

UK Legal News Analysis

## The Human Rights Act--A Bill of Rights by Any Other Name? Pt 1

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### Jurisdiction

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### Related Legislation

Human Rights Act 1998

### Related Digests

Press Release: Law Society Response to Government Consultation on a Bill of Rights, LNB News 25/11/2011 109; Consultation Response: Liberty's Response to the Commission on a Bill of Rights Discussion Paper--Do We Need a UK Bill of Rights? LNB News 14/11/2011 31; Consultation Response: BIHR responds to the Government's Commission on a UK Bill of Rights LNB News 11/11/2011 25; Discussion Paper: Do We Need a UK Bill of Rights LNB News 05/08/2011 43

### Abstract

**The commission set up by the government to investigate the need for a UK Bill of Rights has received some 900 responses in its public consultation. In the first of a two-part article, two respondents with opposing views, Professor Francesca Klug of the London School of Economics and barrister Dr Austen Morgan of 33 Bedford Row, talk to Robert Matthews about whether a Bill of Rights is necessary and what it could contain**

### Analysis

The Commission on a Bill of Rights asked in its discussion paper whether the UK needs a Bill of Rights and what it should contain.

#### Is a Bill of Rights Necessary?

A large number of the lawyers who responded consider that the answer to the first question is no on the basis that the Human Rights Act 1998 ("the HRA") already fulfils that function. A number also suggest that in the public debate, sections of the media and Conservative party have created widespread misconceptions about the HRA, and such misinformation needs to be counteracted.

In response to the second question, they say the HRA should be retained, but if there are to be changes, then the Bill of Rights should guarantee more, not fewer, rights than the HRA or European Convention on Human Rights 1950. The extra rights most commonly suggested were: economic, social, and cultural rights; trial by jury; habeas corpus; equality rights; children's rights; women's rights; other rights protected by the European Union's Charter of Fundamental Rights. Furthermore, the concept of responsibilities should not be introduced, and a Bill of Rights should be entrenched.

Professor Francesca Klug subscribes to that general view. "Most of the submissions to the commission that I have seen make the point that the HRA is a Bill of Rights by any other name. I think the reasons for this are twofold. First, it was introduced following a long debate about whether the UK needed a Bill of Rights. In

the 1970s, '80s and '90s preceding the HRA, the vast majority of proposals, across the political spectrum, were for a UK Bill of Rights based on, or incorporating, the rights in the ECHR. Second, it was crafted not just as a simple statute but, on the classic model of a Bill of Rights, as a higher law to which all other law and policy must conform where possible, but with one caveat to stay within the British tradition of parliamentary democracy where parliament has the final say. I would agree with that description of the HRA."

However, Dr Austen Morgan disagrees: "I favour a UK Bill of Rights and Responsibilities. Although responsibilities are not mentioned in the commission's terms of reference, responsibility is the obverse of rights. I prefer a limited responsibility: the rule of law. This is compatible with art 17 of the Convention. I came to this view advising David Cameron in 2007-10 with others. His position comes from that of the Labour party, which in the early 1990s had envisaged two stages: first the HRA; then a domestic Bill of Rights. I began to see the virtue of homegrown rights, and indeed a bill as a constitutional cornerstone, although a written constitution is not presently practicable. That is my personal view.

"The lobby to defend the HRA is hypocritical for two reasons. One, it gives the impression of wanting to preserve the status quo, but its real agenda is the incorporation of all international agreements. And two, it is avoiding engagement with the public, which is concerned."

### **What Could a Bill of Rights Contain?**

On the question of what a Bill of Rights should contain, Klug and Morgan look to different models. Klug says: "We're in the curious situation where the commission's terms of reference are to consider the creation of a UK Bill of Rights that 'incorporates and builds on all our obligations under the ECHR', but it was set up in the context of disquiet about the HRA, in particular from the prime minister and many other Conservative politicians and their supporters in the press. So there is a mismatch between the terms of reference and the political language that has been used to describe the purpose of this commission. When the commission was established, the prime minister said it was to look at a British Bill of Rights because 'it is about time we ensured that decisions are made in this parliament rather than in the courts'. In my research on Bills of Rights around the world, I've never come across a similar reason given for consulting on a Bill of Rights. The impetus for a Bill of Rights is normally to hold the executive and the legislature to account to the courts, not to take powers from the courts back to parliament.

"In terms of what a British Bill of Rights should contain, there are many models already in existence which comply with the terms of reference of the commission to build on the ECHR: Liberty's A People's Charter; the Institute for Public Policy Research's British Bill of Rights; Richard Gordon QC's draft constitution; the Joint Committee on Human Rights A Bill of Rights for the UK?; and the Northern Ireland Human Rights Commission Bill of Rights for Northern Ireland.

"So if that was the project--to build on the ECHR--it would not be at all difficult to come up with proposals which would be warmly welcomed by human rights groups, but they do not hear this to be the context in which the commission is operating.

"There is also the issue of the powers of the Bill of Rights, not just the contents. It is perfectly possible to replicate the rights in the Convention but with much weaker enforcement powers. That appeared to be David Cameron's aim when he said: 'We will abolish the HRA and introduce a new Bill of Rights so that Britain's laws can no longer be decided by unaccountable judges.' Thus, there would be the same rights, but weaker powers and that, in theory, would comply with the terms of reference of the commission, which notably do not mention the HRA itself."

On the contents, Morgan says: "A Bill of Rights and Responsibilities could simply take over rights from the ECHR, through the HRA. However, I favour modernisation, and possibly the adaptation of the EU's Charter of Fundamental Rights. But a civilised democracy needs to grow its own rights. There is an inspirational canon of recent Commonwealth bills--Canada, New Zealand, South Africa, Australia and Victoria, plus the overlooked dependency, Gibraltar. I have reviewed these Commonwealth bills of rights and think, looking at them alongside the ECHR and the EU's charter, that historic rights lying in the common law could be

articulated in domestic law."

*Tomorrow's article examines the possible results of the consultation and whether a Bill of Rights would need to mirror the scope of the ECHR.*

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