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Rights and responsibilities

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The claim that rights are not well understood in the UK may seem a surprising one, not least to anyone who has ever read a book on political philosophy. For if you had to pick which modern liberal democracy could boast the most robust political tradition of arguing about and defending rights over the centuries, the country that gave the world John Locke, Jeremy Bentham, and John Stuart Mill would seem a pretty safe bet.

According to some of our most senior politicians, however, a lack of popular understanding about the relationship between rights and responsibilities, together with a disproportionate emphasis on the former at the expense of the latter, would seem to be at least partly to blame for many of our social ills. Failure to stress responsibility in the context of rights has been blamed for everything from anti-social behaviour and claims for compensation by the undeserving, to serious crime and the actions of terrorists. Over four centuries since the Glorious Revolution and the 1688 Bill of Rights, and less than a decade since the Human Rights Act 1998, representatives of the UK's two largest political parties now vie to outdo one another with talk of a new British Bill of Rights and Responsibilities, to restore a country swung out of balance by excessive talk of rights.

Leaving aside the larger question of whether there is reasonable case for a UK Bill of Rights – either in addition to or in place of the Human Rights Act – talk of including responsibilities or duties in a Bill of Rights raises its own series of questions. First, what is the actual relationship between rights and responsibilities, or rights and duties?¹ Secondly, is there in fact a general lack of understanding about this relationship in the UK? Thirdly, is this lack of understanding a cause of any of the problems that have been attributed to it by politicians and others? Fourthly, is including reference to responsibilities or duties in a Bill of Rights a proper way to address such apparent problems? Before considering these questions, however, it is worth considering in more detail how the issue has arisen.

The call for responsibility

'Rights and responsibilities have always been at the heart of my politics' declared Tony Blair in 2002,² and he made clear the relationship between the two as central to his 'respect' agenda.³

¹ I use the terms 'duties' and 'responsibilities' interchangeably for the moment, although – as we will see below – they are not synonymous.

² 'My vision for Britain', *The Observer*, 10 November 2002.

³ *Ibid*, emphasis added. See also Blair's speech, 'Our Nation's Future - multiculturalism and integration', Downing Street, 8 December 2006: 'Being British carries rights. It also carries duties'.

Respect is at the heart of a belief in society. It is what makes us a community, not merely a group of isolated individuals. It makes real a new contract between citizen and state, a contract that says *that with rights and opportunities come responsibilities and obligations. The theme of rights and responsibilities will be central to the Queen's Speech.*

In particular, Blair was keen to stress the importance of personal responsibility as an antidote to what he saw as the excessive individualism of earlier social policy:⁴

Social democrats in Britain and the US who held a liberal view of the 'permissive society' divorced fairness from personal responsibility. They believed that the state had an unconditional obligation to provide welfare and security. The logic was that the individual owed nothing in return. By the early 1970s *this language of rights was corroding civic duty and undermining the fight-back against crime and social decay.* It led Robert Kennedy to lament of America, 'the destruction of the sense, and often the fact, of community, of human dialogue, the thousand invisible strands of common experience and purpose, affection and respect, which tie men to their fellows'.

Defending his government's introduction of anti-social behaviour orders, Blair again cited the importance of balancing rights and responsibilities, even to the extent of rebalancing the criminal justice system:⁵

[I]t wasn't just a question of matching legal rights with legal responsibilities. It was about changing the legal processes by which such rights and responsibilities are determined. Traditional court processes and laws simply could not and did not protect people against the random violence and low-level disorder that affected their lives.

This irritation at 'traditional court processes and laws' was not confined to anti-social behaviour. In the 2004 case of *Youseff v Home Office*, Blair chaffed at the exchange of letters between UK officials seeking assurances from the Egyptian government against the ill-treatment of three suspected terrorists that the UK proposed to deport to Cairo:⁶

This letter was read by the Prime Minister who wrote across the top of it 'Get them back [to Egypt]'. He also wrote next to the paragraph that set out the assurances objected to by the Interior Minister 'This is a bit much. Why do we need all these things?'

Similarly in May 2006, Blair famously described a decision by Mr Justice Sullivan related to the immigration status of nine Afghan hijackers as an 'abuse of common sense':⁷

⁴ Ibid.

⁵ 'Our citizens should not live in fear' by Tony Blair, *The Observer*, 11 December 2005.

⁶ [2004] EWHC 1884, para 15.

⁷ See e.g. BBC, 'Blair dismay over hijack Afghans', 10 May 2006. In fact, the judgment of Sullivan J did not concern the Article 3 issue but related instead to the Home Office's failure to grant the appellants leave to remain: see *R (S) v Secretary of State for the Home Department* [2006] EWHC 1111 (Admin).

We can't have a situation in which people who hijack a plane, we're not able to deport back to their country. It's not an abuse of justice for us to order their deportation, it's an abuse of common sense frankly to be in a position where we can't do this.

In Blair's view, whether the conduct in question was anti-social behaviour or terrorism, it was unbalanced for the courts to protect the rights of those whom he saw as having failed in their own duty to observe the rights of others. A month after Blair's remarks in the Afghan hijackers case, the same theme was taken up by the Conservative leader David Cameron in an explicit attack on the HRA.⁸

The Human Rights Act has made it harder to protect our security. And it's done little to protect some of our liberties. It is hampering the fight against crime and terrorism. *And it has helped to create a culture of rights without responsibilities.*

Although a July 2006 review by the Department for Constitutional Affairs concluded that the Act had 'not seriously impeded the achievement of the Government's objectives on crime, terrorism or immigration, and has not led to the public being exposed to additional or unnecessary risks',⁹ it nonetheless claimed that:¹⁰

Deficiencies in training and guidance [to public officials concerning the HRA] have led to an imbalance whereby *too much attention has been paid to individual rights at the expense of the interests of the wider community.*

Shortly before his retirement as Prime Minister, Blair again attacked what he saw as the priority given to the rights of terrorist suspects ahead of the rights of the general public: 'We have chosen as a society to put the civil liberties of the suspect, even if a foreign national, first. I happen to believe this is misguided and wrong'.¹¹ Just as Blair saw 'the language of rights' in the 1970s as 'corroding civic duty and undermining the fight-back against crime', he saw the courts' emphasis on the rights of suspects in the 21st century as endangering the rights of the law-abiding British public.

In July 2007, the government of the new Prime Minister Gordon Brown was no less keen to emphasise the link between rights and responsibilities: the phrase 'rights and responsibilities' appears at least 12 times in its *Governance of Britain* paper with 'rights and duties' being used a further 5 times.¹² Although the paper readily acknowledged that the Human Rights Act 1998 itself 'enunciate[d] principles of decency, respect, dignity of the individual and the balance of rights and responsibilities that are now common to most of the democratic world' and that 'most of the individual rights in the Human Rights Act are balanced with the need to protect

⁸ Speech to the Centre for Policy Studies, London, 26 June 2006. Emphasis added.

⁹ *Review of the Implementation of the Human Rights Act* (Department for Constitutional Affairs, July 2006), p4.

¹⁰ *Ibid*, p29.

¹¹ 'Blair accuses courts of putting rights of terror suspects first' by Nigel Morris, *The Independent*, 28 May 2007.

¹² *The Governance of Britain* (July 2007: Cm 7170).

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the rights of others and the common good',¹³ the paper raised the prospect of making the relationship between rights and responsibilities more explicit:¹⁴

A Bill of Rights and Duties could provide explicit recognition that human rights come with responsibilities and must be exercised in a way that respects the human rights of others. It would build on the basic principles of the Human Rights Act, but make explicit the way in which a democratic society's rights have to be balanced by obligations.

David Cameron meanwhile renewed his attack on the Human Rights Act in August 2007, following the decision of an immigration tribunal not to deport Learco Chindamo, an Italian national who at the age of 15 had murdered headmaster Philip Lawrence, partly on the basis that to do so would violate Chindamo's right to family life (he had lived in the UK since he was 6 and had no relatives in Italy). Cameron called for the Human Rights Act to be abolished and replaced with:¹⁵

a British Bill of Rights, which sets out rights *and responsibilities*. The fact that the murderer of Philip Lawrence cannot be deported flies in the face of common sense. It is a glaring example of what is going wrong in our country. What about the rights of Mrs Lawrence? The problem for this Government is that the Human Rights Act is their legislation and they appear to be blind to its failings.

In late October 2007, Minister of Justice Jack Straw further elaborated on proposals for a British Bill of Rights, stressing that '[a] Bill of Rights and responsibilities imposes obligations on government: but it also makes clear that the citizen has mutual obligations'.¹⁶ He added:

Over many years there has been debate about the idea of developing a list of the rights and obligations that go with being a member of our society. A Bill of Rights and Responsibilities could give people a clearer idea of what we can expect from the state and from each other, and a framework for giving practical effect to our common values.

If this seems vaguely familiar, however, it is worth recalling what Jack Straw, then Home Secretary, said in May 1999 announcing the date for the implementation of the Human Rights Act:¹⁷

Human Rights Day - 2 October 2000 - should not be seen as a field day for lawyers. *It will mark instead, a major step-change in the creation of a culture of rights and responsibilities in our society. The Human Rights Act is a two way street. Rights flow from duties - not the other way round. One person's*

¹³ *Ibid*, para 206.

¹⁴ *Ibid*, para 210.

¹⁵ 'David Cameron: Scrap the Human Rights Act', by Christopher Hope and Caroline Gammell, *Daily Telegraph*, 24 August 2007. Emphasis added.

¹⁶ Mackenzie-Stuart Lecture, University of Cambridge Faculty of Law, 25 October 2007

¹⁷ Home Office press release, 'Jack Straw Announces Implementation Date for the Human Rights Act', 18 May 1999. Emphasis added.

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freedom is another person's responsibility. And the Convention - and the Act - contains many rights which have carefully to be balanced, one with another.

And again in March 2000:¹⁸

The Human Rights Act will help us rediscover and renew the basic common values that hold us all together. And those are also the values which inform the duties of the good citizen. I believe that in time, the Human Rights Act will help bring about *a culture of rights and responsibilities across the UK.*

In other words, it can hardly be said that the Human Rights Act was brought into being without reference or regard to the idea of responsibilities or duties. On the contrary, it was introduced on very much the same basis as the proposed British Bill of Rights is currently being sold. If there has been a problem with a lack of understanding about the relationship between rights and responsibilities in the last ten years, it can hardly be said to be due to a lack of public statements by senior government ministers on the matter.

The relationship between rights and duties

On most accounts, the relationship between rights and duties is a fairly straightforward one. Rights protect interests that belong to persons.¹⁹ They do so by imposing duties upon other people to promote or serve those interests. As Raz puts it, 'rights are grounds of duties in others'.²⁰ However, not all the interests that people have are protected by rights – only those goods or interests that are of sufficient moral importance to justify the imposition of duties upon others. We use the shorthand of 'rights', then, to describe those claims that some person's interest is important enough to justify placing other people under a duty to promote or protect it.²¹

It isn't necessary for present purposes to go into the lengthy and frequently sterile jurisprudential debate over whether rights are strictly *correlative* to duties. It suffices to say that although rights inevitably give rise to duties upon others, it does not follow from this that all duties are therefore referable to some or other individual right. In particular, it would be a serious mistake to assume that every *legal* duty is correlative

¹⁸ 29 March 2000, cited in Harvey, *Human Rights in the Community* (Hart Publishing, 2005) p65. Emphasis added.

¹⁹ This account follows – broadly speaking - the Interest theory of rights; see Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) and MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Oxford: Clarendon Press, 1982) and 'Rights in Legislation', in Hacker and Raz (eds.), *Law, Morality and Society: Essays in Honour of HLA Hart*, (Oxford: Clarendon Press, 1982). Another traditional school of thought is that rights protect choices – the Choice theory of rights; see e.g. HLA Hart 'Are There Any Natural Rights?' in Waldron (ed), *Theories of Rights* (Oxford: Oxford University Press, 1984). As Hartney suggests, 'these two views can be reconciled if one recognizes that autonomy or possibility of choice is a good, and that it is in one's interest (in the broad sense that it contributes to one's well-being) to have such a possibility' ('Some Confusions Concerning Collective Rights' in Kymlicka (ed), *The Rights of Minority Cultures* (New York: Oxford University Press, 1995) p 225. See also the discussion in Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) at pp 79-100.

²⁰ Raz, *Morality of Freedom*, n17 above, p167.

²¹ See *ibid.* See also Waldron, *Liberal Rights: Collected papers 1981-1991* (Cambridge: Cambridge University Press, 1993) at p 212.

to someone's *moral* interest somewhere.²² As useful as Hohfeldian analysis is in the context of *legal* rights,²³ it works poorly in the context of *moral* rights and, indeed, political arguments over human rights.²⁴

At this point, it is also worth clarifying the difference between duties and responsibilities in the context of rights. It is simple enough to describe the relationship between rights and duties: as noted above, rights are a source of duties in others. The idea of responsibility, by contrast, is broader and more abstract, and one that in many cases may have only an indirect relationship to another's *rights* (unless, of course, we resolve to use 'responsibility' purely as a synonym for 'duty' or 'obligation').²⁵ In particular, 'responsibility' is not synonymous with 'legal liability' for, as Cane points out, it is entirely possible for there to be 'responsibility without legal liability and legal liability without responsibility'.²⁶ As an example, my right to free expression puts other people under a duty to respect it.²⁷ I am nonetheless morally responsible for what I say.²⁸ What I am legally liable for is a different matter, and I may be liable for things that I am not wholly responsible for (e.g. I may be liable for repeating defamatory remarks made by another) and accountable for things I am not liable for

²² A legal right may protect, or help protect, a specific moral right. It need not do this directly, however. Just as rights aren't strictly correlative with duties, legal rights may protect moral rights indirectly: for example, parents may have a legal right to child support, but the moral right in question (the interest served) arguably belongs to their children. Equally, the existence of a duty or prohibition doesn't entail the existence of a corresponding *legal* right *per se*. For example, we would say that the legal prohibition against damaging a traffic sign gives rise to duties, but it seems implausible to claim that there are legal *rights* that correspond with these duties. As Hartney points out, 'it is one of the weaknesses of the Hohfeldian analysis of rights that all duties must correlate with rights and therefore be owed *to* someone [original emphasis]' (n17 above, p 225).

²³ Hohfeld (*Fundamental Legal Conceptions as Applied in Judicial Reasoning, and Other Legal Essays*, edited by WW Cooke (New Haven: Yale University Press, 1919) distinguishes four main senses of the term 'right' in *legal* discourse: 'claims', 'liberties', 'powers' and 'immunities'.

²⁴ Just as moral rights 'are unlikely to stand in a simple one-to-one relation with duties' (Waldron, *Liberal Rights*, p 212), they are just as unlikely to stand in a simple one-to-one relation with *legal* rights, immunities, privileges, claims, etc.

²⁵ See e.g. Cane, *Responsibility in Law and Morality* (Hart Publishing: 2002); Gardner, 'The Mark of Responsibility' (2003) *Oxford Journal of Legal Studies* 23 pp 157-171. Gardner describes 'responsibility' as 'the value of being able to offer an account of oneself as a rational being' (167) or 'the ability to offer justifications and excuses' (161).

²⁶ Cane, *ibid*, p5.

²⁷ I do not address here the point that can be made about lack of horizontality under the Human Rights Act, i.e. that Convention rights are held first and foremost against the state rather than against other individuals (but see the developments in relation to a possible tort of privacy under Art 8 ECHR following *Campbell v MGN Ltd* [2004] 2 AC 457). Although it is true that private individuals do not by-and-large owe a direct legal duty to respect another's Convention rights *qua* Convention rights, they are typically under a wide range of statutory and common law duties and prohibitions, etc, that are broadly coextensive with Convention rights. For example, although the prohibition against ill-treatment under Art 3 ECHR only applies to public authorities under the HRA, there is nonetheless criminal and tortious liability for acts of torture under UK law.

²⁸ See e.g. Waldron, 'A Right to Do Wrong' in *Liberal Rights*, n19 above, pp 65-66: 'There is no paradox in the suggestion that a person may have a *legal* right to do an act which is morally wrong. Just as individuals may have legal duties that require them to perform wrong acts (for example, serve in unjust wars), so they may have legal rights that entitle them to perform actions that are wrong from the moral point of view I may be legally at liberty to perform a certain act even though that act is not permissible from a moral point of view; or, others may have a legal duty to me to refrain from interfering with my performance of a certain act, even though the act is morally wrong and their interference morally permissible'.

(e.g. even if my claim of qualified privilege succeeds, I am still responsible for helping to spread the defamatory remarks).

The idea of responsibility in general is, to be sure, a fundamental part of both our legal and moral reasoning and – in that sense, at least – it is easy to appreciate its broader relationship with human rights for both are premised on the idea of human beings as autonomous moral agents. Having the freedom to act also means taking responsibility for one's actions. But the standard complaint made by politicians concerning rights and responsibilities misses the point for at least two reasons. First, *responsibility* under the criminal law follows moral agency: people who are guilty (rather than merely suspected) of terrorism or hijacking or anti-social criminal conduct are liable to be punished *precisely because* they are considered by the law to be responsible. For this reason, the criminal law does not punish those who acted under duress, for example, or as unconscious automatons or by reason of insanity, on the basis that they were not genuinely responsible for their actions. Far from showing that rights and responsibilities are out of balance, therefore, the criminal law is a mark of how seriously we take individual responsibility.

Secondly, although many legal rights may be contingent on a certain status or relationship (e.g. as a party to a contract, a beneficiary of a trust, or as a citizen of a country),²⁹ *human* rights protect certain fundamental moral interests that people have simply by virtue of being human, rather than as consequence of being law-abiding or having a British passport.³⁰ Failure to respect the rights of others can, in the most serious of cases, lead to punishment that includes loss of liberty. So too are some rights tied to conditions, e.g. you need to be of marriageable age before you can exercise your right to marry. But a person's right to be free from torture, for example, does not depend on their previous good conduct nor is their right to a fair trial contingent upon their nationality. Particularly incoherent in this regard is the government's suggestion that human rights 'must be exercised in a way that respects the human rights of others'. Since it is axiomatic that each individual's rights are limited by equal protection for the rights of others,³¹ it would be impossible to

²⁹ See e.g. HLA Hart 'Are There Any Natural Rights?', n17 above, on the difference between general rights and special rights at p84: '(1) General rights do not rise out of any special relationship or transaction between men. (2) They are not rights which are peculiar to those who have them but are rights which all men capable of choice have in absence of those special conditions which give rise to special rights. (3) General rights have as correlatives obligations not to interfere to which everyone else is subject and not merely the parties to some special relationship or transaction'. Waldron (*Private Property*, n17 above, at p 107) suggests that Hart runs together the distinction between special and general rights with that between rights *in personam* and *rights in rem*. Rights *in personam* are held against some individuals and not others; rights *in rem* are held against all the world. Hart thought that special rights were necessarily *in personam*, general rights *in rem*. However, Waldron points out that property rights are an obvious class of special rights (contingent upon a particular relationship or transaction) that are held to the exclusion of all others (rights *in rem*).

³⁰ See Waldron, *Private Property*, n17 above, referring to the idea that each person has certain 'morally crucial' interests that 'are not to be sacrificed merely for the sake of the greatest happiness or the prosperity of society in general' (p14).

³¹ See e.g. Article 4, 1789 Déclaration des Droits de l'Homme et du Citoyen: 'La liberté consiste à faire tout ce qui ne nuit pas à autrui: ainsi l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres membres de la société la jouissance de ces mêmes droits' ('Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights'). See also Mill, *On Liberty* (London: Oxford University Press, 1966): 'the only purpose for which power can be rightfully exercised over any member of a civilized

exercise human rights in any other way. Far from affirming this self-evident truth, though, the government's proposal to make this injunction explicit in a Bill of Rights would have the effect of undermining it by implying that it is possible to violate the rights of others by the exercise of one's own rights.³²

More generally, the relationship between rights and responsibilities desperately needs to be put in its proper legislative context. For it is not only the criminal law that gives rise to duties or attaches responsibility to individual actions. The law in general grants few rights but abounds with duties, prohibitions, penalties and the like. A glance at the Queen's Speech in 2007, for example, shows a legislative programme of 44 Bills and six draft Bills.³³ While most are undoubtedly for the benefit of the common good, the great majority grant no formal legal rights of any kind to individuals (c.f. the Crossrail Bill, the Olympics Bill, the Marine Navigation and Port Safety Bill, the Regulatory Reform Bill) nor would we expect them to. Even those whose title suggests the grant of further rights, e.g. the Parental Rights Bill, are likely on a purely Hohfeldian analysis to contain more duties than rights for individuals.³⁴ On any sensible analysis, therefore, UK law is overflowing with duties and responsibilities while the number of genuine legal rights referable to individuals is relatively small. Certainly the Human Rights Act has made Convention rights justiciable in our courts and the statutory duty upon public authorities to act compatibly with them has given those rights a wide-ranging effect. But it would be foolish to claim that the entire scheme of duties and rights under UK law has been unbalanced as a result of adding a mere 17 or so rights.³⁵

The public understanding of rights

Having set out the relationship between rights and duties, the next question is whether this relationship is widely understood among the general public.

At first glance, it may be tempting to agree that rights are poorly understood. First, despite its long tradition of liberal political thought, the UK's lack of a written constitution has meant that the legal protection of rights has historically depended on the relatively weak mechanism of the common law rather than by explicit constitutional guarantee. As Dicey explained:³⁶

We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to

community, against his will, is to prevent harm to others'. See also Nozick's discussion of rights as side-constraints in *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974).

³² By contrast, Article 17 of the European Convention on Human Rights offers the sound negative formulation that '[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention'. Since Article 17 is already part of Schedule 1 of the Human Rights Act, any further statutory provision would seem otiose.

³³ <http://www.number-10.gov.uk/output/Page13709.asp>

³⁴ In Hohfeldian terms, of course, each of these duties, etc correlate to rights, privileges, immunities, permissions, etc in others but the key point is that most of these are enjoyed by the *state* or particular office holders, rather than the ordinary subject of the law.

³⁵ See Schedule 1 of the Human Rights Act containing *inter alia* Articles 2-12, 14, and the rights under the First and Third Protocols.

³⁶ Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed, (MacMillan, 1927) at p 191.

personal liberty, or the right of a public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.

Secondly, there is evidence that the particular mechanism of the Human Rights Act 1998 is not especially well understood, either among some public officials, the media, or the public at large. A review of the implementation of the HRA in 2006 by the then-Department for Constitutional Affairs found, for instance, that the Act ‘has been widely misunderstood by the public’ and that ‘a number of damaging myths about human rights ... have taken root in the popular imagination’.³⁷ The report concluded:³⁸

There is an urgent need for the public as well as the wider public sector to be better informed about the benefits which the Human Rights Act has given ordinary people, and to debunk many of the myths which have grown up around the Convention rights and the way they have been applied, both domestically and in Strasbourg. The European Convention and Court of Human Rights occupy a proud place in the new order which followed the Second World War, and the UK played a leading role in their creation.

The ‘leading role’ played by the UK in establishing the Council of Europe and the European Convention on Human Rights is a useful case in point, the Convention having been ‘drafted substantially’ by Sir David Maxwell Fyfe QC.³⁹ It is, however, a safe bet that most readers of the Daily Mail are unaware that the ECHR was drafted by a one-time Tory Home Secretary⁴⁰ for, like most tabloids and even some broadsheets, its journalists regularly confuse the Council of Europe with the European Union.⁴¹

Indeed there can be no greater proof of the subservience of British law to a *Brussels-inspired Act* than the fact that our future King, who represents hundreds of years of British sovereignty, has to resort to the Human Rights Act to justify his marriage.

None of this shows, however, that either the *concept* of rights or their relationship with duties is poorly understood by the public at large. At worst, it shows only that the particular legislation protecting human rights is not well understood. And while this is certainly unfortunate given the constitutional significance of the HRA,⁴² the same

³⁷ *Review of the Implementation of the Human Rights Act* (Department for Constitutional Affairs, July 2006), p 29.

³⁸ *Ibid*, p 42.

³⁹ *Ibid*, p8.

⁴⁰ Maxwell Fyfe was Home Secretary under Churchill from 1951 to 1954 and Lord Chancellor in the governments of Churchill, Eden and Macmillan until 1962.

⁴¹ ‘Common sense and human rights’, *Daily Mail*, 5 March 2006 [emphasis added]. See also e.g. ‘Human rights is merely a sweetener for rapists, murderers and violent criminals’ by Alison Pearson, *Daily Mail*, 6 November 2007, referring to ‘Article 8 of the EU Convention on Human Rights [sic]’;

⁴² See e.g. *Thoburn v Sunderland City Council* [2002] EWHC 195 per Laws LJ at para 62: ‘The special status of constitutional statutes follows the special status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and

could equally be said for the provisions of the European Communities Act 1972, or either of the Parliament Acts, for example. Although it is essential in a democracy governed by the rule of law for the participants in that democracy to understand and, indeed, deliberate upon the nature of the constitutional arrangements that govern their decision making, we should not make the mistake of confusing that kind of understanding with a detailed legal knowledge of particular statutes. Improving public awareness of the HRA is undoubtedly an important goal, but we should not confuse familiarity of its core concepts with an ability to recite its first schedule chapter and verse (or article and paragraph).

In fact, there is every reason to believe that the public at large have an excellent understanding of the relationship between rights and duties. The UK is, after all, home to the world's oldest human rights organisation (Anti-Slavery International, founded in 1839) as well as its largest (Amnesty International, headquartered in London with over 2.2 million members worldwide). Nor is the UK's tradition of liberal political thought confined to dry works on political philosophy: instruments such as the Magna Carta (the so-called 'Great Charter of the Liberties of England'), the 1628 Petition of Right, and the 1688 Bill of Rights all speak to an well-established political tradition of respect for rights and liberty. Indeed, it would be impossible for such a tradition – what the Prime Minister describes as this country's 'passion for liberty'⁴³ – to exist unless there were an implicit general understanding of the relationship between freedom and responsibility, rights and duties. In this light, the claim that the Human Rights Act has somehow contributed a '*culture of rights without responsibilities*' is revealed as both patronising and offensive for it implies that at least some people were either credulous enough or stupid enough to suppose that the enactment of the HRA in some way relieved them of their obligation to obey the law.

We come, then, to answer the third question posed at the outset of this article: is lack of public understanding of rights and responsibilities a cause of any of the problems that have been attributed to it by politicians and others? No, since there is no serious evidence that the relationship is not well-understood. There is, however, at least one group among whom apparent lack of understanding of rights has given rise serious problems and that is politicians. Statements by senior members of both parties frequently reveal serious misunderstandings about how rights work, as the complaint of John Denham MP concerning the non-removal of Mustaf Jemma on Art 3 ECHR grounds illustrates:⁴⁴

enlarged the franchise, the HRA, the Scotland Act 1998 and the Government of Wales Act 1998. The [European Communities Act] clearly belongs in this family'. See also Bogdanor, 'The Human Rights Act: cornerstone of a new Constitution', Gresham College, 25 January 2005; or the speech of Lord Steyn in *Jackson v Attorney General* [2005] UKHL 56 at para 102: 'We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts [T]he European Convention on Human Rights as incorporated into our law by the Human Rights Act, 1998, created a new legal order a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom'.

⁴³ Gordon Brown, 'On Liberty', University of Westminster, 25 October 2007, <http://www.number10.gov.uk/output/Page13630.asp>.

⁴⁴ John Denham MP, 'Human rights and wrongs', *Guardian*, 8 May 2006. Denham was at that time chair of the Commons Home Affairs Committee. In fact, as Denham acknowledges, the decision not to deport Jemma was made by the Home Office and not the courts.

The Mustaf Jamma case, though not directly determined by the courts, leaves many people asking whose rights should take priority. It is an interesting test case. His original offences, though highly unpleasant, were not among the worst the courts see, and Somalia is a very dangerous country. On the other hand, he had sought sanctuary in this country, and had been given it. Surely, most people would say, that brings its own responsibilities. The problem is that the interpretation of human rights law seems to focus almost entirely on the risks to the individual at the expense of the wider concerns for public safety.

Here, then, is the same complaint as that made by Tony Blair: that the courts give priority to the rights of dangerous criminals and terrorists at the rights of the safety of law-abiding public.⁴⁵ But the one of the core features of human rights is that they protect the fundamental moral interests of individuals, including freedom from torture, from being overridden by majoritarian decision-making.⁴⁶ The idea that there could be or ought to be some utilitarian trade-off between public safety and exposing a suspect to torture abroad runs contrary to this basic principle. Although rights can and do conflict, posing difficult questions as to their resolution, the apparent ‘conflict’ between torture and public safety is not one of them. It is true that the collective weight of each person’s individual moral interest in their own physical well-being and property, etc, gives rise to a more general public interest in the prevention of crime, and that this in turn imposes certain positive obligations on government including, among other things, to have a system of laws criminalizing things like murder, rape and burglary, etc, as well as responsibilities for policing, and so forth.⁴⁷ But nobody could seriously claim, for instance, that there is some individualised *right* held by members of the public that entails that foreign nationals who have committed criminal offences must be deported following the conclusion of their sentence, regardless of the consequences. Indeed, taken to its logical extreme, such an argument would require the suspect in each case to be under a moral duty to deport themselves.

Neither is the supposed ‘conflict’ as described by Blair between the rights of suspected terrorists and those of the general public a genuine clash of rights. For the idea that a suspect’s rights could be diminished simply because he or she is accused or suspected of a crime flies in the face of one of the essential guarantees of a fair trial: that individuals are presumed innocent until proven guilty.⁴⁸ Insofar as there is

⁴⁵ See e.g. n11 above.

⁴⁶ Nor does the Human Rights Act prevent Parliament from legislating in a way that is incompatible with Convention rights - see section 4(6) of the Act: ‘[a] declaration ... of incompatibility ... does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given’.

⁴⁷ See e.g. the judgment of the European Court of Human Rights in *Osman v United Kingdom* [1998] ECHR 101 (28 October 1998), para 115, noting that the right to life under Article 2(1) ECHR ‘enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction It is common ground that the State’s obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual’.

⁴⁸ See e.g. Article 6(2) ECHR: ‘Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law’.

problem with public misunderstanding of the HRA, therefore, it is one for which government ministers have been largely responsible. As the Joint Committee on Human Rights reported in 2006:⁴⁹

We must ... draw to Parliament's attention the extent to which the Government itself was responsible for creating the public impression that in relation to each of the ... highly contentious issues under consideration it was either the Human Rights Act itself or misinterpretations of that Act by officials which caused the problems. In each case, very senior ministers, from the Prime Minister down, made assertions that the Human Rights Act, or judges or officials interpreting it, were responsible for certain unpopular events when ... in each case these assertions were unfounded. Moreover, when those assertions were demonstrated to be unfounded, there was no acknowledgment of the error, or withdrawal of the comment, or any other attempt to inform the public of the mistake [P]ublic misunderstandings of the effect of the Act will continue so long as very senior ministers fail to retract unfortunate comments already made and continue to make unfounded assertions about the Act and to use it as a scapegoat for administrative failings in their departments.

The role of duties in a Bill of Rights

Having considered the relationship between rights and duties, and apparent problems concerning the public understanding of rights, we come to the fourth and final question: is there a need to make duties or responsibilities explicit in a Bill of Rights?

Having already dismissed the argument that the public do not understand the general relationship between rights and duties, it is nonetheless worth considering the other arguments in favour of making duties explicit in a Bill of Rights. The core of these seems to be something like as follows: (i) public understanding of human rights could always stand to be improved; (ii) Bills of Rights are more than ordinary legislation, they are constitutional documents and as such perform an important symbolic function; (iii) there is therefore no harm in making the relationship explicit, for the avoidance of doubt.

Proponents of making duties explicit in a Bill of Rights can find some comfort in the fact that some human rights instruments *do* make reference to duties. For instance, the 1948 American Declaration of the Rights and Duties of Man,⁵⁰ which predated the UN's own Universal Declaration on Human Rights by over seven months, includes in its preamble the statement that:

The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.

⁴⁹ Joint Committee on Human Rights, *The Human Rights Act: DCA and Home Office Reviews* (14 November 2006: HL 278/HC 1716)

(<http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/27802.htm>), para 21.

⁵⁰ O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948).

The drafters of the Universal Declaration, despite being aware of this formulation, nonetheless eschewed it. The *travaux préparatoires* suggests that the reason for this was that the drafters felt that spelling out the relationship between rights and duties was too obvious to bear mentioning.⁵¹ Instead, the Universal Declaration settled for the admonition in Article 1 that:⁵²

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and *should act towards one another in a spirit of brotherhood.*

In addition, Article 29(1) offered the observation that:

Everyone has duties to the community in which alone the free and full development of his personality is possible.

Similarly, the International Covenants on Civil and Political Rights⁵³ and Economic Social and Cultural Rights both confined reference to ‘duties’ to the preamble, with the exhortation that:

the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.

Interestingly, the sole reference to duties among the actual articles of both the International Covenant on Civil and Political Rights and the European Convention on Human Rights is a qualification on the right to freedom of expression, which is stated to carry with it ‘duties and responsibilities’.⁵⁴ This reference was explained by the UN Special Rapporteur on Freedom of Opinion and Expression in the following terms:⁵⁵

The issue of duties and responsibilities was subject to some debate during the *travaux préparatoires*. Those who opposed proposals stipulating that the right to freedom of expression carries with it duties and responsibilities contended that the general purpose of the Covenant was to set forth civil and political rights and to guarantee and protect them rather than to lay down duties and responsibilities and to impose these upon individuals. It was furthermore contended that since each right carried with it a corresponding duty and since in no other article was this corresponding duty of any right set out, article 19

⁵¹ See e.g. Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff: 2001), p 426. See also UN Doc A/2929, 10 GAOR, Annexes, Agenda Item 29, Part II (1955), annotating the role of the Human Rights Commission in helping to draft the Universal Declaration; and the memoirs of John Humphrey, director of the Division of Human Rights within the UN Secretariat (*Human Rights and the United Nations: A Great Adventure* (New York: 1983) describing the drafting in pp 10-78.

⁵² Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. Emphasis added.

⁵³ Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966.

⁵⁴ C.f. Art 10(2) ECHR: ‘The exercise of these freedoms, *since it carries with it duties and responsibilities*, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society’; Art 19(3) ICCPR: ‘The exercise of the rights provided for in paragraph 2 of this article *carries with it special duties and responsibilities*. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary’.

⁵⁵ UN Doc. E/CN.4/1995/32, para 37.

should not be an exception to this rule. It was principally upon the argument that the modern media could exert a powerful influence on the exercise and enjoyment of freedom of expression that those supporting proposals to include a reference to duties and responsibilities in the article maintained their position. It was for these reasons that in the ultimately adopted text of article 19 the word 'special' was included before the words 'duties and responsibilities'.

Although some regional human rights instruments also make reference to duties,⁵⁶ proponents of including duties in Bills of Rights must confront the fact that – other than the exceptions noted here – almost all Bills of Rights in common law countries contain no reference to the duties, responsibilities or obligations of individuals. Magna Carta makes no reference to them (unless one counts the many and various obligations on the hapless King John). Neither does the 1688 Bill of Rights or the 1787 US Bill of Rights and indeed, the only duty contained in the US Declaration of Independence is the duty of the people to ‘throw off’ despotic governments. There is no reference to duties or responsibilities in the Canadian Charter of Rights and Freedoms 1982, or the New Zealand Bill of Rights Act 1990 and the only substantive reference in the South African Bill of Rights is the duty of the state to legislate to implement the right to just administrative action under Article 33. Similarly, the only mention of ‘duty’ in the provisions on fundamental rights in the 1937 Irish Constitution is a reference to the ‘right and duty’ of parents to provide an education for their children.⁵⁷

The sole exception to this common law tradition of referring to rights without duties is legislation in the Australian state of Victoria, the Charter of Human Rights and Responsibilities Act 2007. Although the 1900 Australian Constitution makes no provision for constitutional rights, the Victorian Charter seeks to provide rights at the state level, and its preamble includes the principle that:

human rights come with responsibilities and must be exercised in a way that respects the human rights of others;

For a common law country without human rights legislation, one hates to criticise progress and the Victorian Charter is in all other respects a sound and worthy human rights instrument. But its clumsy⁵⁸ reference to ‘responsibilities’ is testament to two things: first, the relative immaturity of the Australian debate over human rights; and secondly, the fact that it is possible to get legislation, even human rights legislation, wrong (by way of contrast, the Australian Capital Territories Human Rights Act 2004 makes no such reference to duties or responsibilities, showing perhaps that there is slightly more wisdom in Canberra than there is in Melbourne).

The reference to responsibilities brings us back to the argument that Bills of Rights (i) perform a symbolic function and (ii) there is no harm in making the relationship between rights and duties explicit. It is certainly true that Bills of Rights have a symbolism above and beyond their legal functions, and commentators are keen to

⁵⁶ See e.g. the African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁵⁷ Article 42(1) and (5).

⁵⁸ See p7 above.

point to the success of the US Bill of Rights, the Canadian Charter and the South African Bill of Rights in helping to provide the kind of sense of shared identity that helps to foster mutual respect. Certainly this seems to explain much of the appeal of a British Bill of Rights to the current Prime Minister. It is also fair to say that, kept to a preamble, references to duties or responsibilities are largely harmless and anodyne and therefore unlikely to cause much confusion for the courts.

But the fact that something is probably harmless is hardly an excellent reason for its inclusion in a constitutional document. Legislation sometimes has a symbolic function but it must not be at the expense of its actual function, which in this case is the protection of fundamental rights. We should be especially wary of references to ‘duty’ or ‘responsibility’ in the current political context, in which politicians from both parties are only too keen to suggest that human rights are to blame for weakening public safety, or that ‘responsibility’ must somehow factor into decisions about deporting people to ill-treatment and torture.

Similarly, the argument that Bills of Rights have a symbolic function is in fact one of the best arguments *against* including reference to duties or responsibilities in a Bill of Rights. For the importance of rights is long-fought and hard won, the product not only of centuries of tradition but also of hardship and genuine sacrifice. We have a responsibility to that tradition and that inheritance to ensure that it is not qualified or watered down to the level of a press release, part of a government communications strategy that takes its place alongside focus groups and the targeting of key demographics. And if we are serious about rights, if our talk of them is to be not just talk, then we can surely do better than stating the obvious and the banal.

The last word on this issue can be left to Thomas Paine, the English writer and pamphleteer who did so much to popularise rights at the time of the American Revolution. In his recent speech in Cambridge, the Minister of Justice Jack Straw quoted Paine’s observation that:⁵⁹

A Declaration of Rights is, by reciprocity, a Declaration of Duties also. Whatever is my right as a man, is also the right of another, and it becomes my duty to guarantee as well as to possess.

What Straw shrewdly (or perhaps cynically) left out of his quotation was the fullness of Paine’s remarks:⁶⁰

While the Declaration of Rights was before the National Assembly some of its members remarked that if a declaration of rights were published it should be accompanied by a Declaration of Duties. *The observation discovered a mind that reflected, and it only erred by not reflecting far enough.* A Declaration of Rights is, by reciprocity, a Declaration of Duties also. Whatever is my right as a man is also the right of another; and it becomes my duty to guarantee as well as to possess.

⁵⁹ Paine, *The Rights of Man* (1791), p98.

⁶⁰ See n16 above. Emphasis added.

(2007) 2 *JUSTICE Journal*, forthcoming.

In other words, the sometime author of *Common Sense* was not arguing for the link between rights and duties to be spelt out in a Bill of Rights, but explaining why reference to duties would be plainly redundant. To Paine's contemporaries also, Jefferson, Adams, Hamilton and Madison, the relationship between rights and duties was too obvious to bear mentioning, too self-evident even for a document meant to declare self-evident truths. Like the drafters of the Magna Carta, the 1688 Bill of Rights or the post-Apartheid Constitution of South Africa, they understood themselves as heirs to an ancient tradition of liberty in which such reference was plainly unnecessary. To introduce the language of duties and responsibilities into a new British Bill of Rights would not, therefore, be a sign of maturity. At best, it would, in Paine's words, show only a lack of reflection among British politicians. At worst, it would be a mark that the UK had, at long last, lost its natural understanding of rights.

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