

UK Legal News Analysis

The Human Rights Act--A Bill of Rights by Any Other Name? Pt 2

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Jurisdiction

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Related Legislation

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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 second 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 the possible outcomes of the consultation and whether any Bill of Rights would need to mirror the scope of the ECHR

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.

Possible Outcomes

As to the likely eventual result of the consultation, Professor Francesca Klug points out: "Nothing is expected of the commission beyond producing a report at the end of 2012. It is not required to draft a Bill of Rights and its report will probably be written in a way that many people will interpret different meanings into it. The eventual outcome will depend on the next election. If the Conservatives win outright, it is very likely they will commit to replacing the HRA with a British Bill of Rights which, if it is to fulfil the expectations that are now being raised among Conservative backbenchers and the Conservative-supporting press, will have, at the very least, to tweak the rights in the Convention so that unpopular groups, such as travellers, asylum seekers and foreign prisoners, could no longer benefit from them.

"If the Conservatives do not win, my guess is that the status quo will prevail or you might find very minor amendments to clarify the HRA. But it would be better to carry out a public education programme. Human rights defenders are very nervous about any amendment to the HRA because, rightly and understandably, they feel one amendment could lead to many more and before you know it you have a Bill of Rights under

which the HRA's current powers are returned to Parliament from the courts, which to many people's minds defies the whole purpose of a Bill of Rights. Finally, there is a strong desire among human rights and constitutional advocates for a stronger Bill of Rights, not just with increased rights, but which is entrenched and gives judges strike-down powers. However, we are simply not living in such a constitutional moment: such plans and wishes couldn't be further from where we are in reality and therefore I do not see in the foreseeable future such a Bill of Rights being introduced."

Dr Austen Morgan is fairly optimistic about the eventual result of the consultation: "I do not accept that the commission will fail as there is a basis for compromise within the Coalition. However, if the human rights community frightens the Lib-Dems into digging their heels in, then there will be no constitutional progress.

"If a new Bill of Rights were introduced, rights could be reviewed in accordance with developments since the introduction of the ECHR 60 years ago. For example, at present, in regard to the UK's removal of terrorism suspects back to their countries of origin, art 3 of the ECHR rides over the security rights of the British people. Strasbourg jurisprudence only considers the question whether the suspect would be at risk if returned and not the question whether allowing him to remain would put the British public at risk. That is because when the ECHR was introduced it was to deal with the conduct of states and not terrorists.

"Likewise, in respect of art 8, in 1950 it pertained to the private and family life of ordinary people who did not want to be molested by the police and other state bodies. As each subsequent decade passed, new legislation was introduced in response to gay rights, feminism and transgender issues. It would now be possible to fashion a new 'gender and sexuality' right from Strasbourg case law on art 8 to reflect where these matters stand at present, as opposed to 1950."

Relationship with ECHR

Finally, they address the question of whether a Bill of Rights which was wider or narrower than the ECHR would cause problems. Klug says: "A Bill of Rights which was wider than the ECHR would not necessarily create problems constitutionally, but one which was narrower would. I think some of the confusion in this debate is caused by people saying we can keep all of the rights of the Convention but we can just use clearer language. But if by clearer language they mean the rights only apply to, say, people who are British, not suspected of a crime and not travellers, then it would fall foul of the ECHR, which applies to all humans in the jurisdiction of a particular state.

"Given that the HRA does not overturn parliamentary sovereignty, there is a way to address some of the issues that have made the HRA unpopular in the eyes of the government and its supporters. That is to introduce clear and specific primary legislation to address the mischief it says it wants to correct. If the government really wants to prevent the courts having any discretion at all about, for instance, deporting foreign prisoners at the end of their sentence, it can introduce primary legislation which makes absolutely clear that there are no circumstances whatsoever in which such people should not be deported. Whether such legislation would fall foul of the ECHR eventually will depend on whether the ECtHR gives the UK a margin of appreciation in such issues, and it's quite possible on an issue such as immigration that it could.

"You have to ask why this is not the preferred option. It would be much simpler than introducing a Bill of Rights. Is it because the intention is to introduce a Bill of Rights where the courts would no longer have their present powers to declare legislation incompatible with the rights in the ECHR?"

Morgan responds: "If the Bill of Rights and Responsibilities is narrower than the ECHR, then that would open the door to Strasbourg widely. That is not my agenda, though I accept that a right might be drawn more narrowly. I think the Luxembourg court is superior to Strasbourg because it applies jurisprudence to the whole of civil and political society. For example, if you are representing an immigrant and go to Strasbourg, it is a pure human rights case, balancing the individual against the community. If you go to Luxembourg, the concept of freedom of movement means that court looks at immigration as a social phenomenon."

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