from earlier days in cases like *Duport Steel -v- Sirs*⁴⁴, in which Lord Diplock observed “[T]he British constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws, the judiciary interprets them.” Lord Scarman said: “[A] constitution’s separation of powers, or more accurately functions, must be observed if judicial independence is not to be put at risk. For, if people and Parliament come to think that the judicial power is to be confined by nothing other than the judge’s sense of what is right … confidence in the judicial system will be replaced by fear of it becoming uncertain or arbitrary in its application. Society will then be ready for Parliament to cut the power of the judges …” Quite so.

⁴³ Words delivered in the singular by the thespian Richard E Grant in the film “Warlock” over something which was as precious to his character – a piece of ironmongery - as democracy should be to all of us.

⁴⁴ [1980] 1 WLR 142 H/L

13. The Commission asks: Q13: To what extent should current constitutional and political circumstances in Northern Ireland, Scotland, Wales and/or the UK as a whole be a factor in deciding whether (i) to maintain existing arrangements on the protection of human rights in the UK, or (ii) to introduce a UK Bill of Rights in some form?

13.1. Commitment to a rebirth of freedom - that government of the people, by the people, for the people, shall not perish from the earth – dictates, amongst other things, that a period of waiting is called for. We would prefer that period to be sine die, but at the very least the outcome of the Scottish referendum needs to be known. We have no business seeking to drag the people of a free Scotland down the road to kritarchy.

14. The Commission asks: Q14: What are your views on the possible models outlined in paragraphs 80-81 above for a UK Bill of Rights?

14.1 If human rights have any meaning at all, it is one that is, or ought to be, universal in nature. To suggest differing levels of protection as envisaged by paras 80 and 81 is actually rather bizarre: it represents the worst of both worlds, and the best of neither. It is, or would be (perish the thought), relativist in effect, if not intention.

14.2 For the record, we do not support any proposal which would undermine, in fact or fantasy, the legislative supremacy of the Westminster Parliament. The Commission document comes close to regarding the Sewell Convention as the Sewell Law, which is a pernicious ratcheting-up of the legal effect of the devolution settlement.⁴⁵

14.3 There should be no UK Bill of Rights; then the problems of what to do with Scotland, Wales and/or Northern Ireland before they leave the Union is not a problem.

15. The Commission asks: Q15: Do you have any other views on whether, and if so, how any UK Bill of Rights should be formulated to take account of the position in Northern Ireland, Scotland or Wales.

15.1 Beyond emphasising our opposition to the creation of such a Bill of Rights ab initio, the answer is “no”.

16. Concluding thoughts

16.1 It saddens us that we have to appear so negative and condemnatory. However, it has always been the case with Bills of Rights that they have sought to knock issues off the agenda of public discussion: if they did not do so, they would be of no use.

16.2 It has always been the case that courts have (for good reasons or for ill) sought to extend their essentially unelected, unrepresentative and unaccountable powers at the expense of the powers of those who are elected, representative and accountable for their actions. Lord Hoffman again: “International institutions which are set up by

⁴⁵ Lord Steyn’s “The settlement contained in the Scotland Act 1998 also point to a divided sovereignty” obiter referred to already in footnote 9 (above) being the classic statement of such ratcheting-up so far on the books.

everyone become in practice answerable to no one, and courts have an age-old tendency to try to enlarge their jurisdictions. And so the Strasbourg court has taken upon itself an extraordinary power to micromanage the legal systems of the member states of the Council of Europe (or at any rate those which pay attention to its decisions) ...⁴⁶

16.3 The political system is not perfect. It is sick; probably approaching terminal illness, in fact. Whatever the remedy may be for this illness, it is not taking the last vestiges of responsibility from citizens to determine what should be done, and replacing it with legal diktats from Luxembourg, Strasbourg and/or north Parliament Square. Elected politicians do not need to act to create a Bill of Rights if they are desirous of leaving people alone. They simply need to vote against proposals to infringe on rights, rather than vote for them because their leaders say so.

16.4 Whilst, as Shelley wrote in "England, 1819":-

Golden and sanguine laws which tempt and slay;
Religion Christless, Godless – a book sealed;
A senate – times worst statute unrepealed, -
Are graves, from which a glorious Phantom may
Burst, to illuminate our tempestuous day.

- it might not. Better not to take the risk.

16.5 For the avoidance of any doubt, nothing in the foregoing should be treated as an acceptance of, or acquiescence in, the idea of a UK Bill of Rights.

David Radlett

Sue Radlett

17th September 2012

⁴⁶ Again, in his foreword to Michael Pinto-Duschinsky's "Bringing Rights Back Home" available on-line at:
<http://www.policyexchange.org.uk/images/publications/bringing%20rights%20back%20home%20-%20feb%2011.pdf>