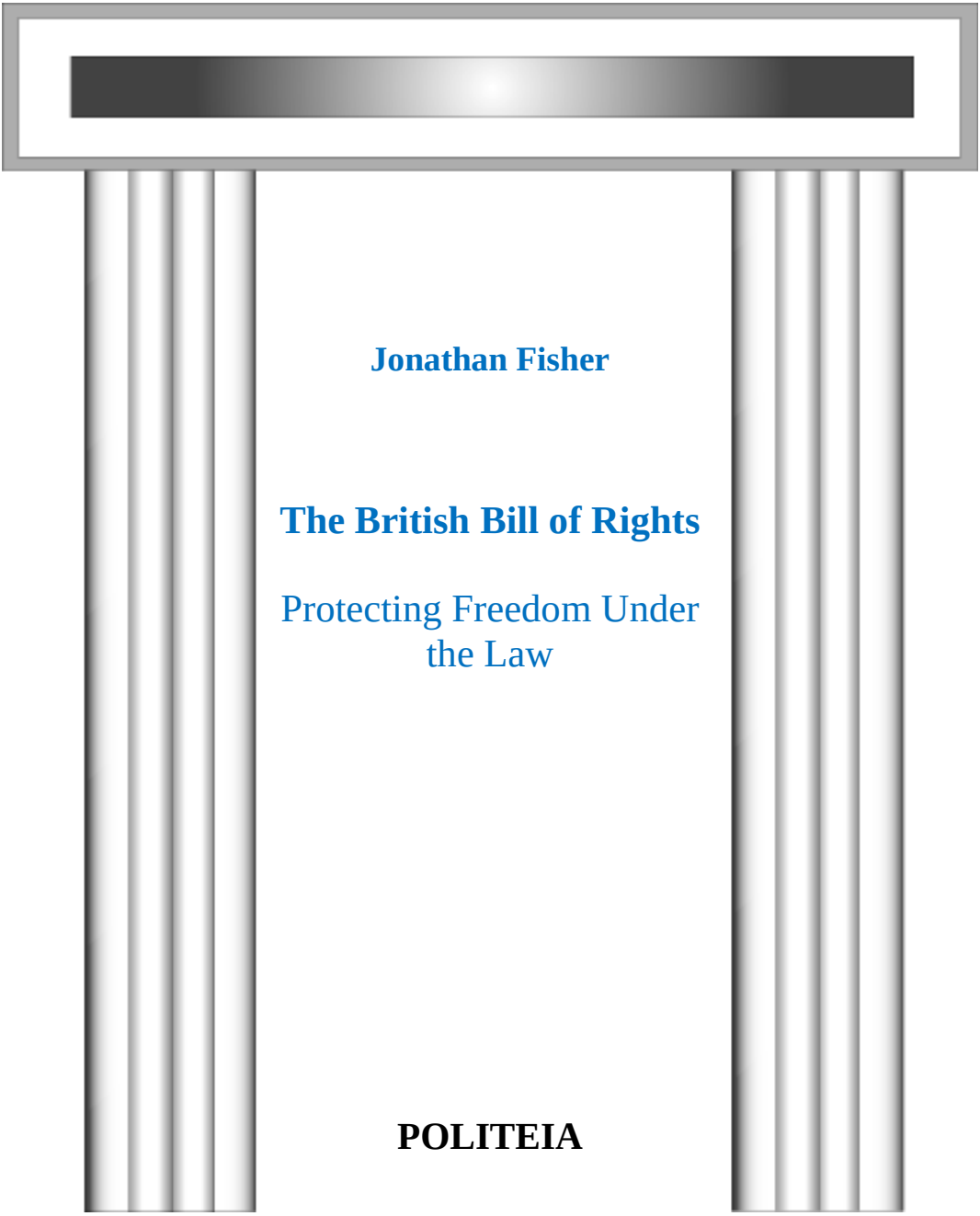


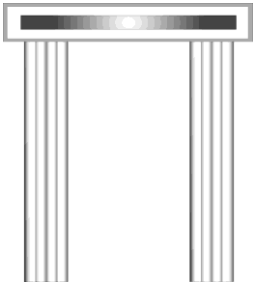
Jonathan Fisher

The British Bill of Rights

Protecting Freedom Under the Law

POLITEIA

A FORUM FOR SOCIAL AND ECONOMIC THINKING



POLITEIA

A Forum for Social and Economic Thinking

Politeia commissions and publishes discussions by specialists about social and economic ideas and policies. It aims to encourage public discussion on the relationship between the state and the people. Its aim is not to influence people to support any given political party, candidates for election, or position in a referendum, but to inform public discussion of policy.

The forum is independently funded, and the publications do not express a corporate opinion, but the views of their individual authors.

www.politeia.co.uk

The British Bill of Rights

Protecting Freedom Under the Law

Jonathan Fisher

POLITEIA

2015

First published in 2015
by
Politeia
33 Catherine Place
London SW1E 6DY
Tel. 0207 799 5034

E-mail: info@politeia.co.uk
Website: www.politeia.co.uk

ISBN 978-0-9926340-5-6

Cover design by John Marenbon

Politeia gratefully acknowledges support for this publication from

Foundation for Social and Economic Thinking (FSET)

Printed in Great Britain by:
Plan – IT Reprographics
Atlas House
Cambridge Place
Hills Road
Cambridge CB2 1NS

THE AUTHOR

Jonathan Fisher QC is a practising barrister at Devereux Chambers in the Temple and a Visiting Professor in Practice at the London School of Economics. He served as one of the Commissioners on the Bill of Rights Commission in 2011-2012.

CONTENTS

Foreword
Sheila Lawlor

In the run-up to the general election the Conservative Party promised to replace the Human Rights Act (1998) with a British Bill of Rights if it were returned to government. This followed the 2011-2 Commission on a Bill of Rights, which by a majority of votes recommended such a course. A lively discussion about its implications ensued in the profession, amongst parliamentarians and in the press. This year, the electorate added its voice for change in the 2015 May election.

The government will very shortly start the formal consultation on its draft proposals for a Bill due to pass into law during the current Parliament. To mark and contribute to the process, Politeia has launched a new series, *The British Bill of Rights - Protecting Freedom under The Law* in the course of which leading members of the profession and parliamentarians will consider the issues raised.

One political question will be how best to frame the measure so as to win the support of some for whom the current arrangements appear preferable to a British Bill. How can a British Bill of Rights be drawn up to inspire confidence among those who have reservations about the proposal while meeting the desire for change amongst those who favour such a course?

Other questions already the subject of intense discussion amongst the profession touch on the future status of the Convention in this country, its relationship to a British Bill of Rights and the future role of the European courts.

Should Britain stay within, or leave, the European Convention on Human Rights? Would the Convention, a document drawn up for post-war Europe and signed in 1950, be consistent with the arrangements proposed today for Britain under a British Bill reflecting the common law?

Should the Bill of Rights seek to build on the current Convention Rights, themselves incorporated into domestic law by the Human Rights Act? Or should it start again from first principles? Is there a case for increasing the protections now afforded in the Human Rights Act, whether to reflect both

Britain's traditional liberties or to accommodate the changes in law of recent decades?

What should the relationship be between the Strasbourg and Luxembourg Courts and the Courts of England, Wales and Scotland under the future Bill of Rights? Which should be the ultimate arbiter of British rights?

I am very pleased that the distinguished QC, Jonathan Fisher will launch Politeia's series by exploring some of these matters and contributing to the policy discussions and consultation. He will be followed by other contributors who will bring their specialist knowledge to the questions of policy prompted by the proposals for a British Bill of Rights.

Sheila Lawlor, Director.

Politeia.
November 2015

I
Introduction*

The Conservative Party Manifesto for the 2015 election contained a clear commitment for the party, if elected to government, to 'scrap the Human Rights Act and introduce a British Bill of Rights'.[1] The Manifesto also promised that 'This will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK'.

Plans are progressing to implement the commitment, and the Justice minister, Dominic Raab MP, told the House of Commons in September that the Government would bring forward proposals in the autumn. The Government, said Mr Raab, wanted to restore some balance to our human rights regime, and that is what a Bill of Rights will achieve.[2]

This paper aims to contribute to the discussions about how detailed policy can best be framed as the Bill is prepared by reflecting on a number of questions:

- What is the best approach for tackling the problems associated with the repeal of the Human Right Act 1998?
- Whether the Conservative Government should replicate the European Convention on Human Rights or develop a bespoke Bill of Rights relevant to a modern Britain?
- How the relationship between a British Bill of Rights, the European Court of Human Rights in Strasbourg, and the European Court of Justice will work.

* Jonathan Fisher is writing in a personal capacity as a practising barrister and not on behalf of any political party, or any part of the government, or any organisation or society.

[1] Conservative Party manifesto 2015, pg 60.
[2] Hansard, House of Commons Debates, 8 Sept 2015, cols 206 to 208.

The European machinery – the problems

Does the UK need a Bill of Rights? Is there a problem with the *status quo* and the Human Rights Act 1998 which needs to be solved?

First, the evidence is that British people do not feel a sense of ownership towards the European Convention on Human Rights. Opinion surveys have regularly borne this out.[3] As Lord Lester, one of the architects of the Human Rights Act 1998 noted in his work on the Commission on the Bill of Rights, the present arrangements do not command widespread public confidence. There was a majority recommendation from the Commission by 7 to 2 that the UK should move towards a British Bill of Rights.

Secondly, there is justified concern that the European Court of Human Rights has exercised its jurisdiction too widely, to create rights which the drafters of the European Convention had not intended to establish.

The accusation is one of rights inflation, rather than a complaint about the necessary albeit limited application of the 'living instrument' doctrine as a tool of Treaty interpretation. For example, in the case of prisoner voting the existence of a right which the signatories of the Convention had not intended to be recognised was judicially established *ex nihilo.*

A British Bill of Rights addresses both problems. A domestic instrument which reflects Britain's legal and historical heritage, culture and contemporary values will, if properly drafted, give the people of Britain a document in respect of which they can feel a sense of ownership and pride. This would convert the negative discourse into something positive.

A domestic Bill of Rights would also assist the UK in its relationship with the European Court of Human Rights in Strasbourg and the European Court of Justice in Luxembourg.

[3] See You Gov / ITV survey 23 – 24 May 2011; YouGov /Sunday Times survey 29 – 30 September 2011; You Gov / Sunday Times survey 9 – 10 July 2013; and You Gov / Sunday Times survey 17 – 18 July 2014.

The Courts are obliged to apply principles of subsidiarity when deciding whether or not to accept cases for hearing, and during the hearing they are required to apply a margin of appreciation when assessing whether or not a signatory or Member State has acted in breach of the Convention or Charter of Fundamental Rights. In both respects the UK's position will be stronger if there is a domestic Bill of Rights to which the UK can refer when defending its position before both Courts.

A bespoke Bill – British values and old rights

This leads to another critical aspect of the question on which ministers in the Justice Department will be considering.

Should the Conservative Government replicate the European Convention on Human Rights or develop a bespoke Bill of Rights relevant to a modern Britain?

Amongst the legal profession and beyond, there are differing perspectives. In my view, the government should seize the opportunity to present a bespoke instrument which fully reflects the fundamental freedoms and liberties which have been won for the British people from the time of Magna Carta onwards. The language should be modern and clear, and it should reflect the values of people in Britain today, values which should present little difficulty in summarising. One official body, Ofsted, has come up with a good answer for our school children, which I cannot improve. Fundamental British values are democracy, the rule of law, individual liberty, mutual respect for and tolerance of those with different faiths and beliefs, and for those without faith.

It is somewhat peculiar to suggest that the text of the European Convention on Human Rights is an instrument which adequately reflects the UK's attachment to fundamental freedoms and its contemporary values. The text was drafted in the aftermath of the Second World War, to entrench democratic values on a ravaged continent where democracy and liberty had been abandoned. The drafting style resembles a continental code rather than a re-statement of common law liberties, and this is no surprise because the text of the European Convention was drafted with Europe rather than the UK in mind even though many involved in its conception included distinguished lawyers from Britain who sought to extend to the new convention the principles which lay at the heart of our own justice system.

Nonetheless we see today the disconnection between the text of the European Convention and Britain's common law liberties, a disconnection visible at a glance.

Where, for example, does the European Convention refer to the pivotal British liberty which declares the rights of our politicians to debate freely in our sovereign Parliament in Westminster, perhaps the most important right of all? It does not – unsurprising perhaps, because the European Convention on Human Rights was an instrument which was not drafted with the protection of British liberties in mind.

Or take the fundamental right of an Englishman to be tried by jury in a case where he is alleged to have committed a serious criminal offence, a right recognised in the common law of England for centuries. Jurors have been imprisoned to secure the right to return independent verdicts, irrespective of a judge's direction to convict the defendant who is standing trial (*Bushell's Case* [1670] 84 ER 1123). A more powerful civil liberty could not be envisaged. Even if a jury acquits a defendant perversely contrary to the weight of the evidence, there is nothing the Court of Appeal can do (*R v Wang* [2005] UKHL 9). Yet, the European Convention is silent on this point, perhaps because this is not a right which is shared across Europe. However, it is highly pertinent for the UK.

Then there is the question of the writ of *habeas corpus*, the fundamental liberty to be brought before a judge so that the sufficiency of evidence supporting arrest and pre-conviction detention can be assessed by a judge who exercises jurisdiction in the country in which the arrest and detention is taking place.

Although Article 5 of the European Convention contains a number of safeguards for the liberty of the subject, it does not guarantee the ability to present a writ of habeas corpus.

Other fundamental common law rights relating to due process, such as the right to silence, the right to claim the privilege against self-incrimination and the legal professional privilege, are not spelt out in the text of Article 6 of the European Convention. The European Court of Human Rights decided that the provisions of Article 6, guaranteeing the right to a fair trial, protect these rights (ie. *Funke v France* (1993) 16 EHRR 297, *O'Halloran and Francis v the United Kingdom* (2008) 46 EHRR 21 and *Saunders v the*

United Kingdom [1996] ECHR 65 on the right to silence), but this falls short of spelling out the respective rights.

Then, there is the concern that the European Convention on Human Rights has provided an opportunity for Judges of the European Court to pare back our common law rights. In a withering attack on the text of the European Convention, Geoffrey Robertson QC has described the language used in the European Convention as 'weasel words' which damage basic British rights. Writing in *Standpoint*, he says:

> 'Take the "open justice" principle, the rule that justice must be seen in order to be done. As Bentham put it, 'it keeps the Judge, while trying, under trial'. First articulated by 'freeborn John' Lilburne when put on trial by Cromwell in 1649, it was given definitive shape by Lord Halsbury in the great case of *Scott v Scott* in 1913: "Every court in the land is open to every subject of the King". And so it was, until the European Convention imposed by the 1998 Human Rights Act began to take hold, with its myriad of exceptions. It says "the press and public may be excluded from all or part of a trial in the interests of morals, public order … or where the protection of the private life of the parties so requires …" '.[4]

Consistent with the common law approach to open justice, the exceptions should be limited to cases where a closed hearing is necessary to protect the lives of witnesses or others or to protect national security. The age of the super-injunction should be severely curtailed, if not drawn to a close.

There is therefore, good reason for the Ministry of Justice is to be bold in conceiving and preparing the British Bill of Rights. It must be compatible with the European Convention on Human Rights, but its terms should not be replicated merely because it is the simplest or most expedient short-term solution. A re-badged version of the European Convention on Human Rights would ignore the deficiencies and would not engage the fundamental concern that British people do not feel ownership of the instrument promoted by the Blair Government to protect them. Re-labelling of the European Convention's terms, by changing the language from Articles to Sections or Clauses, with a tweak here or there to the textual

[4] Geoffrey Robertson, 'Why we need a British Bill of Rights', *Standpoint*, Jan/Feb, 2010.

substance in order to cover an unpalatable European Court decision would not be the best way forward.

New rights ...?

Some additional rights, those which people in this country can readily recognise and enthusiastically own, are also worthy of consideration.

For example in recent years, the UK has witnessed the growth of administrative penalties and a significant expansion of regulatory systems. There are significant advantages to an alternative quasi-judicial process which avoids significant court costs and offers speedy resolution, but there is a risk of injustice to the citizen. Protection against abuse could be recognised in a provision which stipulates that no person shall be penalised by way of an administrative penalty where the behaviour involves dishonest or violent conduct. A protective right might also provide that no administrative penalty shall be imposed in circumstances where the amount of the penalty exceeds 20 per cent of a person's (individual or corporate) income in any one year.

Or, as the Government considers privacy issues and the new draft Investigatory Powers Bill, the problems associated with the commoditisation of personal data come into focus. Along with a right to privacy, in addition to the primary legislation the Government may wish to consider recognition for the British people of a broader right to data protection. Although these rights must, of course, be subject to exceptions so that the country is kept safe, a British Bill of Rights should take account of the age of technology and safeguard everyday people from new challenges posed to data protection by Government and corporate interests alike. In this context, there is the associated question of whether a British Bill of Rights ought to recognise that State-invasive powers should not be exercised outside of a statutory framework and in the absence of judicial warrant. My personal view is that it should.

The rights to equality and freedom from discrimination, already enshrined in the Equality Act 2010, would need to be included in a British Bill of Rights, and some thought could be given to the inclusion of environmental rights, such as the right to a clean environment and to control on pollution levels.

These thoughts as to recognition of potential new rights are by no means exhaustive. In recalibrating the balance between rights and responsibilities, the articulation of Britain's civil libertarian credentials should not go by the board.

... and responsibilities?

Alongside the recognition of some new fundamental rights, consideration should be given to the tri-partite balance struck between the exercise of rights, the broader interests of society and the place of the individual within society.[5]

It is surely completely unacceptable to contemplate that we should allow any right contained in a new Bill of Rights to be used by an individual or a group of individuals to engage in any action which is directed at undermining the very rights and freedoms which a British Bill of Rights sets out to protect. There is no right to commit or plan treason here or abroad, there is no right to perpetrate violence on the streets of Britain's cities and in the countryside, and there is no right to attack Her Majesty's Armed Services in the name of distorted political or religious ideology. The UK must not allow a British Bill of Rights to be used to subvert the British way of life, and a Bill of Rights should say so.

All persons present in the UK have a duty to obey the law, and to be subject to such limitations imposed by law as are necessary for securing the recognition of the rights and freedoms and freedoms of others, and a British Bill of Rights should say so.

Most people, irrespective of political leaning, race or religion, have little difficulty uniting around a belief in civic responsibility which spawns social cohesion and harmony. The role of government in enabling a strong and considerate civil society should be reflected in the language of a British Bill of Rights.

The values of such a society can be articulated in recitals to the Bill of Rights. Whilst these would be declaratory and not enforceable duties in a Court of Law the balance between individual civil rights and civil

[5] See Fisher, 'A British Bill of Rights & Obligations' (2006) Conservative Liberty Forum.

responsibilities needs to be recalibrated so that the undeserving are not able to benefit from rights which are intended to protect the vulnerable and the less fortunate.

The idea that a person with a good cause of action may be deprived of his legal remedy on the grounds of his poor conduct has formed part of English jurisprudence for centuries. It is trite (or undisputed) law that a contracting party is not able to specifically enforce a contract where he has acted in an unconscionable fashion.

The most famous manifestation of this principle is summarised by the maxim that a person must seek the assistance of the court 'with clean hands'. In recent times, this historical principle has been woven into the expanding jurisdiction of the courts to review administrative action.

There is no reason why this line of reasoning should not be applied by the courts in the context of civil rights. A judicial discretion to withhold a remedy in appropriate cases where an applicant has failed to discharge his own responsibilities, including his responsibility to obey the law or to respect the rights of others, should be written into a British Bill of Rights.

This is not to say that recognition of absolute rights such as the right not to be tortured or subjected to cruel punishment can be judicially withheld. But it is to say, for example, that in a deportation case an applicant's criminal lifestyle can be taken into account by a court when determining whether the applicant's right to a family life is fully engaged.

Socio-economic rights

In so far as the values of society are reflected in socio-economic rights included in the European Convention, these rights should be replicated in a British Bill of Rights. If omitted, the British Bill of Rights would be insufficiently compatible with the European Convention, and this would precipitate difficulties with the European Union. It would also catalyse serious domestic difficulties (see below p18).

More fundamentally, the UK Bill of Rights needs to command respect across the political spectrum and there may be reason therefore to include those socio-economic rights which already appear in the European Convention in a domestic instrument.

That said, rights inflation should be avoided. Many human rights proponents view socio-economic rights as a tool to effect social change and wealth redistribution.

Whilst notions of fairness, justice and equality of opportunity are cherished by all, not everybody shares the same enthusiasm for expansion of socio-economic rights. Some believe indeed that too much reliance on the State can destroy aspiration. A government which seeks to create opportunities for people to help themselves and avoid dependency traps is much to be preferred.

In so far as the baseline is concerned, the substance of socio-economic rights, such as issues concerning health, education and welfare, are often the subject of primary legislation in any event.

Were socio-economic rights to be drawn more widely than as they appear in the Convention, a determination of whether such a right has been infringed would only draw the judiciary into the political arena, as issues of proportionality and allocation of economic resources come into the frame.

Now, one of the concerns regarding the establishment of a British Bill of Rights relates to its potential compatibility with the European Court of Human Rights in Strasbourg and the European Court of Justice in Luxembourg.

Far from being problematic, the establishment of a British Bill of Rights will be extremely useful in Europe. It is not a silver bullet, and it will not be determinative of any issue brought before either of the courts. But there are a number of European cases which demonstrate the influence afforded by the courts to an instrument which reflects national values and has an impact on the application of the margin of appreciation.

European Court of Human Rights (ECtHR)

In *Sahin v Turkey* [2004] ECHR 299, a Turkish medical student contended that Turkey's headscarf ban violated her rights and freedoms under Articles 8, 9, 10 and 14 of the European Convention on Human Rights. By a majority, in 2005, the European Court Grand Chamber held that it did not. Considering that a clear margin of appreciation was afforded to States in the context of religious regulation, the Court placed heavy reliance on the Turkish Constitution in determining the precise margin to be applied (paragraph [29]). Relevant constitutional provisions identified by the Strasbourg Court included Article 2 providing that Turkey is 'a democratic, secular and social State based on the rule of law, respectful of human rights', Article 10 providing for equality before the law and Article 24 providing for freedom of belief and prohibiting compelled religious participation. The Court traced the development of secularism in Turkey from the Ottoman era, regarding it as a key principle underpinning modern Turkish society (paragraph [30]). Accordingly, this value and others reflected in the Turkish Constitution had a marked bearing on the margin of appreciation afforded to Turkey.

More recently, in *S.A.S v France* [2014] ECHR 695, the applicant claimed in the ECtHR that France's ban of full-face veils in public places breached her rights under Articles 3, 8, 9, 10, 11 and 14 of the Convention. Applying a wide margin of appreciation, the Strasbourg Court found that the case fell

within its scope owing to the French value of '*le vivre ensemble*' (living together). The Court considered that it 'has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question' and because 'in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight' (paragraph [15]). Although the Court did not base its decision on the provisions of France's constitution, the value of '*le vivre ensemble*' is reflected in Article 1 of the French Constitution which provides that France shall be an 'indivisible, secular, democratic and social Republic and that France shall ensure the equality of all citizens before the law, without distinction of origin, race or religion, and that it shall respect all beliefs'.

European Court of Justice (ECJ)

The impact of a national constitution was also considered in *Omega GmbH v Bundesstadt Bonn* [2004] ECR I-9609, a preliminary decision of the European Court of Justice, which remains a leading European case on respect for constitutional identity. The case concerned a German court order prohibiting Omega from operating a Laserdrome installation, providing a simulated killing game involving the use of laser guns, on the basis that it violated human dignity. Examining the validity of the order, the Luxembourg Court considered that 'in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right' (paragraph [35]). In considering whether the prohibition of the installation was proportionate to the end of preserving human dignity and assessing the margin to be applied, the Court had plain regard to the German Constitution. The Court noted (paragraph [39]) that:

> 'the prohibition on the commercial exploitation of games involving the simulation of acts of violence against persons, in particular the representation of acts of homicide, corresponds to the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany'.[6]

6 *Omega GmbH v Bundesstadt Bonn* [2004] ECR I-9609, para 39.

In another preliminary decision of the European Court of Justice four years later, the Austrian authorities had refused to register the name *Furstin* von Sayn-Wittgenstein. This was because under Austrian Law, following the abolition of nobility, the Austrian constitutional principle implemented a principle of 'equal treatment' which has constitutional status. So in accordance with Federal Constitutional Law the use of titles like *Furstin*, which translate as a Princess, was prohibited. The applicant, an Austrian citizen, resided in Germany where titles were in fact permitted. But having regard to the unique constitutional identity of Austria, the European Court of Justice upheld the decision of the Austrian authorities (C-208/09 *Sayn-Wittgenstein v Landeshauptmann von Wien* [2010]).

Taming the European Court of Human Rights

A survey of these cases suggests the potential influence of a document reflecting British values and fundamental rights and freedoms on the European courts. However, the establishment of a British Bill of Rights will not insulate the UK from the possibility of occasional adverse rulings before the European Court of Human Rights.

On the one hand, successive cases in the last twenty years have demonstrated a clear need for the European Court in Strasbourg to recalibrate its position (see *McCann v UK* [1996] 21 EHRR 97 – micromanaging an anti-terrorist operation in Gibraltar; *Chindamo, R (on the application of) v Secretary of State for the Home Department* [2006] EWHC 3340 – micromanaging the Philip Lawrence deportation case; *Dickson v UK* [2008] 46 EHRR 41 – micromanaging a prisoner's right to facilities for artificial insemination; and the paradigm case - *Hirst v UK (No 2)* [2005] ECHR 681 establishing a right to prisoner voting where there was none).

But on the other hand, if the UK were to withdraw from the Convention, there would be many complications, especially if the withdrawal preceded a decision by the UK to leave the European Union. This is because the UK would remain a part of the Council of Europe, and subject to the jurisdiction of the European Court of Justice in Luxembourg which is committed to applying the Charter of Fundamental Rights. European law has become inextricably bound up with decisions of the European Court of Human Rights and the European Court of Justice.

The European Court of Human Rights - drawing back from an expansionist vision? There are small signs that the European Court of Human Rights may at last be drawing back from its expansionist position. Paradoxically, this may be illustrated by reference to the aftermath in the prisoner voting saga. The case of *Hirst v UK (No 2)* [2005] ECHR 681, when the Grand Chamber found that the UK's blanket ban on prisoner voting contravened Article 3 of Protocol 1 of the Convention, was the beginning rather than the end of the prisoner voting litigation.

In a later case on prisoner voting rights, *Scoppola v Italy (No 3)* [2011] ECHR 2417, the Grand Chamber made clear that there were a very range of options open to signatory States which would be sufficient to satisfy the right which the Court had identified. In reality, it would be sufficient if a system was devised which established a discretion to confer the vote on a small number of prisoners.

This was followed by the decision in *Firth and Ors v the United Kingdom* [2014] ECHR 540 when, by a majority of 5 to 2 the European Court of Human Rights held that although in relation to ten Scottish applicants there had been a violation as prisoners had not been permitted to vote in the 2009 European elections, neither damages nor costs would be awarded. In line with *Hirst v UK (No 2)* [2005] ECHR 681, just satisfaction was considered to be the finding of the violation and the changing of the domestic position in due course, with the Court noting at [18]:

> 'In the vast majority of these cases, the Court [has] expressly declined to make any award of damages. As in those cases, in the present case the Court concludes that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage sustained by the applicants'.[7]

On the issue of costs, the Court found that as the application was 'straightforward and did not require legal assistance' (paragraph [21]) and no costs were awarded.

The *Firth* decision was most recently followed by *McHugh and Ors v the United Kingdom* [2015] ECHR 155 in which the Court similarly held, this

[7] *Hirst v UK (No 2)* [2005] ECHR 681, para 18.

time in relation to over 1,000 legacy applications, that although denying prisoners the right to vote was similarly in breach of Article 3 of Protocol 1, no damages or costs would be awarded.

This approach is consistent with the approach in the UK courts where minimal damages are awarded to an individual in an action where a person has not suffered any substantial injury or loss for which he or she must be compensated.

These more recent decisions come close to recognition on the part of the European Court of Human Rights that it overreached itself in the *Hirst* case. As Sir Nicholas Bratza acknowledged when giving evidence to the Joint Committee on Human Rights on in March 2012, if there was judicial creativity in relation to the invention of a prisoner voting right, it was creativity 30 years ago (Hansard, 13th March 20-12, columns 144, 145).

Next, the Brighton Declaration in April 2012, adopted by the Parliamentary Assembly of the Council of Europe of Protocol 15 in June 2013, has yet to have had an effect. Specifically, the Declaration requires the Court to give great prominence to 'principles such as subsidiarity and the doctrine of the margin of appreciation' and 'consistently apply these principles in its judgments' (paragraph [12]).

The narrative which has been urging the European Court of Human Rights to adopt a more restrictive view of its interpretative role has begun to have some impact in intellectual circles and ultimately on the Court. See Fisher, 'Rescuing Human Rights' (2012) The Henry Jackson Society pp 69-70; Speaight, 'Democracy Must Prevail, A Call for a Conservative Intellectual Revival in Law and Human Rights' (2012) Society of Conservative Lawyers.

Robert Spano, the Icelandic Judge at the European Court of Human Rights and former Professor of Law at the University of Iceland, discussed the increased restraint of the Court in a speech delivered at Oxford University in 2014, and has defended its legitimacy. Judge Spano pointed to a line of cases involving the UK which demonstrated that the European Court of Human Rights is committed to developing a more robust concept of subsidiarity (*Murphy v Ireland* [2003] ECHR 352; *Hirst v UK (No 2)* [2005] ECHR 681*; Evans v UK* 43 EHRR 21*; SAS v France* [2014] ECHR 695 and *Animal Defenders International v UK* [2013] ECHR 362).

Animal Defenders, decided in 2013, concerned an NGO which complained about the prohibition on paid political advertising in the UK under section 321 of the Communications Act 2003. The parties agreed that the policy rationale was to ensure impartiality of broadcasting and protect the democratic process. The key question which arose for decision was whether the prohibition was, for the purposes of the potential Convention violation, 'necessary in a democratic society.' In considering this issue, the European Court of Human Rights noted that 'the quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including the operation of the margin of appreciation' (paragraph [108]).

The Court proceeded to consider in depth the UK's parliamentary safeguards and bipartisan support for the Act, finding that there was no violation of Article 10. According to Judge Spano, this decision demonstrates that the Strasbourg court is 'in the process of reformulating the substantive and procedural criteria that regulate the appropriate level of deference to be afforded to the Member States so as to implement a more robust and coherent concept of subsidiarity in conformity with Brighton and Protocol 15'.[8]

Against such a background, the UK should, at the present time, remain a signatory to the Convention and continue to argue the intellectual case that the European Court of Human Rights ought to be more circumspect in future cases. This endeavour is not forlorn.

It is not uncommon for national courts to have periods of judicial creativity followed by periods of consolidation.[9] Viewed from a high level perspective, it is perhaps no surprise that during the years which followed its inception, the European Court of Human Rights should embark upon an aggressive period of assertion, in order to consolidate its place at the international table and establish its credibility in the world of human rights protection following the horrors of the Second World War. But now, more

[8] Spano, Universality or Diversity of Human Rights - Strasbourg in the Age of Subsidiarity [2014] 14 *Human Rights Law Review*, 487, 492.

[9] See Posner, 'The Rise and Fall of Judicial Self-Restraint' [2012] 100(3) California Law Review 519; Whittington, 'The Least Activist Supreme Court in History, The Roberts Court and the Exercise of Judicial Review' [2014] Notre Dame Law Review 2219.

than fifty years on, it is time for consolidation and mature reflection. This is not to say that we should weaken the British pushback against the European Court's overreach. On the contrary, I suggest pressure needs to be kept on Strasbourg, as well as Luxembourg, to ensure that the UK wins the argument against judicial creativity and invention.

To this end, the UK's best legal minds should be deployed and this country should initiate discussions and symposia in London, Luxembourg and Strasbourg, to make a clear case for encouraging and accelerating the Courts' respect for subsidiarity. There is also a strong argument for reconsidering the way in which national Judges are appointed to the Strasbourg Court and the composition of the Grand Chamber which could consist of senior national Judges seconded to Strasbourg to hear the case or cases in question. This would substantially enhance interaction between Strasbourg judges and national judges and increase public confidence in the Court's decisions, which would be less judicially expansionist in these circumstances.

Moreover, the arguments for such a course are sound. In recent years, the law has witnessed the growth of extra-territorial jurisdiction in a number of areas. This is precisely why there is a strong case for saying that an international court should react with considerable deference to national interests and it should be slow to override the domestic democratic process. The Strasbourg Court needs to bear in mind that whilst the post-Second World War years have witnessed a growth in the exercise of extra-territorial jurisdiction, there has been a counter-balancing trend in favour of the re-assertion of national identity. Here, we can point to the Balkans, the collapse of secular States in the Middle East, and closer to home and the quest for increased self-determination within the UK itself.

Britain's withdrawal from the European Convention on Human Rights would not significantly damage the cause of international human rights, give succour to Convention countries or cause the UK to become a pariah nation. Nor would Mr Putin's resolve to act in a manner which conflicts with Russia's Convention obligations be likely to be influenced by whether the UK remains a signatory state or not.

However, withdrawal from the Convention would damage the Strasbourg Court in terms of its finances and its reputation. The preferred option from a legal perspective is for the UK to remain a signatory to the European Convention. This is because European Union law and European Convention law are inextricably entwined, and the UK would still be subject to European Convention jurisprudence on any issue in respect of which the European Court of Justice has competence. This difficulty would evaporate only if the UK decided to leave the European Union as well as the European Convention on Human Rights.

Scotland, Wales, Northern Ireland

Leaving the European Convention on Human Rights could also create difficulties in so far as the Scotland, Wales and Northern Ireland devolved assemblies are concerned. Scottish devolved legislation is not permitted where it is incompatible with Convention rights (Scotland Act 1998, section 29(2)(d)), and the meaning of Convention rights is directly tied to its meaning in the Human Rights Act 1998 (Scotland Act 1998, section 126(1)). There is the same arrangement in Northern Ireland (Northern Ireland Act 1998, section 6(2)(c), and Wales (Government of Wales Act 2006, section 108(6(c)).

If the UK were to withdraw from the Convention, the terms of the devolution settlements would need to be amended to refer to the British Bill of Rights instead of the Convention. It is axiomatic that any change has to be consensual, and the notion that Westminster could vote to amend the terms of the devolution legislation in the absence of local support would be a recipe for fracturing the present constitutional arrangements beyond repair.

However, provided the UK remains a signatory to the Convention, the devolution settlements would remain untouched.

Having the last word?

From a legal perspective, there is a further consideration which needs to be taken into account in terms of protection of civil liberty.

If the UK were to withdraw from the European Convention and more particularly the jurisdiction of the European Court of Human Rights, it would remove a safeguard in the protection of human rights. This is because Article 46(1) of the Convention requires the UK to abide by the final judgment of the European Court of Human Rights in any case to which it is a party. Withdrawal from the Convention would leave a vacuum which could only be filled by the development of a 'strike down' power in the UK Supreme Court. This would enable the Supreme Court to declare void a statutory provision where it is considered to contravene the domestic Bill of Rights.

Contrary to what is often thought, the notion of judicial strike down has a pedigree in English jurisprudence. In 1610 the revered Chief Justice, Sir Edward Coke, struck down a law he considered insupportable, a statute authorising the London College of Physicians to imprison unlicensed doctors (*Dr Bonham's Case* [1610] 8 Co. Rep. 114 (Court of Common Pleas)). Rather than permit the British judiciary to revive this power, it would be better for Parliament to codify judicial power and limit it to cases involving fundamental freedoms - see comments by senior English judges in recent years on 'strike down', such as Lord Hope in *Jackson v Attorney General* [2006] 1 AC 262 at paragraph [107]; Lord Justice Elias, Annual Lord Renton Lecture, Statute Law Society, 24 November 2009 and Lord Phillips, interview with BBC News, 2 August 2010.

A 'strike down' power is highly controversial for a number of reasons, most significantly because it trumps the will of the majority expressed through the operation of a democratically elected Parliament.[10] It is the 'thin edge of the wedge' in terms of the balance between Parliament and

[10] See Faulks and Fisher, 'Unfinished Business' in Commission on a Bill of Rights, A UK Bill of Rights?' The Choice Before Us, Vol. 1 p. 189.

the Courts, and it would draw members of the senior judiciary into the political arena.

If judges are to exercise this sort of power, the question arises as to whether their appointments should be considered by a Parliamentary Committee, with the Judges giving evidence about their political beliefs along the lines of their American counterparts.

Viewed against this background, remaining a signatory to the European Convention on Human Rights is by far the more attractive option.

V
The Future

Looking ahead, it is now expected that a British Bill of Rights will be introduced within the duration of this current Parliament.

The Human Rights Act 1998 will be repealed in so far as the incorporation of the European Convention on Human Rights into English law is concerned, and it will be replaced by the British Bill of Rights. There appears to be little appetite to change the elegant balance between judicial and political power encapsulated in the declaration of incompatibility process.

There is, however, considerable enthusiasm for the domestic courts when interpreting rights issues to moderate their deference to the jurisprudence of the European Court of Human Rights and instead afford these decisions no more than parity with decisions of the courts in common law and other countries, and of other international courts and bodies.

The right of a UK litigant to take a case to Strasbourg would remain, and in the small number of cases where the UK Government loses its case, the UK will be obliged to honour the decision. But the robust intellectual discourse on the way in which the Court discharges its interpretative role under Article 32 of the Convention should continue to be pursued with some vigour.

As regards Scotland, Wales and Northern Ireland, this needs most careful thought and the various options discussed in the Commission on a Bill of Rights report and others should now be considered – Speaight, 'Devolution Options' in Commission on a Bill of Rights, A UK Bill of Rights? The Choice Before Us, Vol. 1 p. 243.

One possibility, perhaps, is that a British Bill of Rights could be introduced with a sunrise clause that it should not come into effect without the consent of the devolved assembly in question, and until this occurs the Human Rights Act 1998 would continue to apply in that jurisdiction. It would be best if the devolved assemblies acted *in tandem* with Westminster, and there is no reason why the devolved assemblies could not add or subtract rights as they consider fit. If the devolved assemblies decline to implement

the British Bill of Rights in their jurisdiction, this is a matter which they would need to explain to their electorate in due course.

In this context, it should be remembered that the Government has received a mandate from the British people to introduce a British Bill of Rights and repeal the Human Rights Act 1998. This is a manifesto commitment for enactment at Westminster during the present Parliament.

To those who have had reservations about the alternative arrangements to the Human Rights Act 1998 which have long been discussed, the measure should provide the opportunity to join the consultative process and work constructively for a British Bill of Rights which has been promised by the Government and supported by the British electorate.

Accordingly, the Government's intention to replace the Human Rights Act 1998 with a British Bill of Rights is to be welcomed. It is now time to proceed with the publication of a draft Bill for consultation.

There is a strong case for such a Bill:

1. The development of a bespoke British Bill of Rights which codifies the fundamental rights and liberties won for the British people over many centuries.

    - A bespoke British Bill of Rights reflecting Britain's legal and historical heritage, culture and contemporary values will give the people of Britain a document in respect of which they can feel a sense of ownership and pride.

    - A British Bill of Rights would assist the UK in its relationship with the European Court of Human Rights in Strasbourg and the European Court of Justice in Luxembourg.

2. The British Bill of Rights should set out in plain English a list of long established British rights, such as, for example –
    - the right of politicians to debate freely in Parliament
    - the sovereignty of Parliament
    - a person's right to apply for a writ of release (habeas corpus)
    - a person's right to silence
    - a person's right not to be forced to incriminate himself
    - a person's right to trial by jury
    - a jury's right to reach its verdict independently of Government or judicial influence
    - a right to open justice.

3. The British Bill of Rights should recognise the emergence of new civil libertarian rights, such as, for example:

    - a right which affords a person protection against the imposition of excessive administrative penalties

- a right to privacy in the context of the commoditisation of personal data.

4. The British Bill of Rights should set out the responsibilities of people in Britain to respect British values and to obey the law. The Bill of Rights should explicitly state that its provisions may not be used by an individual or a group of individuals to engage in any action which is directed at undermining the rights and freedoms which the Bill of Rights sets out to protect.

5. The British Bill of Rights should make clear that in appropriate cases a Court of Law has discretion to withhold a remedy where an applicant has failed to discharge his own responsibilities, including his responsibility to obey the law or to respect the rights of others..

6. The British Bill of Rights should permit the UK Courts when determining any issue of interpretation and application to take into account the decisions of the courts in common law and other countries, and of other international courts and bodies. Decisions of the European Court of Human Rights are not to be afforded precedence in the determination of domestic cases.

7. The UK should remain a signatory to the European Convention on Human Rights and continue its intellectual battle against judicial creativity.

    - At the present time, it is appropriate for the UK to remain a signatory to the European Convention on Human Rights. European Union law is inextricably linked with the application of European Convention jurisprudence. Domestically, the legislative powers of the devolved assemblies in Scotland, Wales and Northern Ireland are inextricably bound up with the application of the Convention.

    - The UK should deploy its best legal minds to argue against judicial creativity which has characterised decisions of the European Court of Human Rights in Strasbourg (and also the European Court of Justice in Luxembourg) on occasions. The UK should organise colloquia and symposia in the UK, Strasbourg and Luxembourg to

discuss potential reform of the European courts and challenge judicial creativity.

8. The devolved assemblies of Scotland, Wales and Northern Ireland should be permitted to amend the terms of the British Bill of Rights so that it reflects the heritage and aspirations of the peoples of Scotland, Wales and Northern Ireland.

Subscribe to Politeia's Publications!

For £35 a year (£30 standing order) you will receive an electronic copy of each of our publications, plus hard copies of two new publications on request, and, if you wish, free hard copies of your choice from our back catalogue. You will also be receive advance notice and invitations to Politeia's conferences and flagship events, with guest speakers from the UK and overseas.
More information can be found on our website: www.politeia.co.uk. Or, write to the Secretary, Politeia, 33 Catherine Place, London SW1E 6DY or at info@politeia.co.uk

A Selection of Recent and Related Publications

Britain and the EU: What must change?
William Cash, Bernard Jenkin, John Redwood

Paying for the Future: Working Systems for Healthcare and Pensions
Ludger Schuknecht, Matthias Dauns, Werner Ebert

Working Welfare: Contributory Benefits, the Moral Economy and the New Politics
Frank Field

What's the Point of the Human Rights Act?
Dinah Rose

The UK Government Spending Ratio: Back to the 1930s?
David B Smith

Magistrates Work! Restoring Local Justice
Stanley Brodie, John Howson, Simon Reevell

Zero-Plus: The Principles of EU Renegotiation
Martin Howe

After Osbrown: Mending Monetary Policy
Douglas Carswell

History in the Making: The New Curriculum, Right or Wrong?
David Abulafia, Jonathan Clark, Robert Tombs

The Financial Sector and the UK Economy: The Danger of Over-Regulation
J. McFall, K. Matthews, P. Minford, D.B. Smith and others

University Diversity: Freedom, Excellence and Funding for a Global Future
Martin Rees

As the government prepares a British Bill of Rights to replace the Human Rights Act, many in the legal profession and the country welcome the change. They see the return of powers now exercised by foreign courts as beneficial. No longer would Parliament be overruled by foreign bodies, or its sovereignty be compromised undemocratically.

But others are concerned. They fear that the current protections under the Human Rights Act could be lost. They worry that Britain may leave the European Convention on Human Rights, and fear for our future standing with the European Courts

Who is right and how should the government proceed?

In *The British Bill of Rights – Protecting Freedom Under the Law*, **Jonathan Fisher QC** considers the case for change, the ideal parameters for a Bill of Rights and the benefits it would bring. The author, who served on the recent Commission for a Bill of Rights, answers some of the difficult question posed by the change, explaining which rights should be included in the Bill, what would the benefits be and how the Bill should be framed.

POLITEIA

£8