

# Replacing the Human Rights Act with a weaker British Bill of Rights would send a sign to the international community that we are no longer serious about human rights.

Dec 20 2011

The prime minister has made clear his intention to 'repatriate' human rights jurisdiction back from Europe to the UK. [Helen Wildbore](#) and [Professor Francesca Klug](#) survey the different currents which are driving the debate for a new UK bill of rights and argue that replacing the Human Rights Act with anything weaker would send a sign to the international community that the UK is not serious about human rights.



Some human rights advocates and constitutional lawyers would welcome the introduction of a new bill of rights which is 'constitutionally entrenched' (requiring special parliamentary majorities for amendment or repeal) or 'judicially entrenched' (granting courts the power to strike down legislation). Other supporters of a new UK bill of rights have a diametrically opposed view. When the [Prime Minister announced the establishment of the Commission on a Bill of Rights](#) it was "because it is about time we ensured that decisions are made in this Parliament rather than in the courts". On the basis of our research there is no instance we can find where a Bill of Rights has been passed in order to *reduce* the accountability of the executive or legislature to the courts, rather than the other way round.



## Don't we already have a UK Bill of Rights?

The [Commission on a Bill of Rights](#) was established by the government in March 2011 to investigate the creation of a Bill of Rights for the UK. In its public consultation paper of August 2011 the Commission asked '[Do we need a UK Bill of Rights?](#)' This question raises the issue of what comprises a Bill of Rights? The Human Rights Act (HRA) was always intended to be more than the incorporation of a human rights treaty into domestic law. The Act was described by Jack Straw in a speech in 2000 as "the first Bill of Rights this country has seen for three centuries" and has been recognised as 'a Bill of Rights by any other name' by most informed commentators since.

Whilst the HRA is an 'ordinary Act of Parliament', most of the common features that characterise bills of rights in other jurisdictions are present in the HRA:

- The rights in the HRA were drawn from the European Convention on Human Rights (ECHR); a treaty which was inspired by the United Nations' Universal Declaration of Human Rights.
- Like all bills of rights, the HRA was deliberately crafted as a 'higher law', to which all other law and policy must conform "so far as it is possible". The courts can hold the executive to account and review Acts of Parliament for compliance with human rights standards. However, the HRA does not allow judges to strike down Acts of Parliament, only to issue a "Declaration of Incompatibility". It is then for Parliament to decide *whether and how* to proceed. This model for the HRA was deliberately crafted to respect parliamentary sovereignty.
- Individuals can obtain remedies for breaches of human rights in the domestic courts under the HRA.

An alternative title for the consultation might therefore have been 'Do we need an additional, stronger or different Bill of Rights for the UK than the 1689 Bill of Rights and the HRA?'

## The content of a UK Bill of Rights

It is sometimes suggested that the rights in the HRA could (or should) be further qualified, or given clearer interpretation, to address criticisms that rights are claimed by unpopular groups or individuals. To comply with the Commission's [terms of reference](#), great care would be needed if the language of the rights in the HRA were to be changed, or new interpretations added.

The Commission's terms of reference do not include any specific reference to the HRA, but their 'spirit' is widely understood as augmenting, and certainly not decreasing, the level of protection currently afforded by the HRA. Support for an *additional* or *supplementary* Bill of Rights is commonly conditional on this being

'HRA plus'.

It would, of course, be perfectly possible to introduce a Bill of Rights that is wider in scope and stronger in enforcement powers than the HRA. But to ensure a new Bill of Rights fulfilled the Commission's terms of reference, any additional rights would need to cover new ground, or transparently supplement ECHR rights.

There already exist several other models for bills of rights that could fairly be described as 'ECHR plus' (and post HRA, 'HRA plus'). For example, prominent human rights lawyer Richard Gordon QC published a draft constitution in 2010 which includes the HRA augmented with additional rights and the Joint Committee on Human Rights produced ['A Bill of Rights for the UK?'](#) in 2008 based on the HRA model with additional rights.

### **Implications for the devolved countries**

Experts on devolution have emphasised that the HRA is an important [important pillar of the constitutional framework of devolution](#). According to the director of the human rights charity Justice, Roger Smith, repealing or significantly amending the HRA would be a [legal and political nightmare](#) in the context of devolution. Devolution statutes would almost certainly need amending if the HRA were repealed or if a subsequent UK Bill of Rights amended it by implication.

In Northern Ireland further complications arise due to the ECHR (and subsequently the HRA) [being crucial parts of a peace accord](#). There has been over ten years of widespread consultation and consideration on a Northern Ireland Bill of Rights which builds on the HRA. According to Monica McWilliams, former Chief Commissioner of the Northern Ireland Human Rights Commission, recent "proposals to amend the HRA have created a sense of particular unease among those concerned to preserve and maintain the fragile constitutional balances that have been painstakingly put in place" given that the HRA is [central to the constitutional DNA of the UK](#).

Repeal of the HRA could arguably cement a two-tier system of human rights protection within the UK, as it is unlikely that the Scottish Parliament would seek to lower the level of protection of human rights in Scotland in relation to devolved areas.

### **Enhanced ownership or distancing from human rights legislation?**

Political and legal support for a UK Bill of Rights to replace the HRA sometimes relies on the erroneous view that the Act requires the importation of European Court of Human Rights (ECtHR) case law. Although domestic courts have at times acted as if they are bound by the ECtHR jurisprudence, the plain words of the HRA, and the parliamentary debate which introduced it, make it clear that this is not what the Act requires. The duty in section 2 of the HRA is for domestic courts to "take into account" Strasbourg jurisprudence, not to follow it. Our research suggests that domestic courts interpreting the HRA do *not* act as if they are bound by ECtHR case law in a range of circumstances. Although clear on the face of the statute, it may well be that further guidance to the courts is required to clarify the intent and purpose of section 2 of the HRA.

[David Cameron has argued](#) that the "existence of a clear and codified British Bill of Rights will lead the ECtHR to apply the 'margin of appreciation'" which gives states greater discretion in their interpretation of ECHR rights. However, comparative research by Oxford University has demonstrated that, if anything, a [British Bill of Rights would likely result in less leeway to parliament](#) and stricter rights protections in British courts.

A compelling argument for a new Bill of Rights is "so that all British citizens of different backgrounds feel ownership of it" (a quote from Dominic Grieve's speech to the Conservative Liberty Forum in 2006). Whilst the HRA may never have been properly 'owned' as a bill of rights by the general public, there is consistent [polling evidence that the rights in the Act are popular](#). However, it is difficult to understand how simply labelling a new bill of rights *British*, as some commentators propose, would make it more popular when one of the prime purposes of Bills of Rights is to protect the rights of (sometimes unpopular) minorities.

There have also been [calls by senior politicians to replace the HRA](#) with "a clear articulation of *citizen's* rights that *British* people can use in British courts". The underlying philosophy of human rights is that every human being is entitled to fundamental rights simply because they are human. A new Bill of Rights that attempts to exclude non-citizens or unpopular groups from certain of its provisions, could certainly result in successful challenges at the ECtHR.

Both the current government and the previous one have suggested that a new Bill of Rights would remedy a 'responsibilities deficit' in society. As Strasbourg and UK case law have emphasised, a search for balance is inherent in most ECHR rights and if it is desirable to highlight this in any new Bill of Rights, this could be achieved by including references to responsibilities in a pre-amble.

[When the Prime Minister says](#) he wants to “...show that we can have a commitment to proper rights, but they should be written down here in this country”, this could be interpreted as distancing ourselves from the European and international human rights framework. Repealing the HRA and replacing it with something less effective (either the rights or the enforcement mechanisms) would send a strong message to the rest of the world about our commitment to international human rights norms.

*This article is based on Professor Francesca Klug and Helen Wildbore’s response to the Commission on a Bill of Rights discussion ‘Do we Need a UK Bill of Rights’ which is [available in full here](#).*

Please read our [comments policy](#) before posting.

---

### **About the authors**

#### **Professor Francesca Klug - LSE Human Rights Project**

Professor Francesca Klug OBE is a Professorial Research Fellow at the LSE and a Senior Research Associate at the Centre for the Study of Human Rights. She is the Director of the Human Rights Futures project which seeks to explore and analyse the future direction of human rights discourse in the UK and elsewhere. Francesca is also a member of the Advisory Committee for the LSE’s Centre for Analysis of Social Exclusion. Francesca was previously a Senior Research Fellow at King’s College Law School where she assisted the government in devising the model for incorporating the European Convention on Human Rights into UK law reflected in the Human Rights Act. From 2006-09 Francesca was a Commissioner on the Equality and Human Rights Commission (EHRC), the statutory body that acts as a central point of advice, guidance and enforcement on equality and human rights issues.



#### **Helen Wildbore - LSE Human Rights Project**

Helen is a Research Officer on the Human Rights Futures Project. Human Rights Futures seeks to explore and analyse the future direction of human rights discourse in the UK and elsewhere. Helen’s research interests include the impact of the HRA inside and outside the courts, Bills of Rights, human rights values, equality as a fundamental human rights value and the rights of the child.



This entry was posted in [Fairness and Equality](#), [Francesca Klug](#), [Helen Wildbore](#) and tagged [British Bill of Rights](#), [Conservatives](#), [ECHR](#), [Europe](#), [European Convention on Human Rights](#), [human rights](#), [Human Rights Act](#), [justice](#), [rights](#). Bookmark the [permalink](#).