FOREWORD

The present Conservative Party leader, David Cameron, has more than once said that, if elected, a Conservative government would repeal the Human Rights Act 1998 and replace it with a British 'Bill of Rights' which would set out what would presumably be his government's view of people's responsibilities and rights.[1] The Brown government has taken a more measured stance, and, in an extraordinarily thoughtful document, has proposed retaining the Act, but supplementing it with a new 'Bill of Rights and Responsibilities'.[2] It may be significant that the Chapter on 'Responsibilities' precedes that on 'Rights'. The future of the Human Rights Act, and perhaps even of human rights as a juridical reality in the United Kingdom, may therefore seem to be somewhat uncertain. To produce a book at this time which analyses family law through the perspective of the Human Rights Act might therefore seem a bold move. But it can go a long way towards dispelling the kinds of myths and misunderstandings which build up an impetus of derision about 'rights', especially 'human rights'.

And this is important. Why? We must not forget that the idea of individual rights in its modern form emerged during the 18th-century Enlightenment as part of the movement to restrict the absolutist powers of the *ancien régime*. It culminated most visibly in the American Declaration of Independence and the French Declaration of the Rights of Man, but was a driving feature in Condorcet's *Reflections on black slavery* (1781) and his *On the admission of women to the rights of citizenship* (1790), in Gouges' *The rights of women* (1791), in Wollstonecraft's *A vindication of the rights of women* (1792) and in Paine's *Rights of man* (1791). As the government's Consultation Document rightly observes, claims such as these were about limitations on power.[3] Bentham, however, de-bunked the idea of rights, or at least of 'natural' rights, probably as a reaction against their apparent contribution to the excesses of the French Revolution, and rights discourse became muted in the political conservatism of the 19th century (apart from a brief resurgence in mid-century), the great anti-slavery and franchise reforms being effected more through appeals to religious conscience or enlightened self-interest, and revolutionary socialism based more on claims about historical inevitably, than by claims about individual rights.[4]

Women had to wait over a century before the rights asserted for them in the 1790s were realised, although JS Mill, who wrote (in 1863) 'if (a person) has what we consider a sufficient claim, on whatever account, to have something guaranteed to him by society, we say that he has a right to it',[5] readily referred to the 'rights' women had, or should have, in

[1] www.dailymail.co.uk/news/article-1092716/Cameron-calls-UK-Bill-Rights-Straw-reveals-plans-overhaul-Human-Rights-Act.html.

[2] Ministry of Justice, *Rights and Responsibilities: Developing our Constitutional Framework* (2009), 10 (referred to here as 'Consultation Document').

[3] Consultation Document, para 3.2.

[4] The word 'rights' does not even appear in the main text of the Communist Manifesto.

[5] JS Mill, *Utilitarianism* (1863) ch 5.

his *The Subjection of Women* (1869). But the concept of individual rights struggled in the oppressive political climate of the first half of the 20th century.[6] After the Second World War, the resurgence of rights discourse was more a strategy to try to protect individuals against any reversion to excessive centralisation of power than, as in earlier times, a means for re-distributing power. This perhaps explains the perception in the Consultation Document that modern human rights instruments seek stability in times of uncertainty. Nevertheless, appeals to individual rights remain significant aspects of recent and current movements to promote empowerment of various groups, such as married women, fathers, gay people and children.[7]

Of course, the nature and source of 'rights' remains problematic. My own view is that they are no more than instances where 'background' moral values are socially recognised as applying to specific circumstances in such a way that it is held that there is a social responsibility to bring about certain 'end-states' which are desired by their beneficiaries, or reasonably thought would be so desired. Casting these situations in terms of 'rights' implies an equal entitlement to the said 'end-state' for all persons in a similar position. Whether such social recognition of these entitlements exists can of course be heavily contested and that is why it is important that there should be trusted social institutions to resolve the contests. Social recognition need not necessarily mean simple 'majority opinion'. Indeed, it should not, because many rights would be worthless if they could be swept aside on the basis of public sentiment, as indeed the French Revolution and many other political events have demonstrated. Exactly how these rights are given institutional protection is a matter of constitutional governance, and varying solutions are possible, some more robust than others. The United Kingdom 'solution', embodied in the Human Rights Act, has a number of virtues. It locates the 'background' principles which sustain the rights in the European Convention of Human Rights and Fundamental Freedoms, and provides a process for their reasoned application to specific situations through forensic argument and judicial decision. It retains an ultimate check over the process by Parliament, although this in turn could be inhibited by conditions of membership of the Council of Europe. Obviously other models are possible.

But two features of any model seem to be particularly important. One is that individual rights should be capable of being legally enforced, even against the government. Rights are very different from responsibilities in this respect. For while it is undoubtedly true that many duties must be subject to legal enforcement (the duty to respect individual rights being an obvious case), there is a strong reason for holding that the performance of general responsibilities to one's community are often (but not always) better underwritten by appeals to altruistic behaviour (such as community spirit) than legal coercion, whereas rights can *only* be effectively protected by institutional mechanisms, like the law.[8] The reason is that when states proclaim duties they think their citizens owe to their communities, and follow this up with force (or other coercive measures), the ambit of individual liberty narrows and can be seriously threatened. It is therefore comforting that the Consultation

[6] See FA Hayek, *The Road to Serfdom* (1944), throughout, and especially pp 63–5.
[7] See John Eekelaar, *Family Law and Personal Life* (2007) ch 6.
[8] *Ibid*, ch 7.

Document strongly hints that any statement of responsibilities that 'we all owe as members of UK society' would not necessarily take the form of legally enforceable duties.[9]

Another feature of the model is that the nature and application of rights should be subjected to continual reasoned debate and evaluation. It is inevitable that this may become complex and difficult. But, as said earlier, the application of even agreed principles to concrete situations can be highly contested. That is the nature of individual rights, and it is naïve to expect otherwise. That is why the analysis of family law in the context of human rights provided in this book is so very important.

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[9] Consultation Document, p 9.

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