

From the Human Rights Act to a Bill of Rights?

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Proposals for a British Bill of Rights have come from across the political spectrum. The various plans would have very different consequences

The Human Rights Act (HRA) was introduced in 1998 to “bring rights home”. Essentially, it allows UK nationals to rely on rights contained in the European Convention on Human Rights before the domestic courts.

The legislation has not been universally popular. Some have branded it a “criminals’ charter”, following suggestions that it had been abused by various litigants. In 2006 Tony Blair complained that a judgment about a group of Afghans who had hijacked a plane was an “abuse of common sense”. The judgment was later upheld on appeal.

Such cases have fed concern that the courts are becoming more “activist” and involved in dealing with “small p” political questions that would previously have been settled by politicians and administrators. Some political figures have criticised the way in which the courts have dealt with an increase in public law (judicial review) and human rights cases. There sometimes appears to be a tension between the principles of the supremacy of

Parliament and the rule of law, exacerbated by extensive commentary on the Act. This has resulted in friction in policy areas such as asylum, immigration and counter-terrorism.

Damaging myths about the HRA have taken root in the popular imagination

The Conservatives have further argued that the current legislation has created a culture of “risk aversion” among public authorities. In 2006 a Government-sponsored review of the operation of the Act stated that it had been bedevilled by misconceptions and had sometimes been “misapplied”. The Government also acknowledged that a series of damaging myths about the Act had taken root in the popular imagination.

TOWARDS A NEW BILL OF RIGHTS?

In 2007 the Labour Government began to consult on building on the Human Rights Act to create a Bill of Rights. Other political parties have also called for a Bill of Rights. There are consequently various models for such a document, each of which has a significantly different meaning.

BUILDING ON THE HUMAN RIGHTS ACT?

Some have suggested that wider economic, social and environmental rights could be added to a British Bill of Rights, though it may be that all concerned would prefer that decisions regarding taxation and resource

distribution remained matters for elected governments rather than the courts.

Labour mooted the possibility of introducing specific “duties” or “responsibilities” that would sit alongside the rights already guaranteed, such as the duty to obey the law and pay taxes, though, as some fundamental rights are absolute and not subject to “good behaviour”, it is not clear whether such responsibilities could be given legal effect in legislation.

REPLACING THE HUMAN RIGHTS ACT?

Some have argued that the HRA does little to protect historic constitutional rights and liberties, such as the right to trial by jury or free speech. The Conservatives have suggested a new Bill of Rights to replace the HRA. Exactly how this would operate in practice in relation to the European Convention on Human Rights is unclear, though the Conservatives have indicated that they would seek a greater national “margin of appreciation” in how the rights were applied in a domestic context.

While it seems unlikely that the UK would opt out of the European Convention on Human Rights, if the HRA were repealed and the Convention rights were no longer contained in UK law, aggrieved parties might once again have to take their case to the Strasbourg court for determination. Moreover, depending on the funding available (through legal aid or otherwise), parties might find it less easy to bring rights-related proceedings.

There are also certain devolution issues which would need to be overcome if the HRA were to be repealed. How would a new Bill apply

in Northern Ireland, which has been working towards its own rights framework? Would the Scotland Act 1998 need to be amended, as currently the Scottish Parliament cannot pass legislation which is incompatible with the HRA?

A NEW CONSTITUTIONAL FRAMEWORK?

A Bill of Rights might also be brought forward together with a new written constitution. This could entrench constitutional legislation and allow the courts to rule legislation unlawful. Gordon Brown raised the possibility that such a document might be published in time for the 800th anniversary of the Magna Carta in 2015. Creating such a new constitutional framework would need to be achieved with political consensus in order to be sustainable in the long term, but also perhaps with public involvement. One criticism of the HRA has been that the public has felt no ownership of the legislation. There have been suggestions for a “citizens’ convention” to formulate or debate proposals before they are put to the country in a referendum.

Commentators and Non-Governmental Organisations involved in the Bill of Rights debate (whatever their views of the 1998 Act) look upon it as an opportunity to gain public support for a new constitutional settlement. Most recognise that while the HRA may have had a substantial influence on UK law, it has not found popular support amongst the general public and has been subject to sustained criticism by parts of the press.

HUMAN RIGHTS AND PARLIAMENT

Ministers who bring primary legislation before the House of Commons are currently required to produce a “statement of compatibility” indicating whether or not the Bill is in conformity with the provisions of the European Convention on Human Rights.

Parliament’s Joint Committee on Human Rights also considers the human rights compatibility of legislation, although it does not have any right to veto it.