**COMMISSION ON A BILL OF RIGHTS**

**SUBMISSION**

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**Introduction**

1. On 5 August 2011, the commission, acting under its terms of reference, went out to public consultation. It asks four questions.[[2]](#footnote-2)
2. This submission – drawing on continuing work – contains arguments in favour of a new United Kingdom bill of rights and responsibilities (replacing the Human Rights Act 1998), as a cornerstone of the state’s largely uncodified constitution.
3. I consider the following topics:

* (1) English (?) tradition;
* (2) international human rights standards;
* (3) Strasbourg in crisis;
* (4) the labour party’s two stages;
* (5) devolution in the UK;
* (6) configuring a UK bill of rights and responsibilities;
* (7) a preamble drafting competition?

In doing so, I believe I address the four questions, and answer them as follows: (1) yes; (2) answered generally, and in argument 6; (3) as the Human Rights Act 1998 applies; and (4) yes, generally.

*Approach*

1. I continue to take a historical approach, which perforce is also international. I eschew national chauvinism, and the radicalism of the human rights community. Ultimately, I write as a lawyer (and not an *ersatz* politician).

**Argument One: English (?) Tradition**

1. The constitutional development of England (and Wales), Great Britain and the United Kingdom (‘UK’) – these islands - is significant for two reasons: one, it is where we come from legally; and two, it infuses our democracy, and even popular life.
2. This is not an ignoble tradition, to be eclipsed by ‘Europe’ or dissolved in the united nations. It is worth listing the constitutional milestones (perhaps an appropriate word).

*The United Kingdom*

1. First, the constitutional evolution of England and Wales, Scotland and Ireland, and the idea of liberty: essentially, negative freedoms:

* 1215 Magna Carta (England & Wales)
* 1216 an Irish version
* 1628 Petition of Right (England & Wales)
* 1679 Habeas Corpus Act (England & Wales)
* 1688/89 Claim of Right (Scotland)
* 1688/89 Bill of Rights (England & Wales)
* 1688/89 applied to Ireland
* 1700/01 Act of Settlement (later applied to Scotland and Ireland)

It is worth talking generally about the first bill of rights (in the world), a national constitutional text which is still litigated[[3]](#footnote-3). However, the act of settlement, which is related, remains sectarian – because of the church of England - and (despite Elizabeth I, Victoria and Elizabeth II) sexist (the latter being practically less significant than the former, given the queue of kings to succeed the queen[[4]](#footnote-4)).

1. The rush of empire (with a sovereign parliament) in the nineteenth century explains the antipathy to a written constitution – articulated by Dicey – , but the end of empire (leading to the commonwealth) in the twentieth century saw London draft many state constitutions for others, including bills of rights. What is appropriate for new states, and dependencies (including the colony of Gibraltar in 2006), has yet to be conclusively applied to ourselves. A written constitution, I submit, which has no practical prospects at the moment, could, nevertheless, be an – acknowledged or unconscious - incremental process.[[5]](#footnote-5)

*America and France*

1. Second, Great Britain as an inspiration in the eighteenth century. In 1776, George III lost his American colonies. The settlers provided for republican governmental institutions, in the United States constitution of 1787. It was the anti-federalists, being closer to the states and the people, who secured amendments one to ten – the bill of rights – in 1791 (there being subsequent additions).
2. Revolutionary France got in first, in 1789, with a déclaration des droits de l’homme et du citoyen (the 1793 version being less critical of republican state power). There followed a constitution, for the republic of 1792 to 1804. Revolution – ‘the old Parisian ferocity’ – repelled Edmund Burke (the Irish MP for Bristol), and Jeremy Bentham, living through the French wars, would describe the déclaration as ‘nonsense upon stilts’[[6]](#footnote-6).
3. It is easy to contrast the UK and the European continent – as the English jurists, John Austin (1790 – 1859), A.V. Dicey (1835 to 1922)[[7]](#footnote-7) and Ivor Jennings (1903 – 1965), would do in the nineteenth and twentieth centuries – as: an uncodified versus written constitutions; the common law versus civil law; elected parliaments versus the state; empiricism leading to pragmatism versus theory implying dogmatism; flexibility versus rigidity; and the unenumerated rights of the subject versus the need to give individuals guaranteed constitutional (including human) rights.
4. There were, nevertheless, considerable continuities, between the 1688/89 bill of rights and the 1789 déclaration des droits de l’homme et du citoyen: natural law origins; opposition to royal absolutism; the myth of a social contract (the idea of society); belief in the rule of law, with civil and criminal courts (and punishment[[8]](#footnote-8)); incremental electoral democracy; individualism, including property rights; and, surprisingly, negative freedoms in both countries[[9]](#footnote-9).

ARGUMENT TWO: INTERNATIONAL HUMAN RIGHTS STANDARDS

1. There is a different (superior in the opinion of some) international tradition. The UK lost its empire in the third quarter of the twentieth century. Unfortunately, it sought to maintain global reach diplomatically. And, while confident of the unenumerated rights of the British subject, it acquiesced in the development of human rights by international agreement for the benefit of others. This was to prove short sighted, even in the context of building a new world order after the second world war – as the state may now be appreciating.

*The United Nations*

1. One, post-world-war-two global state internationalism. The UN was established by the victors in 1945 (replacing the failed league of nations). The charter became the leading legal text in customary international law (but not the constitution of a world government).
2. The universal declaration of human rights of 1948, which remains non binding, led eventually to the two 1966 – cold war – international covenants (entering into force in 1976), one dealing with civil and political rights and the other with economic, social and cultural rights (with Africa subsequently developing third-generation, collective or group rights [including duties]).[[10]](#footnote-10)
3. Other UN human rights instruments (most with international machinery) may be listed, with the dates of entry into force in international law in parenthesis:
   * 1948 convention on the prevention and punishment of the crime of genocide (1951);
   * 1951 convention relating to the status of refugees (1954);
   * 1965 convention on the elimination of all forms of racial discrimination (1967);
   * 1967 protocol to the refugee convention (1967);
   * 1979 convention on the elimination of all forms of discrimination against women (1981);
   * 1984 convention against torture (1987);
   * 1989 convention on the rights of the child (1990);
   * 1990 convention on the protection of the rights of all migrant workers and members of their families (2003);
   * 2006 convention on the rights of persons with disabilities (2008); and
   * 2006 convention for the protection of all persons from enforced disappearance (2010).
4. Geoffrey Robertson QC has written of this process: ‘Many overoptimistic international lawyers argue that everything in the Universal Declaration is by now part of international law, but this is the sort of wishful thinking that has made international human rights law such a fatuous academic exercise. If human rights are to have the force of law in the twenty-first century, we must abandon these norms of the imagination (which guarantee sophisticated rights to hundreds of millions of women and children who have no hope of possessing them) and concentrate on consolidating, and above all enforcing, the elemental rules which have already ripened into rules of international law.’[[11]](#footnote-11)
5. The UK, as a permanent member of the security council, practised global UN diplomacy. It took comfort in constitutional dualism: we choose if and when to incorporate such international human rights. But this has led to the double problem, in the advanced world, after the 1960s, of: radical international politics being articulated by non-governmental organizations as simply the pursuit of ‘human rights’; and the domestic proponents of such international standards – like a fourth branch of government - politically reporting their state and government to unrepresentative monitoring bodies in New York and Geneva.
6. These human rights communities, I submit, have overreached themselves in the constitutions of functioning liberal democracies. This is especially the case with quangos. There is now an ideology of human rights, with multilingual impact, with many of the characteristics of an organized religion. It is no defence to state that this new morality – widely perceived as moralistic - , is deployed selflessly (and not for collective self advancement) in the service of good governance globally.
7. There have always been preachers and believers, but true liberty thrives on scepticism and aversion to statism, even (especially?) the 47-strong UN human rights council (2006 - ).

*‘Europe’*

1. Two, post-world-war-two regional state internationalism. The council of Europe was established in 1949. Partly, this was a contribution to the UN new world order. But it was mainly a west versus east body for the European continent.
2. The council of Europe agreed the 1950 convention for the protection of human rights and fundamental freedoms. The targets were fascism and communism. The UK led with the drafting (drawing on the unenumerated rights of the subject), and was the first member state to ratify in 1951. But the European court of human rights (‘ECtHR’) was not established, at Strasbourg, until 1959. It was in part a state versus state court, though this jurisdiction was to be used rarely. The UK had secured that the right of individual petition would be voluntary to contracting states, but, in 1965, Harold Wilson, without referring the matter to cabinet, accepted the person versus (any) state jurisdiction of Strasbourg. This is now a compulsory, and predominant, jurisdiction of the court.
3. Strasbourg, as a regional body, may be contrasted with the UN, morally leading the world. First, the latter’s enforcement mechanisms remain less than the ECtHR’s, despite Strasbourg’s doctrine of subsidiarity[[12]](#footnote-12). Second, while the council of Europe has also produced a range of international instruments, the human rights convention alone remains justiciable at Strasbourg. That is why Strasbourg is more significant (at least for 47 European states) than the global plurality of international human rights standards.
4. There is a second, more important, Europe, which, under the 2007 Lisbon treaty, has become the European Union (‘EU’). It now has 27 member states (within the council of Europe’s 47). Its project is European integration. This was initially economic, but the institutions embody wider governmental functions. The EU has a court of justice in Luxembourg (‘the ECJ’), which asserted the doctrine of the supremacy of EU law. And it also has the 2000 charter of fundamental rights (still underestimated), which now has legal effect in EU law.
5. The EU’s accession to the human rights convention may become a reverse takeover of the ECtHR. And, while the charter of fundamental rights applies only to EU competencies, member states may well follow it domestically in other areas. These two Europes – however they interact – are not going to go away, and there are no prospects of the UK withdrawing from either the council of Europe or the EU: that, however, is not to accept that nothing can be done in either context. I tend to the view that the fundamental charter, being a modernized version of the 1950 convention, and now part of European primary law, is the more important human rights text. And that the ECJ is already eclipsing Strasbourg with human rights jurisprudence rooted in a government context of European integration.

Argument Three: Strasbourg in Crisis

1. The human rights community has revered the ECtHR for several decades. During that time, the court has become sclerotic. And it is domestic UK judges, forced since 2000 to consider its jurisprudence, who have emerged as the most profound critics.
2. The ECtHR, which only got into its stride in the 1970s, became a victim of its own success. The demise of the European commission of human rights, as a result of the 1994 protocol no. 11 (1998), means there has been no fact finding worthy of the name. There is a growing body of case law, but no doctrine of precedent, which means that judgments (in an age of information technology), are increasingly lengthy. One reads a collective judge’s words processed by machines (and functionaries), but there appear to be fewer thoughtful dissents, individual or shared. Strasbourg is not a supreme court for the members states (like the ECJ), but a specialist human rights court, of first, and final, instance – which seems to be losing touch with civil society, in all its diversity, across the continent.
3. The attempted restructuring of the control machinery of the 1950 convention, which began long before 1994, foundered on the sole, Russian, veto to the 2004 protocol no. 14. Strasbourg became preoccupied with itself, always a danger for a court. The calibre, and election, of judges had been called into question, in 2003. There was the Woolf report of 2005. And a wise persons group reported to the council of ministers, in late 2006. In 2007, the backlog was over 103,000; nearly sixty per cent of the applications came from five countries: Russia, Romania, Turkey, Ukraine and Poland – all, except Turkey, post-communist entrants to the council of Europe. Protocol no. 14, which the council of Europe tried to implement behind the back of Russia[[13]](#footnote-13), was permitted belatedly to enter into force, on 1 June 2010. The backlog in 2011 has risen to 150,000.
4. The commission – following the coalition government’s articulation of the need to reform Strasbourg (which is not in the 20 May 2010 programme) – has correctly focussed on this question.[[14]](#footnote-14) The Interlaken declaration of 19 February 2010, under Swiss chairmanship, and the Izmir declaration of 27 April 2011, under Turkey, do not disguise the state of crisis for the court. The lesson for the UK, which will hold the chairmanship from November 2011 for six months, is surely: a domestic bill of rights, producing remedies nationally, in the name of subsidiarity, would be a very constructive contribution. And reform of the ECtHR, through the council of Europe, with the EU no doubt manoeuvring, would help as regards those UK cases which will continue to go to Strasbourg.[[15]](#footnote-15)
5. The reform of the ECtHR is on the council of Europe agenda. But this has spilt over into amending (in the name of modernization) the 1950 convention.[[16]](#footnote-16)

*The Judicial Critique*

1. Little attention has focussed on the growing domestic discontent with Strasbourg. It may be dated from 2009-10.[[17]](#footnote-17) There is no anti-human rights judicial conspiracy. But one case may come to be seen to be central. The following chronology (from the dying days of the labour government) helps establish the point:

* 19 March 2009 Lord Hoffman’s JSB annual lecture;
* 22 May 2009 court of appeal decides Horncastle;
* 9 December 2009 supreme court upholds Horncastle;
* 17 March 2010 lord chief justice’s JSB annual lecture.

1. I will briefly summarize the events of these twelve months. First, Lord Hoffman – a law lord from 1995 (and number two) on the eve of retirement, and seemingly out of the blue[[18]](#footnote-18) – publicly criticized, less the 1950 convention, and more the ECtHR, at the judicial studies board annual lecture for 2009.[[19]](#footnote-19)
2. Lord Hoffman relied upon Jeremy Bentham. He accused Strasbourg of trying to emulate the supreme court of the United States. Developing a theme of national human rights, and arguing for a stronger margin of appreciation doctrine, and scrapping the living instrument doctrine, Lord Hoffman called effectively, but without specification of the means, for the end of the right of individual petition to Strasbourg.[[20]](#footnote-20)
3. Subsequently, in writing the foreward to a Policy Exchange document – Michael Pinto-Duschinsky’s *Bringing Rights Back Home* (7 February 2011) - , Lord Hoffman endorsed the de-legitimizing of the Strasbourg court: ‘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…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) culminating, for the moment, in its decision that the UK is not entitled to have a law that convicted prisoners lose, among other freedoms, the right to vote.’ (p.7)
4. This was a reference to: Hirst v United Kingdom (No 2), decided by the grand chamber on 6 October 2005, after the UK effectively appealed. Strasbourg, by holding by twelve votes to five, that the UK had violated protocol 1/article 3, threw into question the blanket ban on sentenced prisoners voting from their cells. The case then went to the committee of ministers, for enforcement. There were also further decisions. On 10 February 2011, backbenchers in the house of commons were to vote, after a debate on the case, by 234 votes to 22, that they were ‘of the opinion that legislative decisions of this nature should be a matter for democratically-elected lawmakers…’.[[21]](#footnote-21)
5. This was UK elected representatives versus multinational human judges at Strasbourg.
6. Second, the court of appeal decision: *R v Horncastle* [2009] EWCA Crim 964 [2010] 2 WLR 50.
7. The issue was whether the inability to cross-examine a witness in a criminal trial (due to absence or death) meant that sole or decisive reliance upon such evidence amounted to a violation of article 6(3)(d). Strasbourg had said yes, in two UK cases, on 20 January 2009 – Al-Khawaja and Tahery v UK. (On 16 April 2009, the UK was to request referral to the grand chamber. This would not be done, until 1 March 2010, and the decision is still awaited.) On 24 March 2009, when a five-judge court of appeal heard the appeals of Horncastle and two other sentenced defendants (one of whom succeeded), it was argued that the UK court had to follow Al-Khawaja and Tahery.[[22]](#footnote-22) The court of appeal chose not to.[[23]](#footnote-23) And this after section 2(1) of the Human Rights Act 1998, and a number of cases suggesting domestic courts should follow Strasbourg decisions. But the court of appeal certified points of law of public importance, including whether a conviction, based upon such hearsay evidence, was necessarily unsafe. The court of appeal stressed the new statutory code regarding admissibility, in the Criminal Justice Act 2003.
8. Three, the further appeal. The house of lords heard the appeal on 7 and 8 July 2009, but it would be the supreme court which would decide the case on 9 December 2009: *R v Horncastle* [2009] UKSC 14 [2010] 2 WLR 47. It was a seven-member appellate committee. Significantly, it comprised: Lord Phillips (the first president of the supreme court); Lord Judge CJ (the lord chief justice); and Lord Neuberger MR (the master of the rolls). Lord Phillips gave the sole judgment. The supreme court upheld the court of appeal. And it declined to follow Al-Khawaja and Tahery. It also declined to follow: *SOS v AF (No 3)* [2009] UKHL 28 [2009] 3 WLR 74, decided on 10 June 2009 (even though it had turned also, at Strasbourg, on a sole and decisive rule as regards closed material in civil proceedings).[[24]](#footnote-24) The president of the supreme court: strongly criticized Strasbourg jurisprudence on fair criminal procedure; and held that the common law (in England) was superior, courts being able to consider hearsay evidence and, indeed, convict upon it solely or decisively: ‘The regime enacted by Parliament [wrote Lord Phillips PSC] contains safeguards that render the sole or decisive rule unnecessary…The continental procedure had not addressed that aspect of a fair trial that article 6(3)(d) was designed to ensure…The sole or decisive rule has been introduced into Strasbourg jurisprudence without discussion of the principle underlying it or full consideration of whether there was justification for imposing the rule as an overriding principle applicable equally to the continental and common law jurisdictions.’ (para 14)
9. This was open UK judicial defiance of Strasbourg. No doubt, the supreme court decision encouraged, and/or helped, the UK to get its referral to the grand chamber, on 1 March 2010. The fact that Strasbourg has not yet revealed the result of a hearing on 19 May 2010, may be indicative of more than backlog. The ECtHR is faced with an unenviable (from its point of view) decision: and, in November 2011, Sir Nicholas Bratza, the UK judge, becomes president of the court. It could affirm Al-Khawaja and Tahery, the most likely decision, but then have the supreme court of the UK resisting such a decision in extremely strong terms; or, if it were to back down, at least as regards the UK, it would be seen – across the continent – to have failed to sustain a general rule of criminal procedure across the member states of the council of Europe.
10. Four, the lord chief justice’s annual lecture to the judicial studies board, on 17 March 2010. This was a *tour d’horizon* of the art of judging, and the need for continual training. It seems to have been unscripted. Lord Judge CJ distinguished the ECJ and Strasbourg, as regards binding and non-binding decisions. But it was clear that he was alert to the political criticisms of Strasbourg. And, as a senior judge, was ready to downgrade ECtHR case law: ‘Naturally, the decisions there must command our respect…But I venture to suggest that that is not because we are bound to do so, even if the decision is that of the Grand Chamber, or because the [UK] Supreme Court is a court subordinate to the Strasbourg court, but because, having taken the Strasbourg decision into account and examined it, it will often follow that it is appropriate to do so. But it will not always be appropriate to do so. What I respectively suggest is that statute ensures that the final word does not rest with Strasbourg, but with our Supreme Court.’[[25]](#footnote-25)

Argument Four: the Labour Party’s Two Stages

1. On 19 November 1998, the Human Rights Act (‘HRA’) had received royal assent. It is customary to state that this statute incorporates[[26]](#footnote-26) the Strasbourg convention. This is not correct.
2. Before entry into force on 2 October 2000, the common law held that international agreements might have some domestic effect.[[27]](#footnote-27) That is why the long title of the HRA 1998 refers to giving ‘further effect’ to the rights and freedoms guaranteed under the convention. The Strasbourg convention remains a multilateral treaty in international law. It has not been transformed into a set of domestic rules of law.
3. This problem was addressed, from the first, when the labour party, from 1992, and in opposition, began to develop a human rights policy. Stage one – in the final policy - was to be the incorporation of the Strasbourg convention.[[28]](#footnote-28) A full domestic bill of rights was to constitute stage two.
4. An extremely useful volume on the antecedents of the HRA 1998 is: Robert Blackburn, *Towards a Constitutional Bill of Rights for the United Kingdom,* London 1999. The introduction deals with: ‘The Human Rights Act: The first step towards a constitutional Bill of Rights for the UK’ (pp.xxxiii-xxxix). Part 2, chapter 5 contains proposals for such a UK bill from: the institute for public policy research, from 1990; Liberty, in 1991; and a handful of individual advocates over a longer timescale (pp. 531-636).
5. The following documents, included in Blackburn, show the emergence of this (then uncontroversial) idea of two stages of human rights reform (even if incorporation of the Strasbourg convention eventually became the headline proposal):

* 1992 election manifesto: ‘radical constitutional reform’; ‘Our Charter of Rights [of individual legislative proposals], backed up by a complementary and democratically-enforced bill of rights, will establish in law the specific rights of every citizen.’ (pp.930-1)
* a front-bench commitment in parliament, 27 May 1993: ‘Incorporation will take place speedily under the next Labour Government and will be just a beginning. We shall then need to examine – perhaps by means of an all-party commission – a home-grown British Bill of Rights.’ (pp. 939-40; also, 940-2);
* 1993 party conference: incorporation of the convention, followed by a UK bill of rights, becomes party policy; ‘because it is recognised the Convention is inadequate and outdated, we propose an all-party commission be appointed to draft our own Bill of Rights and consider a more permanent form of entrenchment;’ (pp.942-51);
* 1997 election manifesto: ‘We will by statute incorporate the European Convention on Human Rights into UK law to bring those rights home and allow our people access to them in their national courts. The incorporation…will establish a floor, not a ceiling, for human rights. Parliament will remain free to enhance those rights, for example by a Freedom of Information Act.’ (p.960)

1. Labour party figures have not been consistent on the HRA 1998. On the one hand, some are defensive, if not proud, of their legislative initiative. On the other, former ministers, who were on the receiving end of human rights judgments, are more open to further thinking.
2. A strange, unthinking conservatism, however, has been articulated in surprising quarter. When David Cameron first mooted his big idea in 2006, it did not lead universally to legal creativity. Justice was suspicious. And so was Liberty.[[29]](#footnote-29) And they both set out to dampen enthusiasm for reform. The slogan became: defend the HRA 1998! Ultimately, their shared position became defensive (what of incorporating all other international human rights standards?). The basis of this, I believe, was simply the anti-tory instinct of many in the centre, and on the left, of the political spectrum. I submit that, if Justice and Liberty had engaged more constructively after 2006, the debate about human rights would be more advanced today.

Argument Five: Devolution in the UK

1. A totally unnecessary problem has been raised; namely, that the HRA 1998 now belongs also to the three devolved administrations in the UK. This is to misunderstand how our state operates.
2. The legislative precedent for the Scotland Act (‘SA’) 1998, the Northern Ireland Act (‘NIA’) 1998 and the Government of Wales Acts (‘GWA’) 1998 and 2006 is the Government of Ireland Act 1920, when Westminster legislated for a parliament in Dublin and a separate one in Belfast, both to be within the UK. The latter representative body, established in 1921, was effectively closed down in 1972, by act of the sovereign parliament. Freedom, once given, was taken away – and that remains the position.[[30]](#footnote-30) Sections 5 and 8 of the GOIA 1920 contained a human rights provision – religious equality – against discrimination by legislative act and executive action. And this has been followed, and extended, in the three main statutes governing devolution today.
3. The partition of Ireland in 1920 was an *ad hoc* constitutional decision. And so were the devolution settlements of 1998. The UK, pending the legal transfer of sovereignty to the people, a constituent assembly, and the creation of a federal state, remains a centralized state, with statutory local government and an intermediate layer of regional government.
4. The three principal constitutional features – relevant to a discussion of devolution – are: one, the doctrine of parliamentary sovereignty; two, a still uncodified constitution; and three, the indivisibility – in contrast to the monarchy from 1953 – of the Westminster parliament (as I put it). Thus, all the devolution legislation reserves to Westminster the right to enact laws for Scotland, Northern Ireland and Wales, even when those powers have been transferred.[[31]](#footnote-31)

*The Human Rights Aspects of Devolution*

1. These may be distinguished as: (i) legislative competence; (ii) entrenched enactments; (iii) incompatible executive actions; (iv) jurisdiction and devolution issues; (v) and official human rights bodies (including equality law).

(i) Legislative Competence.

1. This is provided for, as follows:
   * SA 1998 ss 29 & 30;
   * NIA 1998 ss 6 & 7;
   * GWA 2006 ss 94 & 95.

The three administrations are prohibited from legislating incompatibly with convention rights (as defined in the HRA 1998).

(ii) Entrenched Enactments.

1. This is provided for, as follows:
   * SA 1998 ss 29 & 30 (through sch 4);
   * NIA 1998 ss 6 & 7;
   * GWA 2006 ss 94 & 95 (through parts 2 & 3 of sch 5).

The HRA 1998 (like the European Communities Act 1972 and major aspects of the devolution acts) is entrenched in the three jurisdictions. Westminster imposes. The three administrations do not wield the HRA 1998 (and certainly not against central government).

(iii) Incompatible Executive Actions.

1. This is provided for, as follows:
   * SA 1998 s 57(2);
   * NIA 1998 s 24(1)(a);
   * GWA 2006 s 81.

No minister in Edinburgh, Belfast or Cardiff may act (including making subordinate legislation) incompatibly with convention rights.

(iv) Jurisdiction and Devolution Issues.

1. These are provided for, as follows:
   * SA 1998 ss 98 (through sch 6), 100[[32]](#footnote-32) & 103;
   * NIA 1998 s 79 (through sch 10) & 82;
   * GWA 2006 s 149 (through sch 9)[[33]](#footnote-33).

(v) Official Human Rights Bodies (including Equality Law).

1. This is provided for, as follows:
   * SA 1998 sch 5 section L2 (reserving equal opportunities);
   * NIA 1998 ss 68 to 78 (establishing a Northern Ireland human rights commission [‘NIHRC’] and an equality commission) plus no references to equality law in schs 2 & 3;
   * GWA 2006 no references to equality law in part 1 of sch 5.
2. Equality law is not devolved in Scotland and Wales (nor, of course, is human rights law). The separate treatment of Northern Ireland relates to its local anti-discrimination legislation (the ground of religious belief or political opinion), in the public, and then private, sector, from respectively 1973 and 1976.
3. The rest of the UK caught up institutionally, following the enactment of the Equality Act 2006, with the establishment of Trevor Phillips’s equality and human rights commission (in Manchester, London, Glasgow and Cardiff) in October 2007. But there is also a Scottish human rights commission, also in Glasgow (established under the Scottish parliament’s Scottish Commission for Human Rights Act 2006). There is no similar body in Wales, yet.
4. To conclude, the regional assemblies do not have a veto on the repeal of the HRA 1998. That is a matter solely for Westminster. If anything, the HRA 1998 – like the European Communities Act 1972 – is simply an imposition on them. The only point is that the HRA 1998 was to some extent agreed, and therefore any replacement should be negotiated with the devolved administrations – an unremarkable political proposition.[[34]](#footnote-34)

*What Are the Problems?*

1. Can the HRA 1998 be repealed, by Westminster? The answer is simply: yes.
2. Could the sovereign parliament enact a UK bill of rights and responsibilities? The answer is again: yes.
3. There would be one difference, however: under the devolution legislation, Edinburgh, Belfast and Cardiff share generally in the UK’s human rights, and other, international obligations[[35]](#footnote-35). This would not apply to a domestic instrument, but it would as regards the Strasbourg convention etc. (if it continued to bind the UK).
4. The political problem in Scotland, following the 2011 parliamentary elections, is: Alex Salmond objects to the HRA 1998 generally as law from London, and to the particular fact that his criminal law – as a devolution issue – now goes to the supreme court because of it[[36]](#footnote-36); while not strong on the human rights and equality agendas, the Scottish nationalists would see virtue in Scotland succeeding to the Strasbourg convention and separate membership of the council of Europe.
5. The political problem in Northern Ireland is lessened by the fact that the majority, unionist community prefers human rights legislation from London. But it is constituted by the NIHRC’s perverse interpretation of the Belfast Agreement as requiring an all-singing, all-dancing local bill of rights (based upon its so-called advice to the secretary of state). Having failed in this extraordinary enterprise, the human rights community defends the HRA 1998 to prevent a UK bill of rights and responsibilities substituting.

Argument Six: Configuring a UK Bill of Rights and Responsibilities

1. I wrote a piece on this topic for the June 2010 *Barrister* magazine*.* Here, I expand on parts of it. Configuring a UK bill of rights and responsibilities, once there is political agreement, is largely a technical exercise. However, it is worth addressing aspects, because legal advisors, and/or parliamentary counsel, can often crack an intellectual problem with finesse. The HRA 1998, as has often been remarked, was drafted with great skill. It sets a standard for those who aspire to now go further on the human rights front.

## Form

1. The issue of form is not controversial. A UK bill would be a new act of parliament. And partial entrenchments are not inimical to the doctrine of parliamentary sovereignty.
2. The (first) bill of rights of 1688-89 could be re-enacted, with or without further amendment.

## Preamble

1. A preamble (having interpretative effect) should distinguish such a bill. This state’s long history has been globally inspirational. The preamble could embody a statement of modern values for the four countries. International human rights standards will have to be addressed. And the thorny matter of rights and responsibilities needs to be explained.

## Content

The Rights.

1. The issue of content is more complicated. First, the rights. These could be taken over simply from the Strasbourg convention, through the HRA 1998. I favour modernization, and possibly the adaptation of the 2000 charter of fundamental rights (for non-EU competencies). But a civilized democracy needs to grow its own rights. There is an inspirational canon of recent commonwealth bills – Canada, New Zealand, South Africa, Australia and Victoria - , plus the overlooked dependency, Gibraltar.
2. The shaping of individual rights would be political: why not the EU charter’s absolute right to life?; article 3 remains problematic, within EU law; should article 8 not be unpacked?; how can it be better reconciled with article 10?; why not protocol no. 12, and a genuine equality provision?
3. Personally, I regret that UK courts have not developed the indirect horizontal effect, perceived by some in section 6(1) & (3)(a) of the HRA 1998. If A kills B, why do the latter’s loved ones have to pursue ‘the state’ for violating article 2 through inadequate protection (though Morgan J’s Northern Ireland judgment, in the Omagh relatives’ action against the Real IRA, is an important private-law precedent[[37]](#footnote-37)).

## The Mechanisms.

1. Second, the mechanisms. These could be taken over from the HRA 1998, and improved.
2. The section 2 duty to ‘take into account’ Strasbourg jurisprudence, has been blown apart (as noted) by the *Horncastle* decision on article 6 in the supreme court[[38]](#footnote-38). Query the section 3 duty to read down legislation permitting the striking down of delegated legislation? The section 4 declaration of incompatibility could be amended to permit the staying of proceedings, thereby reducing UK cases going to Strasbourg. And remedial orders under section 10 should be less ministerial and more parliamentary.

## The Responsibilities.

1. Third, the responsibilities. Human rights have always implied responsibilities. The principal, or only, responsibility should be support for the rule of law, and this could be made express. I personally regret that the jurisprudence on article 17 stopped developing. Responsibilities could sound in no human rights damages, as they did in the Gibraltar IRA case: *McCann v UK* (1995) 21 EHRR 97.

**Argument Seven: a Preamble Drafting Competition?**

1. One may enter the lists, for or against a UK bill of rights and responsibilities, without a full text. But, as observed above, putting a few words on paper may capture a point much better than an exposition.
2. Architects, with or without work, frequently enter competitions, at home or abroad, to design a prestigious new public building. The persons commissioning get a great deal for nothing, and often if not always a building they could not have imagined or described.
3. Lawyers, and even constitutionalists, could take a leaf out of this profession’s book. Above, I referred to the preamble of a UK bill of rights and responsibilities as performing a number of functions.
4. My modest proposal to the commission is as follows: as part of the process of public consultation, it should announce a national drafting competition for such a preamble. A word limit – 750 or 1,500 – should be decided upon. No prize need be given, and there does not even have to be a winner.
5. The advantages are considerable:

* a great many points could be articulated in such a work of legal art;
* the diversity of opinion – from back to the unenumerated rights of the subject in the common law (pre 2000) to the incorporation of all international human rights standards – would be revealed;
* tricky problems, such as parliamentary sovereignty, could be solved by thin salami slicing; and (not least)
* lawyers, practising and academic, would be challenged to communicate, to a now sceptical if not hostile public, what they mean really by human rights.

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1. Barrister, 33 Bedford Row. Also barrister in Northern Ireland. Independent member, David Cameron’s commission, 2007-10. Website: [www.austenmorgan.com](http://www.austenmorgan.com). [↑](#footnote-ref-1)
2. Discussion paper, *Do we need a UK Bill of Rights?,* para 5. [↑](#footnote-ref-2)
3. *Hamilton v Al Fayed* [1999] 1 WLR 1569 CA; *Boodram v Baptiste* [1999] 1 WLR 1709 PC; *Buchanan v Jennings (AG of New Zealand intervening)* [2004] 3 WLR 1163 PC (all concerning clause 9, on the relationship between parliament and the courts). [↑](#footnote-ref-3)
4. Arguably, this might change if the duke and duchess of Cambridge produced, as a first born, a girl. [↑](#footnote-ref-4)
5. The draft cabinet manual of December 2010, published subsequently by the cabinet office, is not a constitution. [↑](#footnote-ref-5)
6. ‘The Anarchical Fallacies’, in *The Works of Jeremy Bentham,* ed. John Bowring, London 1838 – 1842, vol 2, p. X. [↑](#footnote-ref-6)
7. Dicey should have been concerned, more with the USA (with a written constitution and a bill of rights and still within the common law world), and less with the continent. [↑](#footnote-ref-7)
8. Michel Foucault, *Discipline and Punish: the birth of the prison*, London 1979. [↑](#footnote-ref-8)
9. Article 5 of the déclaration reads: ‘Law can only prohibit such actions as are hurtful to society. Nothing may be prevented which is not forbidden by law, and no one may be forced to do anything not provided for by law.’ [↑](#footnote-ref-9)
10. The so-called international bill of human rights comprises the 1948 text plus the two 1966 ones. [↑](#footnote-ref-10)
11. *Crimes against Humanity: the struggle for global justice,* London 2000, pp. 81-2. [↑](#footnote-ref-11)
12. Belgian Linguistic Case, 23 July 1968, para B10; *Handyside v UK* (1976) 1 EHRR 737, para 48. Subsidiarity, a constitutional concept, is distinct from margin of appreciation, a category of jurisprudence. [↑](#footnote-ref-12)
13. Through the so-called protocol no. 14*bis.* [↑](#footnote-ref-13)
14. *Do We Need a UK Bill of Rights?,* August 2011, para 5. [↑](#footnote-ref-14)
15. Kenneth Clarke QC MP, the lord chancellor and justice secretary, said at Izmir: ‘…the British government thinks that we need to reaffirm that it is individual States and their courts which have primary responsibility for implementing the Convention and granting effective remedies for any violation. In this way, we ensure that our citizens can take full ownership of their rights.’ (undated statement) [↑](#footnote-ref-15)
16. Geoffrey Robertson QC, ‘Why We Need a British Bill of Rights’, *Standpoint,* January – February 2010; Lord Carlile, *Sun,* 7 February 2011. [↑](#footnote-ref-16)
17. Though there is increasing common law scepticism about Strasbourg jurisprudence in the law reports of the 2000s. [↑](#footnote-ref-17)
18. I suspect hearing the following case on 2 to 5 and 9 March 2009 inspired the content of the lecture: *SOS v AF (No 3)* [2009] UKHL 28 [2009] 3 WLR 74, 101-2 on whether the house of lords had to follow a Strasbourg grand chamber decision (A v UK, *The Times,* 20 February 2009). [↑](#footnote-ref-18)
19. ‘The Universality of Human Rights’, JSB annual lecture, 19 March 2009 (original typescript). [↑](#footnote-ref-19)
20. ‘It is therefore hardly surprising that to the people of the United Kingdom, this judicial body does not enjoy the constitutional legitimacy which the people of the United States accord to their Supreme Court. This is not an expression of populist Euroscepticism. Whatever one may say about the wisdom or even correctness of decisions of the Court of Justice in Luxembourg, no one can criticise their legitimacy in laying down uniform rules for the European Union in those areas which fall within the scope of the Treaty. But the Convention does not give the Strasbourg court equivalent legitimacy. As the case law shows, there is virtually no aspect of our legal system, from land law to social security to torts to consumer contracts, which is not arguably touched at some point by human rights. But we have not surrendered our sovereignty over all these matters. We remain an independent nation with its own legal system, evolved over centuries of constitutional struggle and pragmatic change. I do not suggest belief that the United Kingdom’s legal system is perfect but I do argue that detailed decisions about how it could be improved should be made in London, either by our democratic institutions or by judicial bodies which, like the Supreme Court of the United States, are integral with our own society and respected as such.’ (para 38) [↑](#footnote-ref-20)
21. *Hansard,* Vol.523, cols. 493 to 586. [↑](#footnote-ref-21)
22. Interestingly, Lord Hoffman has discussed the Strasbourg decision five days previously (para 30). [↑](#footnote-ref-22)
23. *SOS v AF (No 3)* [2009] UKHL 28 [2009] 3 WLR 74 was not to be decided until 10 June 2009. [↑](#footnote-ref-23)
24. This case had applied A v UK, ECtHR (grand chamber), *The Times,* 20 February 2009). Lord Hoffman even introduced the idea of the UK’s international obligations, as requiring Strasbourg jurisprudence to be followed strictly. [↑](#footnote-ref-24)
25. Transcript lecture, 17 March 2010, judicial communications office. [↑](#footnote-ref-25)
26. Incorporation used to refer to customary international law. The better word for treaties is transformation of international rules into domestic ones. [↑](#footnote-ref-26)
27. *Salomon v Commissioners of Customs & Excise* [1967] 2 QB 116: the presumption that parliament, unless it states otherwise, will not enact statute law, which conflicts with international law (and obligations entered into by the executive). [↑](#footnote-ref-27)
28. A term first used by the party in 1976 (when labour formed the government): human rights sub-committee report recommending a statutory charter of human rights, February 1976). [↑](#footnote-ref-28)
29. Shami Chakrabarti *et al.*, *Common Sense:reflections on the human rights act,* London 2010. [↑](#footnote-ref-29)
30. This is an allusion to Lord Denning MR’s dictum, in *Blackburn v AG* [1971] 1 WLR 1037, that ‘freedom once given cannot be taken away’. He was referring to the Statute of Westminster 1931. I submit that our internal devolution legislation does not follow this principle. [↑](#footnote-ref-30)
31. SA 1998 s 28(7); NIA 1998 s 5(6); and GWA 2006 s 93(5). [↑](#footnote-ref-31)
32. This is singular to Scotland. [↑](#footnote-ref-32)
33. Wales has no equivalent of SA 1998 s 103 and NIA 1998 s 82, on the jurisdiction of the judicial committee of the privy council. [↑](#footnote-ref-33)
34. However, in early 2010, Justice, inspired by the local bill of rights lobby in Northern Ireland, and a similar separatism in Scotland, produced a report suggesting that a tory government could not repeal the HRA 1998, because sovereignty somehow had been shared with Edinburgh, Belfast and Cardiff. See Austen Morgan, ‘No Devolving Human Rights, *Guardian,* 24 February 2010 (available on: [www.austenmorgan.com](http://www.austenmorgan.com) (legal writing page)). [↑](#footnote-ref-34)
35. SA 1998 sch 5 part 1 para 7; NIA 1998 sch 2 para 3; and GWA 2006 sch 5. [↑](#footnote-ref-35)
36. Under the acts of union, criminal cases finished in Scotland. But the SA 1998 entrenched the HRA 1998 (s 29(2)(c)), and made Scottish ministers liable under the HRA 1998 (s 57(2)). Somerville v Scottish Ministers [2007] UKHL 44 is authority for human rights challenges to Scottish criminal justice by way of devolution issues. The case concerned the absent time limit in SA 1998 s 100 (surely an unnecessary section originally), when there is a one-year limitation under the HRA 1998. The Scotland Act 1998 (Modification of Schedule 4) Order 2009, SI 2009/1380, gave the Scottish Parliament power to amend s 100 of the SA 1998 (hitherto also entrenched). The explanatory notes to the SA 1998 suggest that the time limit point was simply overlooked! The Scottish parliament has now acted: Convention Rights Proceedings (Amendment) (Scotland) Act 2009. Somerville had been referred to the Calman commission on Scottish devolution: *Serving Scotland Better: Scotland and the United Kingdom in the 21th Century,* final report, June 2009, paras 5.30 to 5.7. This, of course, was an anti-independence, or unionist, project. Calman neither investigated what had led to Somerville (I say an unnecessary s 100), nor reported on the risk of future HRA 1998 cases causing Edinburgh/London difficulties. [↑](#footnote-ref-36)
37. Breslin v McKenna [2009] NIQB 50. The precedent is unaffected by the partly successful appeal. [↑](#footnote-ref-37)
38. *R v Horncastle* [2009] UKHL 14 [2010] 2 WLR 47. [↑](#footnote-ref-38)