

Developing a Bill of Rights for the UK

Executive summary

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and Andrew Puddephatt

Global Partners & Associates

Human Rights & Social Justice
Research Institute,
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Executive summary

In October 2009, the Equality and Human Rights Commission commissioned Global Partners & Associates and the Human Rights and Social Justice Research Institute at London Metropolitan University to undertake research to identify and explore best practice processes for developing a new Bill of Rights for the UK. The research aimed to analyse evidence drawn from related domestic and international experiences, identify key principles that should underpin the development of a Bill of Rights, and identify policy implications in relation to any future process, regardless of which political party is in power.

All three major parties at Westminster have pledged to initiate a process to create a Bill of Rights – without, in the main, acknowledging that the Human Rights Act (HRA) is, by commonly agreed definition, itself a Bill of Rights. The Labour Government is consulting the public on a UK Bill of Rights and Responsibilities, while maintaining its commitment to the HRA, including both the rights enshrined in it and the mechanisms used to implement those rights. The Conservative Party has pledged to repeal the HRA and replace it with a ‘modern British Bill of Rights’. Repealing the HRA would mean that the European Convention on Human Rights (ECHR) would no longer be incorporated into domestic law; the party has not indicated whether, or how, a future Bill of Rights might incorporate the ECHR using a different mechanism. The Liberal Democrats are committed to a written constitution with, at its heart, a Bill of Rights which would strengthen and entrench the rights guaranteed in the HRA.

Methodology

The research comprised:

- A review of literature on Bills of Rights processes, focusing on Canada, New Zealand, South Africa, Australia and Northern Ireland.
- Forty-three semi-structured interviews with people who have studied and/or been involved in Bills of Rights or analogous processes.
- A seminar on 1 December 2009, held under Chatham House rules, which involved colleagues from human rights commissions in the UK, legal practitioners, academics and non-governmental organisations.

Main findings

Comparative analysis of Bills of Rights processes outside Britain

- Modern Bills of Rights differ in their provenance and the processes used to create them. Some processes were elite-led (Canada and New Zealand); others more participatory (Australia and Northern Ireland); some, over time, became a hybrid of the two (South Africa). Bills of Rights have not emerged in isolation. All have been fundamentally based on, or strongly influenced by, international human rights treaties. They may be viewed as a global collaborative project in which different jurisdictions have incorporated or built upon international human rights standards and adopted legislative models and processes developed elsewhere.
- All Bills of Rights have been designed either to supplement existing human rights protection or to incorporate international human rights into domestic law – to go forwards, not backwards. No Bill of Rights process has permitted even the possibility of regression, either in terms of standards or mechanisms and institutions to protect rights. The way in which governments initiated reform, either through a draft bill and/or through the terms of reference or mandate for the process, expressly excluded this option.
- In jurisdictions where there has been any degree of public participation in developing a Bill of Rights, the effect of that participation has been to give popular weight to the idea of human rights legislation and/or to expand or strengthen the government's proposed legislative model in specific ways.
- Most participants in this research stated that Bills of Rights processes benefit from a clear statement of intent from government about the purpose of a Bill of Rights and the terms of reference of the process for creating it.
- Participants overwhelmingly favoured the establishment of an independent body, usually nominated on a cross-party basis, to lead the consultation. They suggested that the credibility of the process is likely to be enhanced if it is demonstrably non-partisan and has no vested interest in the outcome.
- Most participants said it is imperative to elicit the views and experiences of groups whose human rights are most vulnerable to being breached. Bills of Rights processes in Northern Ireland and Australia have developed methods of working in partnership with community-based networks to achieve this.

- Most Bills of Rights processes have been consultative (the citizen as a 'sounding board') rather than deliberative (the citizen as decision-maker). Deliberative forums have been shown to engender public trust if they are: adequately publicised to engage the wider public; are properly constructed to be representative, and if the government gives clear procedural commitments as to how it will act on their recommendations.
- Most participants viewed raising public awareness and understanding of human rights as a primary aim of consultation: however, this has invariably been imperfectly achieved and is hard to measure. The credibility of a process is likely to be enhanced if public debate is as unconstrained as possible, while being informed to the greatest extent it can be about existing human rights protections and options for building on them.
- Participants agreed that it is desirable for processes to have a defined timeframe with a momentum-building phase that aims to generate interest and participation and a clear procedure for what happens at the end of the process.
- Participants concurred that the outcome of consultation should be transparent about the rationale for specific provisions and how these relate to community preferences and experiences. They said that the voices of relatively powerless groups should be given an elevated status in the processing of responses.
- No Bill of Rights process has included notions of individual responsibility in its terms of reference for developing legislation; any decision to do so must be cognisant of the risk that debates about rights, citizenship, values and public policy priorities may act as a lightning rod for social anxieties and prejudices. Participants overwhelmingly agreed that responsibilities should be incorporated in the process solely in the context of education about the duty to respect the rights of others.
- Whether - and how – democratic legitimacy is secured in the process of creating a Bill of Rights is a matter of experimental practice. In the three decades since Canada's Charter of Rights was enacted, expectations have increased that any process to create a Bill of Rights will be genuinely participatory. This expectation is backed by developing law, theory and practice on the right to participation. It is further fuelled by the development of technology, and methods of consultation and deliberation, which permit ever broader, more inclusive and more sophisticated forms of public engagement.

The UK context

- Our research suggests that current circumstances for any process to create a new UK Bill of Rights are unfavourable. Public understanding of, and enthusiasm for, a Bill of Rights is not assured and there is little discernable popular or civil society momentum behind the idea. The Labour Government's consultation on a proposed Bill of Rights and Responsibilities has not reached the wider public sphere. It remains to be seen how far the deliberative events held as part of the consultation might be used to ignite public interest and how far the consultation will engage directly with disadvantaged and disaffected groups.
- Participants overwhelmingly suggested that the political discourse surrounding a Bill of Rights has not been commensurate with the gravity and complexity of the project. Many expressed disquiet about the prevalence of language and stories which have at times distorted the purported effects of human rights and the HRA. Further, they considered that a convincing case for why a new Bill of Rights is needed has not yet been made.
- Many participants noted that, if a future Conservative government were to repeal the HRA and create a 'British Bill of Rights' that did not contain a new mechanism for incorporating the ECHR into domestic law, this would be a process without international precedent and would risk being viewed as illegitimate both at home and abroad.
- Devolution presents considerable legal, constitutional and political obstacles which, while they may not be insuperable, must be negotiated sensitively if UK parties are to progress the Bill of Rights project.
- It appears highly likely that if the HRA were amended or repealed, and/or a Bill of Rights were enacted covering the devolved jurisdictions, this would require amendments to the devolution statutes. Further, such a decision would almost certainly require the consent of the devolved legislatures in Scotland and Northern Ireland. In Northern Ireland, repeal of the HRA or any regression from those provisions of the ECHR already given domestic effect would be likely to breach the Belfast (Good Friday) Agreement.
- The terms of reference for a UK-wide process and the methodologies by which it might be pursued have not been determined, either between the parties at Westminster or between the UK government and the executives in Scotland, Wales and Northern Ireland; this has exacerbated a sense of unease and

disengagement in the devolved nations. In particular, a process to create a Bill of Rights, whether 'British' or for the UK, risks inflaming sectarian divisions in Northern Ireland.

Key principles

These principles are based on the evidence from the processes of creating Bills of Rights in other jurisdictions. They are suggested as both (i) requirements for the conduct of any future process and (ii) a set of criteria to inform the decision about whether that process is worthy of engagement and against which it might be held up to scrutiny.

A process of creating a Bill of Rights should be:

Non-regressive

Any future UK Bill of Rights should not dilute existing protection provided by the HRA, either in relation to the specific rights protected, or by weakening the existing machinery for the protection of Convention rights. Any process that starts from a premise of going backwards would set a damaging precedent internationally. Any future government must commit unequivocally to retaining the HRA unless and until a new Bill of Rights, protecting human rights to at least the same extent as the HRA, is enacted.

Transparent

Politicians should be transparent about the purpose of a Bill of Rights and the terms of reference and methods of the process by which they propose to create it. This entails a clear procedural commitment to act on the results of public consultation and deliberation within clearly articulated parameters.

Independent

The body running the process should be demonstrably non-partisan, independent of government and have no vested interest in the outcome.

Democratic

For the outcome to be seen as having democratic legitimacy, the process must also be democratic. This principle recognises that Bills of Rights are not only a constraint on the exercise of arbitrary power; they are also a positive instrument to enable relatively powerless groups to have an effective say in the democratic process.

Inclusive

The process should place the highest premium on eliciting the views and experiences of groups whose human rights are most vulnerable to being breached, and should give those voices an elevated status in the assessment of responses and in the final outcome.

Deliberative and participative

The process should be an exercise in building citizenship, not merely 'market research'. It should provide multiple opportunities for participation and, ideally, properly constructed forum(s) for deliberation which should be used to educate and invigorate the wider consultation.

Educative

The public should be informed to the greatest extent possible about existing human rights protections and options for building on them, and about their duty to respect the rights of others. A minimum requirement is the provision of accessible and impartial information and the correction of myths and misperceptions about human rights and the HRA.

Reciprocal

The process should be a two-way dialogue in which the government, too, is educated. The imprint of the process must be visible and acknowledged in the final outcome.

Rooted in human rights

The process of creating a Bill of Rights must be consistent with human rights principles. These include respect for the dignity and autonomy of individuals and the right to participation. These principles are internationally recognised and not subject to political whim or contingency; nor can they be trumped by considerations such as public safety or security or requirements to exercise individual responsibility.

Timed

Any process should have a clear timeframe with, at a suitable juncture, a momentum-building phase. It should not be indeterminate.

Symbolic

The process should be suitably ambitious for the undertaking of a constitutional enterprise. A Bill of Rights that aspires to last for generations requires a process that is compelling to the public.

Designed to do no harm

The process should be adequately resourced and there should be a political commitment to act on the outcome of consultation. A process is better not done at all than done badly. Disillusionment is contagious and corrosive; trust in the political process is fragile.

Respectful of the devolution settlements

Choice should reside with the devolved assemblies and the process should respect their competency and self-determination.

Policy implications

Pre-conditions for engagement

The principles stated above are, to a degree, interdependent. However, the principle of non-regression is of a higher order. Without an unequivocal guarantee that the purpose of a Bill of Rights process is to augment international standards and to maintain their incorporation in domestic law, the other principles are likely to appear immaterial. We suggest that any actor concerned with the protection and promotion of human rights would be bound to reject a process predicated on regression in terms of formal endorsement or engagement.

The corollary of this is that any future government must provide (and non-governmental actors should demand) an unambiguous - and public - statement of intent and terms of reference for the consultation process, along with clear procedural commitments to act on the outcome of consultation within the stated parameters.

Certifying non-regression

Subject to these assurances, any future government should establish (and actors concerned with the protection and promotion of human rights should advocate for) an independent committee of experts, who might be appointed on a cross-party basis, to provide a 'kitemark' throughout the process that the principle of non-regression is being upheld.

Designing process to produce an outcome with democratic legitimacy

Any future government should, drawing from precedents in other jurisdictions, establish an independent body to run the consultation process. Contingent upon the assurances sought above, actors concerned with the protection and promotion of human rights should advocate for a consultative process that is run independently of government and designed to engender public trust.

The process must also be transparent: actors concerned with the protection and promotion of human rights should influence and monitor the process to ensure that any future government does not 'pick and mix' from available methodologies in order to manufacture apparent consensus behind measures which would not, in fact, have democratic legitimacy.

Influencing the terms of debate: a concordat

Actors concerned with the protection and promotion of human rights should advocate for a concordat that would bind all parties that signed it to certain rules of engagement; principally, an agreement not to use language or bring stories into the public domain that knowingly distort the purported impact of human rights and the HRA. This would help to ensure that all parties commit themselves to a process which is avowedly educative and non-partisan and does not trade in myths or seek to use the Bill of Rights as a proxy for unrelated issues.

Devolution

Actors concerned with the protection and promotion of human rights should champion the principle that choice should reside with the devolved assemblies and that the process of creating a UK Bill of Rights should respect their competency and self-determination. It is imperative that those actors with appropriate expertise and authority highlight the legal, constitutional and political implications of devolution for any decision to amend or repeal the HRA and/or to enact a UK or 'British' Bill of Rights.

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