

## Returning Rights: A Written British Constitution

### Introduction

The Olympic Games opening ceremony reminded us of what it is to feel British, filled with eccentricity and self-deprecation. However there does not appear to be a sense of British identity, in terms of anything tangible. America in contrast, has its written Constitution. Britain does not have such a document, yet with the Commission on a Bill of Rights working through a second consultation, there is an opportunity to make British legal history.

Much has been written about a Bill of Rights, however this article argues that in the event of a British Bill of Rights being passed as law, it should update the Human Rights Act and reform the way our legal system works with three things in mind.

First, The Supreme Court should not only interpret legislation but strike it down if it is unconstitutional. Second, it should reform areas in which the 1950 European Convention on Human Rights is silent on. Third, it should combine our unwritten and written constitution to uphold the British identity, as well as educate and inform our public about their rights.

### Judicial Entrenchment

The Supreme Court of the United Kingdom, the judiciary arm of government, consists of some of the most respected jurists in the world. Many individuals and companies from other jurisdictions decide that they want disputes to be settled by the UK judiciary because of their independence and adherence to the Rule of Law. The Supreme Court also holds the government of the day to account, the decision in *A and others v. Secretary of State for the Home Department* [2004] UKHL 56 remains the high watermark of the highest court in the land protecting the key legal rights of its citizens.

This is important as a concerning pattern has emerged, due in part to the Parliamentary whip system, in which the strength of the executive has eroded the power of the legislature and thus undermined the separation of powers. This is relevant to a Bill of Rights and the UK Supreme Court as in the United States, any legislation that is interpreted as out of line with its constitution is struck down. UK Judicial Review presently only allows primary legislation to be overridden by EU law, under a Bill of Rights this would enable primary legislation to be interpreted in line with the Bill of Rights. It would step in to modify the checks and balances on Parliament by enabling The Supreme Court in exceptional circumstances to strike down legislation that is not in the spirit of the Bill and order Parliament to re-legislate.

The issue of Parliamentary Sovereignty would be addressed by a providing that if a large Commons majority were met on a free vote, it would ensure Parliament holds the final say on legislation, and where desirable amend the Constitution to reflect changing societal circumstances.

### The ECHR

Despite the notion of 'bringing rights home' that came with the Human Rights Act in 1998, and the practical ease for citizens to enforce their rights by avoiding a trip to Strasbourg, the Act feels like a missed opportunity. The Human Rights Act takes its wording from the Convention. The Convention,

influenced no less by the British politician, lawyer and Judge David Maxwell Fyfe, is a treaty of its time. It is drafted in the aftermath of World War II, which bears little resemblance to today's Britain.

Additionally it takes its jurisprudence largely from the inquisitorial systems on the continent as opposed to our adversarial system. The Convention does not account for example, guarantee a trial by jury. There is no express right to a reputation. These are all rights that should be implemented in a Bill of Rights. To discuss all the rights, such as socio-economic and environmental, that have been mooted would be beyond the remit of this article.

With regards to the Convention, the Supreme Court should take into account the jurisprudence of Strasbourg as it does under the Human Rights Act, but ultimately decide the law as the Bill of Rights states and therefore not being answerable to the Strasbourg court. The suggestion is therefore that the UK should not withdraw from its core international and ECHR obligations, but instead independently build on them from a British jurisprudential stance.

### **Public Perception and Rights**

My final point is that public education of our legal rights is sadly an aspect that is lacking in Britain. We are frequently told by our tabloid press and our politicians that the wrong types of people are benefiting from our legal system. This leads to a gross misunderstanding and lack of confidence in the law and its function.

The truth is that although there are ways to improve our laws, which the Bill will address, there have been rights that have been hard gained over hundreds of years, from not only the common law but also documents such as Magna Carta providing due process, through the laws of evidence fought for by William Garrow, as well as the 1689 Bill of Rights forbidding cruel and unusual punishment or royal interference in Parliament legislating.

At the heart of these rights is the concept of liberty of the citizen, which every British person should claim as their own. All of these concepts must naturally be continued if a Bill of Rights is to be drafted. As the US Constitution defines a collective legal and political mind-set, we should look to do the same as so many other democracies have done.

### **Conclusion**

A Bill of Rights represents an opportunity for our laws to fall in line with where British society presently stands. Previous efforts such as Magna Carta and the 1689 Bill of Rights were radical departures from the status quo of their time, mainly by holding traditional institutions to account.

It is the perfect opportunity to reform the defects of the present law whilst empowering the legal rights of UK citizens in a progressive manner. Most importantly it should retain British values, in addition to restoring confidence in our legal system.

*James McDermott-Hill*