

A Bill of Rights for Britain?



All three major political parties are currently talking about a British bill of rights:

- The government raised the issue in its *Governance of Britain* green paper in July 2007 and promises further consultation
- The Conservatives have established a commission to investigate the desirability of a bill of rights
- The Liberal Democrats want one as part of a written constitution

Why is there so much interest in a bill of rights?

One reason is that a bill of rights could address an undeniable weakness of our form of Parliamentary democracy. In theory, Parliament is supreme. It can make (or repeal) any law that it wants. But Parliament is typically dominated by the governing party. Difficulties become most apparent during long periods in which one party stays in government: minorities can get little say.

Do our civil liberties and human rights need more protection?

This is the core of the debate about a bill of rights. It is a complex and important constitutional issue – one that has the potential to shape our political and legal culture for decades to come. It is vital that any decision on something as momentous as a bill of rights has broad public support. And, of course, the public's choice must be informed – all the issues and options must be understood as fully as possible.

Where are we now?

We do not, of course, start with a blank sheet of paper. The UK signed the European Convention on Human Rights (ECHR) in 1950 and agreed to the binding jurisdiction of the European Court of Human Rights. We allowed individuals to take the UK to the court in 1966. In 2000, the Human Rights Act 1998 incorporated reference to the ECHR into UK law – since then judges have been required to follow the convention's provisions in UK domestic law.

The ECHR's European origins raise the hackles of some concerned with domestic British sovereignty. They shouldn't. The convention was largely drafted by UK lawyers for the benefit of countries in continental Europe recovering from the Second World War. The result is largely a codification of the principles of the English common law as they stood in 1950 and as developed by the European Court of Human Rights in the interim.

The ECHR is not a product of the European Union, but of the Council of Europe – an organisation set up after the Second World War with the aim of developing democratic principles throughout the continent. It is politically unthinkable that the UK would pull out of the ECHR – to which every nation in Europe except Belarus accedes. An agreed British bill of rights offers the opportunity of giving us greater ownership over the document that protects our rights.

How far should we go?

The ECHR can be interpreted by the European Court of Human Rights or modified by subsequent agreement of the countries that are members of the Council of Europe. No country can unilaterally weaken its commitment to the ECHR – otherwise, all countries would be tempted to evade its standards when they were inconvenient. So, one issue is how far beyond the substance of the ECHR we might want to go. For example, we might want to:

- update some of the rather old-fashioned language and concepts of the ECHR – for example, it was drafted to sanction the detention of ‘vagrants’ and ‘alcoholics’.
- guarantee traditional and common law rights – such as jury trial for serious crimes, a right to legal aid, or protection for the principles of good administration.
- protect certain social, economic or environmental rights.
- refer to a range of moral or legal responsibilities. However, many rights already require balancing against another right (eg freedom of expression versus privacy). This could not be a way of further covertly limiting rights and, thus, this approach could increase confusion.

How would we stop a future government repealing a bill of rights?

This, in turn, raises two rather different questions:

- Is cross-party support required for anything calling itself a bill of rights? After all, the term hints at a constitutional, rather than political, content.
- Are there ways of protecting one piece of legislation against later wrecking or repeal?

How would the judges enforce it?

Parliament has for long been the centre of political struggle in Great Britain. Only for 80 years has every adult had the vote. It might be argued that this situation took 700 years to achieve – from the time that Magna Carta set out the demands of the nobility. Understandably, such a history creates a prejudice against giving unelected judges the power to decide important matters and to strike down legislation – as they can do in the United States. However, the Human Rights Act establishes a dialogue between judges and Parliament. As a result, our judges cannot overturn legislation – but they can declare it incompatible with the ECHR. They can also require public authorities to comply with the ECHR. The Act provides a model that combines judicial enforcement with Parliamentary accountability. It is difficult to see another model that would combine such a deliberate balance of power with real enforcement.

- Do we want to go further than the Human Rights Act?
- Or, for rights unprotected by the ECHR, do we wish not to go so far?

How should we go about deciding on these issues?

A Bill of Rights for Northern Ireland was promised in the Good Friday Agreement of 1998 and discussion still continues. On the other hand, the Australian state of Victoria set up a commission and got widespread community agreement to a draft within six months. How should we go about the process of building consensus on, and understanding about, a bill of rights?

Is it worth doing?

JUSTICE makes no recommendation. If a degree of agreement is possible on the matters above, then a new British bill of rights offers the opportunity of greater understanding of the rights and liberties deeply ingrained in our culture.

A British Bill of Rights

Informing the debate

In 2006 JUSTICE set up a project to establish the elements that would be key to a debate on a bill of rights in Britain. The project was overseen by a committee of eminent constitutional experts (see box on right).

The project's final report – *A British Bill of Rights: Informing the debate* – has now been published.

The report covers:

- **Content** – what should be in a bill of rights?
- **Amendment and derogation** – should a bill of rights be protected from the whims of later governments simply overturning it by a bare majority in the House of Commons?
- **Adjudication and enforcement** – what powers should the courts have to uphold protected values?
- **Process** – how should we debate and decide on these matters?

JUSTICE constitution project committee members

Professor Kate Malleson (chair)
Professor Vernon Bogdanor CBE FBA
Professor Anthony Bradley
Professor Ross Cranston QC
Lord Goodhart QC
Professor Carol Harlow
Professor Robert Hazell
Professor Jeffrey Jowell QC
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Professor Francesca Klug OBE
Lord Lester QC*
Professor Andrew Le Sueur
Alexandra Marks
Professor Martin Partington CBE
Professor Alan Paterson
Jessica Simor

* Lord Lester retired from the committee on his appointment as constitutional advisor to the Secretary of State for Justice.

Learning the lessons from around the world

A British Bill of Rights: Informing the debate also features a wealth of information based on the experience of other jurisdictions that have implemented bills of rights – Canada, New Zealand, the Australian Capital Territory and State of Victoria, South Africa, Israel, the USA, Ireland, Germany and France.



How do I learn more?

Read *A British Bill of Rights: Informing the debate*, available price £9.99 (£8.99 for JUSTICE members) from JUSTICE or download free as a PDF from www.justice.org.uk

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