RESPONSE TO THE DISCUSSION PAPER

PUBLISHED IN AUGUST 2011

BY THE COMMISSION

ON A UNITED KINGDOM BILL OF RIGHTS

1. INTRODUCTION

1.1 In the Discussion Paper the Commission's Terms of Reference are stated at paragraph 1. These include:

> "*To investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extends our liberties.*
>
> *To examine the operation and implementation of these obligations, and consider ways to promote a better understanding of the true scope of these obligations and liberties.*"

These Terms of Reference seem unsatisfactory. They presuppose that any prospective UK Bill of Rights would proceed on the assumptions that the enactment of the Human Rights Act 1998, and the consequent inclusion in our law of the European Convention of Human Rights, were in themselves desirable and should be retained; and that ECHR rights should continue to be enshrined in English law. Those assumptions are not shared with or supported by a significant body of opinion in the United Kingdom, including this author. As will be explained later, this Response proceeds on the footing that the HRA was neither necessary nor desirable,

and should be repealed: see my letter to The Times newspaper published on 26th January 2012.

1.2 However, the "Questions for Public Consultation" set forth in paragraph 5 of the Discussion Paper do admit of a wider review than the Terms of Reference would suggest. It is those questions that this Response seeks to answer.

1.3 A difficulty arising from the Discussion Paper, and the consultation process, would appear to be the absence of any proposed UK Bill of Rights; so that the public has no idea of what any such Bill of Rights would contain. This, I would suggest, is a major flaw in the public consultation as no one has yet spelled out what a UK Bill of Rights would look like. All one gets from the Terms of Reference is that the ECHR is to remain enshrined in UK law without there being the slightest indication of how a UK Bill of Rights would differ from, or add to, the Convention.

1.4 Next the Discussion Paper is silent on the reasons for the establishment of the Commission. The public is being asked the four questions set forth in paragraph 5; and so the facts and circumstances which prompted its creation should have been explained. If any statutory changes are to be made to the HRA or the ECHR, the "mischief" aimed at should obviously be identified. Only then can one begin to consider whether the mischief is capable of statutory treatment; and if so, what form any legislation might take. The contrast here is between a putative United Kingdom Bill of Rights as opposed to the European Convention (seemingly to be retained). The public is given no assistance in identifying any suggested differences between the two, or an understanding of the supposed issues the Commission has been appointed to address.

1.5 The reasons for the creation of the Commission may not, in fact, be difficult to discern. They are political. There is widespread dissatisfaction with the European Convention as interpreted and applied by the courts in the United Kingdom and by the European Court. The apparent misapplication and misuse of the ECHR so as to assist and protect wrongdoers has aroused much criticism and discontent among the general public, as is evident from media reporting and public discussion. Failure to deport unwanted aliens, even those who may be threats to national security, due to the invocation of Convention protections; convicts claiming violation of their "human rights" while in prison; the European Court's decision upholding a convict's right to vote while serving a term of imprisonment (which the House of Commons voted down); and illegal immigrants being permitted to stay in the UK. These are the kind of outcomes which have engendered public disquiet and disapproval, and have in effect got "human rights" a bad name.

There is much resentment of the decisions of the European Court, and of the court itself. It is seen as European and foreign, and unsuitable to pronounce on British issues. Hence a decision in favour of convicts' voting rights by the European Court was firmly rejected by the House of Commons, something which accorded with popular opinion.

In the result, however well intentioned was the introduction of the HRA and the ECHR into United Kingdom law on the 6th October 2000, the law of unintended consequences has brought "human rights" into disrepute. Far from enhancing respect for human rights, the application of human rights legislation in the United Kingdom has had the opposite effect, making it more difficult to maintain popular support for the protection of fundamental rights and freedoms.

It is relevant to note that the Commission is being asked to consider the need for a British Bill of Rights. Why British? Clearly because it is thought that presenting it as British, and not European, would make it more palatable to the electorate of the United Kingdom, especially if the supervisory appellate jurisdiction of the European Court were abolished or somehow modified.

1.6 It is important to bear in mind that prior to the introduction of the ECHR in October 2000, none of the problems I have identified arose in the Courts of the United Kingdom. There existed in United Kingdom law no written articles of a convention or constitution which required interpretation by British Courts, and ultimately by the European Court. Until that time the freedoms, protections and rights enjoyed by individuals within the confines of the State and the jurisdiction of the British Courts, were the product of development over centuries of the common law and statutory changes as and when circumstances required them. The constitutional rights of British citizens within a free and democratic society were fully protected and enforced by the Courts. The Convention, supposedly modelled on the "human rights" enjoyed by Englishmen, seemingly added no fundamental right which Englishmen (and Britons) did not already have. This brings me to the major issues: what are human rights? Is it an appropriate expression to describe the rights and freedoms which are, or ought to be, protected under United Kingdom law? Has the ECHR provided to United Kingdom citizens any fundamental rights, freedoms or protections they did not already enjoy?

2. HUMAN RIGHTS

2.1 As a label or description without more, "human rights" is wide and indefinite. The ECHR is entitled:

> "Convention for the Protection of Human Rights and Fundamental Freedoms".

Article 1 provides:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."

Thus if one confines attention to the ECHR, human rights mean those rights as defined and set forth in Section 1 of the Convention. Later in this paper I will be looking at what some of these Convention Articles provide by way of definition and description.

2.2 There are different categories of rights which may exist; and in my view there has been a tendency to conflate and confuse the nature of differing rights. Not every right or freedom is "human" or "fundamental".

2.3 Legal Rights

Stating the obvious, legal rights are those which accrue to individuals under the law. The rights to sue for defamation, personal injury and breach of contract are examples of rights which arise under the law of the land. So also are property rights. The nature and extent of such rights may vary from state to state, depending on the domestic laws and legal system of each state. Similarly the criminal law of each state may provide legal rights to prosecutors, and legal rights of defence. Such rights are different and distinct from fundamental human rights. However, the fundamental

right to a fair trial would come into play were civil or criminal rights or liabilities to be litigated in a court. So in that context one can see the contrast between legal rights and liabilities and a fundamental right to a fair trial. In England the former arise under the ordinary or general law; the latter is the product of the evolved and evolving common law and reflected in Article 6 of the ECHR.

2.4 **Democratic and Constitutional Rights**

Rights of this kind stem from the constitutional settlement in a state: the nature and extent of such rights are usually (but not invariably) defined and to be found in a written document like the United States constitution. In the United Kingdom we do not have a constitution like that; but it is inaccurate to say that we do not have a written constitution at all. Our constitution is written in many places beginning with Magna Carta, though a similar charter may have been in existence before 1215. Constitutional settlements are political. It is at this point that politics and the law coincide and collide: statesmen create constitutions; judges decide what the constitution means and provides. In the United States, and in most countries having a written constitution, it is the judiciary who has the last word on what is and what is not constitutional. In the United Kingdom the Court's function is to consider what is lawful: that is because our constitutional arrangements are the product of the common law and statute, and can be changed by Parliament at any time, particularly so at the behest of a government which enjoys a majority in the House of Commons. Such rights as the citizens of the United Kingdom enjoy under our constitutional arrangements are, I would suggest, not all fundamental rights. The right to vote in elections is a political right. In any constitutional settlement a nation may agree on voting age limits, or upon the classes of individual entitled to vote, such as property

owners or those domiciled in the country for a minimum length of time. Democracy may take many forms; and if a democracy differs from our own in its constitutional provisions, that may not make it any less democratic having regard to the character and will of the people. Modern Russia seems a good example of that, where autocracy and democracy appear to interact with the support of the people. Furthermore, it does not follow that a democracy will always preserve and protect fundamental rights; or that an autocracy will not. King John was an autocrat entitled to wield absolute power; yet by Magna Carta he reaffirmed the customs and liberties of Englishmen, and by Articles 38-40 stated their rights to life, liberty, protection of property and a fair trial according to law. He, with his barons, reached a constitutional settlement by which the King acknowledged and agreed that his rule was to be subject to the law of the land. As I shall explain later, a democracy like the United Kingdom does not always protect fundamental rights as effectively as it should; and recently has seriously derogated from one of them. Though it has to be said, generally speaking, that in a democracy there is a greater probability that fundamental rights will be protected and preserved than in the modern autocracies around the world with which we are familiar.

The distinction between fundamental rights and the other rights I have identified is important. It is to be noted that while articles set out in the ECHR do provide for fundamental rights to be protected, they also include rights which I would suggest are not fundamental. Thus "human rights" as a description includes rights which are "fundamental" and rights which are not; and results in a blurring of the distinction. That brings this discussion to the question: what rights are fundamental

and call for absolute preservation and protection under the laws of the United Kingdom?

3. FUNDAMENTAL RIGHTS, PROTECTIONS AND FREEDOMS UNDER THE LAW OF THE UNITED KINGDOM

3.1 I would begin this section by expressing my indebtedness to Ms Dinah Rose QC ("Rose") who in her outstanding Atkin Lecture given in 2011 explained the nature and extent of the fundamental rights, protections and freedoms embedded in English common law, as compared with some of the protections supposedly provided by the ECHR: appended to this paper is a copy of her Lecture. Rose came to two important conclusions: first, that fundamental common law rights provide greater protection to English citizens than the ECHR; and second, that there is a serious danger of overlooking and losing our common law rights as a result of the primary attention given nowadays to convention rights: see Lecture paragraphs 22-24.

3.2 Rose used as her starting point Blackstone's Commentaries (1765), and in particular Book I of Chapter I entitled "The Absolute Rights of Individuals". At paragraph 29 she cites a passage from Blackstone which I gratefully adopt:-

> "For the principle aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these is clearly a subsequent consideration. And, therefore, the principle view of human laws is, or ought always to be, to explain, protect, and enforce such rights as are absolute, which in themselves are few and simple: and then such rights as are relative, which, arising from a variety of connections, will be far more numerous and more complicated. These will take up a greater space in any

> code of laws, and hence may appear to be more attended to—though in reality they are not—than the rights of the former kind. Let us therefore proceed to examine how far all laws ought, and how far the laws of England actually do, take notice of these absolute rights, and provide for their lasting security."

3.3 At paragraph 30 Rose summarises the citation in these words:

> "Blackstone identifies three principal absolute rights: security of the person (which includes life, health and reputation); liberty (principally protected, of course, by the great writ of habeas corpus); and private property. He identifies what he calls three further "auxiliary subordinate rights of the subject, which serve principally as outworks or barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property." These are first, the powers and privileges of parliament; second, the limitations on the royal prerogative, and third, the right of access to justice."

3.4 Rose at paragraph 31 refers further to Blackstone's observations about access to justice. She then refers to the principle of legality and, after further citations, reaches this conclusion at paragraph 36:

> "So there can be no doubt that the common law has for generations recognised and protected a category of fundamental human rights, which are treated as having a special constitutional status, and which will prevail unless they are overridden by clear and specific statutory language, demonstrating a recognition by Parliament of the implications of its actions."

3.5 Relying upon the Rose Lecture and its citations, it would seem clear that from 1215, and no later than 1765, there existed at common law *absolute* rights for the protection of individuals. They can in modern terms be summarised as follows:

(i) The right to life, i.e. security of the person;

(ii) The right to liberty and not to be unlawfully detained (*habeas corpus*);

(iii) The right to own private property and have it protected;

(iv) The right of free speech;

(v) The right and liberty to practise one's religion (stemming from the rights to life and liberty);

(vi) The right of access to justice and to a fair trial which includes equality before the law. (It is interesting to note that the need for a fair trial was reflected in the 9th of the Ten Commandments - "*Thou shall not bear false witness*").

I would argue that those absolute rights, and subsidiary rights derived from them, are the only fundamental rights which require protection. To the extent that the ECHR provides similar protections, the Convention adds nothing of value to the individual under English law.

3.6 Furthermore, there are "human rights" stated in the Convention which do not seem to be fundamental rights requiring absolute protection. Take Article 8: the right to respect for private and family life may be a desirable right to have, but it is difficult to understand how that should be a "human" or fundamental right. It cannot, for example, be compared to a right to a fair trial. Families break up for many reasons. Privacy may be destroyed by the very individuals who claim it. I would suggest that Article 8 rights are more suitable to be enacted by a domestic legislature rather than be enshrined in the ECHR as fundamental freedoms or human rights. Articles 11 and 12 similarly seem to be rights more suitable to be the subject of domestic legislation. In short I would suggest that those who framed the ECHR after the Second World War, animated by liberal altruism, failed to distinguish between what were and are the few, simple fundamental rights required for the proper functioning of a civilised democratic state, and those rights which were socially desirable but not fundamental.

3.7 **The right to vote**

This supposed right is, of course, topical. It is at the heart of the recent decision of the European Court to the effect that a blanket ban on voting applicable to imprisoned convicts is a breach of their human right to vote. The decision is based on Article 3 of the First Protocol. However, Article 3 does not expressly provide for the right to vote. I have not had the time to examine closely the reasoning of the Court's decision but it would appear that the supposed human right to vote is a construct of the court relying on its interpretation of Article 3. That Article provides:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

That language is wide and imprecise, leaving it to nation states to determine the form and content of their electoral systems. Thus the right to vote can only be a political or constitutional right, the nature and extent of which will be determined by the national constitutional settlement.

In Lester and Pannick, Human Rights Law and Practice, 3rd Edition, at paragraph 4.21.17 one finds this statement:

> "Any electoral system must be assessed in the light of the historical and political evolution of the country concerned. Features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the 'free expression of the opinion of the people in the choice of the legislature'. This includes a principle of equality of treatment for all citizens. In *Ždanoka v Latvia,* the ECtHR observed that there are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe, which it is for each contracting state to mould into its own democratic vision. In *Russian Conservative Party for Entrepreneurs v Russia*, the ECtHR referred to 'diversity of possible choice on the subject'. UK courts and tribunals are in a better position than the ECtHR to assess whether impugned

> features of the electoral system for political participation are justified. However, subject to the need to protect minorities against the abuse of power by the rule of the majority, courts will seek to avoid having to decide what are really political rather than judicial questions."

I agree with those comments. The right to vote is not a human right in the sense of a fundamental right or freedom requiring absolute protection. What the case demonstrates is the inability of the European Court to distinguish between political and constitutional rights in a given nation state not requiring the engagement of the ECHR, and fundamental or "human" rights which may require it. It would seem *prima facie* that the European Court may have acted beyond its proper remit.

4. PARLIAMENTARY SOVEREIGNTY

4.1 At paragraph 33 Rose refers to the principle of legality: that is to say that the power of Parliament to legislate contrary to fundamental principles of human rights. This it must do with its eyes open, conscious of the political impact of its legislation. But as Rose points out later in her Lecture, the political impact may be minimal; as it has apparently been in the case of the secret trials procedures. It would seem that the democratic system we have may not be sufficiently robust to withstand, on supposed grounds of national security, the diminution of fundamental rights for the benefit and advantage of government agencies unwilling to come clean with the courts and the public. The protection afforded to national security by the application of the principle of public interest immunity (formerly Crown privilege), apparently effective during two world wars, is said not to be enough.

4.2 I would argue that the time has come to revisit the supposed principle of Parliamentary Sovereignty and to ask the question whether the "principle of legality" can any longer stand without some qualification. Should the fundamental

rights arising from the evolved and evolving common law be absolute and inviolable and susceptible to change only by judicial evolution? The right to a fair trial is clearly the bedrock of the English legal system. It is vital to ensuring the rights to life and liberty, and to the protection of property. Without the right to a fair trial, human rights in their broadest sense would go unprotected. That is why Rose is entirely correct in the criticisms she makes of the secret trials procedures.

4.3 Ever since 1688 the principle of parliamentary sovereignty has been accepted and unchallenged. But it should be remembered that at that time it would never have entered anyone's head that the fundamental absolute rights enunciated by Blackstone would ever be violated by Parliament. It actively supported them. Nor is it clear that the principle of *unlimited* parliamentary sovereignty was universally accepted.

4.4 In *Bonham's Case* in 1610 Coke C.J. maintained that:

> "*When an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void.*"

And five years later, in *Day v Savadge,* Hobart C.J. said:

> "*Even an act of parliament made against natural equity ... is void in itself, for jura naturae sunt immutabilia, and they are leges legum.*"

Lord Irvine in a lecture given in October 1995, after referring to those two cases, said this:

> "*Such notions form no part of the modern law, though I will discuss later the attempt by some to revive them as part of the law of judicial review. They became obsolete when the supremacy of Parliament was fully established by the Revolution of 1688.*"

Whether the opinions of Coke and Hobart became obsolete, or only dormant, may be a subject for debate. Certainly, the remarks of Coke C.J. were discussed during the 17th Century, but in the end the discussion appears to have petered out. As I have said, the time has come to open the debate on parliamentary sovereignty. The secret trials procedures clearly violate the common law right to a fair trial, and undermine a foundation block of the English legal system. This has been fully explained by Rose in her Lecture: there is no need for me to repeat what she has said. Furthermore, the right to a fair trial expressed in Article 6 of the ECHR has been compromised by the decision of the European Court, paving the way for the secret trials procedures to be adopted and expanded under English law. The required legislation, it would appear, is not incompatible with the ECHR: whereas it is clearly incompatible with and violates the absolute common law right to a fair trial. The principle of legality seems to have been an ineffective shield for its protection.

5. CONCLUSIONS

My answer to the four questions is as follows.

(1) Yes. I do think there should be a British Bill of Rights (BBR). The Human Rights Act and the ECHR should be repealed and removed.

(2) The BBR should contain statements of the absolute rights for the protection of individuals as summarised in paragraph 3.5 above. The Queen in Parliament should do no more than reaffirm and recognise that those absolute rights already exist as part of the common law, and are common to all parts of the United Kingdom. No new legislation would be required as the absolute rights have been embedded in the law for centuries. I do not understand that those

absolute rights are any less recognised or respected in Scotland or Northern Ireland. The publication of the BBR, accompanied by explanatory notes, should enable citizens of the United Kingdom to find in one easily accessible place a statement of their absolute rights, freedoms and protections. The BBR would require careful drafting, but should be kept simple as the rights themselves are short and simple.

(3) The problem of Parliamentary Sovereignty should be addressed and resolved. It has become entirely unsatisfactory, as any government can alter, amend, remove or remake the rights of individuals at will if it has a decent majority. The secret trials procedures are a frightening example of what can happen when one has an alliance of too powerful civil servants and unthinking, complaisant Ministers (and, dare I say it, a weak European Court). In most democratic countries in which the rights of citizens are set forth in a written constitution, the judiciary has the last word on whether any piece of legislation is lawful or is in breach of the constitution. I can see no reason why the British judiciary should not be the final arbiters of whether a piece of legislation is lawful, or unlawful as being in breach of fundamental rights. I would argue that the opinions of Coke C.J. and Hobart C.J. should now prevail. That would continue the evolutionary development of the common law, protecting fundamental rights and freedoms, yet having the flexibility to adapt to changing circumstances.

(4) The jurisdiction of the European Court to pronounce on " human rights " issues arising in the United Kingdom should be abolished. The Court is not well regarded in Britain, and does not command any great respect (see

paragraph 1.5 above). The Supreme Court should be the appeal court of last resort on issues involving fundamental rights and freedoms in the United Kingdom. There can be no doubt that the British judiciary , and the Supreme Court in particular , are held in high regard and enjoy the respect and confidence of the nation. The public perception of " human rights" is more likely to be enhanced by British courts pronouncing on such issues , rather than by any decisions of the European Court ; assuming that our courts are no longer embarrassed by the ECHR.

There has been much concern expressed as to whether rejection of the ECHR and the European Court might result in breaches of Britain's treaty obligations. I express no view about that: save to say that if such a course were thought to be desirable, it should not be too difficult to secure some amendment or new understanding of the treaty obligations. Politicians and diplomats would have to be responsible for any necessary negotiations.

Stanley Brodie Q.C.

Blackstone Chambers,

Temple, London,

EC4Y 9BW

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