

DO WE NEED A UK BILL OF RIGHTS?

Response to the Discussion Paper from the Commission on a Bill of Rights by the Mission & Public Affairs Council of the Church of England

The Mission & Public Affairs Council of the Church of England is the body responsible for overseeing research and comment on social and political issues on behalf of the Church. The Council comprises a representative group of bishops, clergy and lay people with interest and expertise in the relevant areas, and reports to the General Synod through the Archbishops' Council.

(1) Do you think we need a UK Bill of Rights?

1. Our answer to this question is a clear “No”. We find the proposal set out in the first of the Commission’s Terms of Reference puzzling in a number of respects. First, the stipulation that a UK Bill of Rights would “incorporate and build on” all our obligations under the European Convention on Human Rights raises the question of the meaning of “building on” ECHR obligations and how this would operate. Second, it is unclear what is meant by the function of “ensuring that these rights continue to be enshrined in UK law” and how this would be achieved. Third, it is unclear how a Bill of Rights would “protect and extend our liberties”.

2. Human rights law is shaped by the interplay between the sovereignty of Parliament in enacting legislation, the obligations to which the UK is committed as a result of ratification of the European Convention in 1951, and the interpretation and enforcement of Convention rights by the domestic courts under the 1998 Human Rights Act. It is difficult to see how a UK Bill of Rights would materially add value to this already complex framework; indeed it would risk adding further confusion, not least for those whom it was designed to benefit.

3. If a Bill of Rights merely “incorporated” ECHR obligations, it would appear to be superfluous. If it added to ECHR obligations, the status of those additional rights would be problematic. They would not constitute international obligations constraining domestic legislation, and even if the provisions of the Bill were entrenched, it is unclear how the courts and Parliament would deal with a finding of incompatibility between the Bill of Rights and other domestic legislation.

4. It is also unclear what rights would be selected to “build on” those contained in the European Convention. There is an argument for parsimony and restraint in identifying human rights as distinct from civil, political and economic rights. The defining characteristic of human rights is that they claim universal scope: rights to life, liberty, privacy, a fair trial, freedom of religion and conscience, freedom of expression and freedom of association can be seen to apply to all societies. Social and economic rights, crucial though they are, cannot be categorised and enforced in the same way as a *human* right applicable to all people in virtue of their humanity.

5. If, on the other hand, the Bill of Rights reduced or limited ECHR obligations, there would be a straightforward situation of incompatibility. Since the Attorney General has recently stated that the UK has no intention of repudiating the European Convention, the option of attenuating its provisions has already (rightly, in our view) been closed off. Yet there is a sense that part of the political impetus behind the proposal for a Bill of Rights is a wish to loosen the constraints imposed upon UK legislation and policy by the operation of the Convention. This evades the awkward complication that adherence to the Convention is integrally related to the UK's membership not only of the Council of Europe, but of the European Union through the Charter of Fundamental Rights of the European Union and Articles 6(2) and 6(3) of the Treaty of Lisbon which effectively incorporate the ECHR into European Union law.

6. The Prime Minister has previously spoken of "a British Bill of Rights", but it is clear that this could not be "a Bill of (restricted) British Rights" without withdrawal from the Convention. It is disturbing that many MPs and members of the public seem to think that repeal of the 1998 Human Rights Act would reduce the scope of the UK's human rights obligations. This ignores the fact that the effect of the Act is simply to make enforceable in domestic courts the Convention rights which have been operative since 1951 and of which individuals have had the right to seek enforcement through the Court in Strasbourg since the 1960s.

7. Since the European Convention was ratified in 1951 and has been enforceable in UK courts since 1998, it is difficult to give any meaning to the suggestion that a Bill of Rights would ensure that Convention rights would continue to be enshrined in UK law. The Convention is *already* enshrined in UK law, and the proposal for a Bill of Rights to reinforce it comes dangerously close to what the Book of Common Prayer terms "vain repetition".

8. If, on the other hand, it is intended that the Bill of Rights should entrench additional obligations, it is unclear how this would be effective given the sovereignty of Parliament. Parliament, having enacted the Bill of Rights, would always be free to amend or even repeal it, unless it also enacted some kind of self-limiting provision. However, in the absence of a written constitution, no Parliament can bind its successors. Therefore, a Bill of Rights would be at best declaratory. In many contexts, declarations can have value, but not where there is already a large and complex corpus of law.

9. The rhetoric of "protecting and extending" our liberties through a Bill of Rights is problematic for much the same reasons as are set out above in relation to "incorporating and building on" our obligations under the Convention. The function of "protecting" is either unintelligible or futile for the reason given in para. 7. The function of "extending" is incoherent for the reasons given in paras. 3 and 4.

10. The claim that the UK needs a Bill of Rights is therefore highly implausible and illogical. This raises the question why such a proposal is being advanced by the coalition Government. It is hard to avoid the conclusion that the proposal is being supported by the parties in the coalition for diametrically opposite reasons. For one party, the appeal

seems to be the (false) assumption that a Bill of Rights would confer a degree of independence from the European Convention and the European Court, a means of combating what many describe as “human rights gone mad.” For the other party, it seems to be a rhetorical way of burnishing their credentials as champions of human rights and civil liberties.

11. Clearly these sets of objectives are incompatible. While compromise and ambiguity are inevitable in the management of a coalition, it cannot be right on a subject as important as this to contemplate legislating when the logical case for what is proposed simply does not exist.

Because of a negative answer to question (1), questions (2) and (3) on the content and application of a Bill of Rights are not relevant.

(4) Having regard to our terms of reference, are there any other views which you would like to put forward at this stage?

12. Having regard to the second of the terms of reference, there would be value in the Commission “examining the operation and implementation of these obligations”. We have expressed the view that there is widespread ignorance and misunderstanding both of the European Convention and the Human Rights Act. An informed and expert assessment of the impact of human rights law should help to dispel myths and prejudices.

13. Our expectation is that such an assessment would reveal that unacceptable and anomalous interpretations of human rights originate, not so much from the provisions of the Convention or the decisions of the courts, but from ill-judged statements and actions by politicians and public authorities. This would also contribute towards the aim of “promoting a better understanding of the scope of these obligations and liberties”.

14. Having regard to the third of the terms of reference, we believe that some of the concerns driving the demand for a UK Bill of Rights would be met by appropriate reforms of the operation of the European Court of Human Rights. In his ministerial statement of 18th March 2011, Mr Mark Harper, the Parliamentary Secretary to the Cabinet Office, said, “We will be pressing in particular to reinforce the principle that states rather than the European Court of Human Rights have the primary responsibility for protecting Convention rights”.

15. It is difficult to know what to make of this, as both the Court and states have a role in “protecting” Convention rights at present. If “protection” is taken to include interpretation of the meaning and application of the Convention, this would seem to usurp the function of the Court and to weaken the binding force of the Convention on national governments – though it must be conceded that the practical consequences of a declaration of incompatibility between domestic law and practice and the provisions of the Convention remain somewhat unclear.

16. A better way forward might be increased use by the European Court of the “margin of appreciation”, whereby variations in the application of the Convention are allowed in view of the diverse history, traditions and institutions of different states. This might, for example, have taken the heat out of the Court’s judgment on the voting rights of prisoners in the UK in the *Hirst* case, which is a major cause of present discontent in Parliament with human rights law. At any rate, reform of the operation of the European Court of Human Rights and its relation to national courts is a more logical and promising way of dealing with difficulties in the system than the introduction of a UK Bill of Rights.

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