

**Rights and Responsibilities: developing our constitutional framework**  
**Response to the Ministry of Justice Green Paper (Cm 7577)**  
**From the Federal Trust for Education and Research**  
**May 2009**

1. The Federal Trust is a think tank that studies the interactions between regional, national, European and global levels of government. We are currently engaged in the study of the possible applicability of federal structures to the UK; and as part of this work we have an interest in mechanisms by which rights may be defined and upheld within a federal settlement.
2. Please find below our response to the Green Paper of March 2009.
3. We deal in particular with the themes of chapters 3, 'Rights' and 4, 'Legal Effect' – and within chapter 4, the subsection 'A Bill of Rights and Responsibilities and devolution'.

**Introduction**

4. We have two central contentions.
5. First, a Bill of Rights must apply equally to all tiers of governance and it should be possible for primary legislation issued by the UK Parliament to be struck down under it.
6. Second, rights should not be owned by any one tier of governance.
7. These arguments are founded in the view that parliamentary sovereignty has ceased to be an accurate description of our constitutional practice; and that acknowledgement of this fact is essential to any attempt to assess and improve the UK constitutional settlement.
8. The doctrine that the Crown-in-Parliament is the font of all legitimate power in the UK does not function in practice, for a number of reasons. They include UK membership of various supranational bodies, including NATO, the European Union, the Council of Europe, the World Trade Organisation and the World Health Organisation; the informal entrenchment of devolution for Wales, Scotland, Northern Ireland and London; and the progressive liberalisation of currency markets since the Second World War.
9. We believe that the reality of the UK constitution, within which sovereignty is shared between different tiers of governance, both at, above and below the UK Parliament, rather than lodged only at the Palace of Westminster, should be acknowledged; and that any attempts at codification and/or reconfiguration should recognise this reality if they are to prove effective. For instance, as the Ministry of Justice Green Paper states (p.58, para 4.32): 'Devolved legislatures and administrations...have become an established part of the United Kingdom's political landscape'.

10. It should be noted that, as far as the UK is concerned, many existing rights of individuals and groups are guaranteed and enforced at different tiers of governance.
11. For instance, the UK is signatory to a number of international human rights instruments (discussed below), which have supranational monitoring and/or enforcement bodies. At the same time, the UK Parliament passed the *Human Rights Act 1998*; and at a tier below again there exist human rights commissions in Scotland and Northern Ireland (and one covering England, Wales and Scotland).

## **Rights**

12. The Green Paper correctly notes that there are a wide variety of rights that could potentially be included in a UK Bill of Rights. They include the civil and political rights upon which the European Convention on Human Rights (ECHR) is focussed; and the socio-economic rights that are dealt with by such documents as the United Nations International Covenant on Economic, Social and Cultural rights (ICESCR); and environmental rights.
13. We believe that a useful starting point for a debate over which rights to include in a UK Bill of Rights would be a consideration of all those international covenants on human rights to which the UK is already bound. While under the UK constitution treaties are not domestically self-enacting, it would seem reasonable that the rights contained in these international covenants should be the basis of a UK Bill of Rights. It is important that wider awareness is generated of the international human rights commitments of the UK; and that the relationship between rights provided for at different tiers of governance, whether international, at UK level, or more local, is as clear and consistent as possible.
14. In practical terms, when different kinds of rights are discussed, across the UK as a whole there is likely to be more consensus around the idea of providing for civil and political rights in a UK Bill of Rights than for securing other rights such as socio-economic rights. It is perhaps as a reflection of a cultural differentiation between types of rights that the ECHR has already been incorporated into UK law by the Human Rights Act 1998; while the ICESCR, although the UK is a signatory to it as an international agreement, has not. Attitudes towards the various kinds of rights may vary significantly across different UK regions and nations.
15. We advocate the establishment of a framework within which it is possible for individual regions and nations within the UK to introduce their own bills of rights that build upon a floor established by the UK bill of rights. For instance there might be a UK-wide Bill of Rights concentrating on civil and political rights, with additional bills of rights introduced in Wales, Scotland or Northern Ireland that made extra provision for economic and social rights.
16. To some extent the process leading to a possible Northern Ireland Bill of Rights provides a precedent for this approach, since if established it would

extend upon existing rights associated with the Human Rights Act/ECHR, which could be regarded as an embryonic UK Bill of Rights (although we do not wish to preclude the possibility that a UK Bill of Rights may extend beyond the provisions of the ECHR).

17. However, the introduction of a Northern Ireland Bill of Rights, though being based on the advice of the Northern Ireland Human Rights Commission, is subject to the agreement of the UK government; to space being found in the UK legislative programme; and to receiving the assent of the UK Parliament. This anomalous arrangement is in a sense the mirror image of the problem highlighted by the so-called 'West Lothian Question'. Why, it might be asked, should those who are not directly affected by the introduction of a Bill of Rights for Northern Ireland be able to determine whether it is adopted?
18. We believe that decisions over sub-UK regional or national bills of rights which extend upon the UK Bill of Rights should be taken at the regional or national level where they will apply.
19. Locating such decisions at their appropriate level in this way has a number of merits:
  - a) It would help clearly to establish a principle that any cost consequences of a decision taken to introduce a sub-UK Bill of Rights would be borne by the region or nation that chose to bring this measure about.
  - b) It would be an illustration of the principle that if a Bill of Rights is to be legitimate and fully democratic, all tiers of governance must be equally subject to it; and it cannot be owned at any one level of governance. The Green Paper hints at such a principle when stating that (p.61, para 4.42) 'Consideration of a Bill of Rights and Responsibilities for the UK – whatever form it might take – will clearly need to involve Parliament, the devolved legislatures, and the devolved executive bodies as well as the Human Rights Commissions which operate in the different parts of the UK'.

## **Legal Effect**

20. At present institutions for devolved governance are prevented from acting in a way that is incompatible with the ECHR, given domestic expression, as noted above, under the *Human Rights Act 1998*. But the UK Parliament is not subject to the same constraints, since primary legislation it has passed cannot be struck down under the Human Rights Act (though immense political pressure is applied to a government to repeal an Act by its declaration of incompatibility with the Human Rights Act).
21. We believe that a Bill of Rights must apply to all tiers of governance within the UK, up to and including the UK Parliament, as part of a codified UK constitution. The UK Supreme Court, when fully functional, would possess ultimate responsibility within the UK for interpreting and enforcing all aspects of this constitution, including the Bill of Rights. The UK Parliament would, like all other tiers of governance, be subject fully to its judgements. If it was

not, it would be hard to discern in what way the Bill of Rights was offering more than is provided by the Human Rights Act at present.

22. Ideally, the principle that all tiers of governance were subject to a UK Bill of Rights would be underpinned by the principle of joint ownership. It would be desirable to establish mechanisms whereby the consent of all tiers of governance was required in order both to establish the contents and form of the Bill of Rights; and to any alterations to it.

### **Other issues**

23. We have considered the ‘rights’ part of the ‘rights and responsibilities’ formulation. We have not commented on the ‘responsibilities’ concept, although we feel, as the government suggests, that it would be ‘not necessarily suitable for enforcement through legal sanction’. However, in our view the unsuitability of ‘responsibilities’ for implementation in this way should not be a reason for a Bill of Rights to be denied justiciability. Rather, it means that the ‘responsibilities’ concept should either be decoupled from rights (at least in terms of provision for enforceability) or dropped altogether.
24. But we believe that ‘rights and responsibilities’ as a concept could have broader constitutional applicability beyond the Bill of Rights and as part of a federal settlement for the UK as a whole. Both the federal and sub-federal tiers of governance could have established in such a document their rights and responsibilities – in other words, the policy areas in which they were able and required to act. Each tier would be required to recognise its rights and responsibilities; respect those of the other tiers; and if a particular policy area was shared, to cooperate with the other relevant tier/s of governance.