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## Commission on a Bill of Rights: Second consultation

### About me

My name is Frank Cranmer. I am a Fellow of St Chad's College, Durham, and an honorary Research Fellow in the Centre for Law & Religion at Cardiff Law School. Unsurprisingly, my particular academic interest is in religion and human rights. I make this response in a personal capacity.

### Questions and answers

*Q1: What do you think would be the advantages or disadvantages of a UK Bill of Rights? Do you think that there are alternatives to either our existing arrangements or to a UK Bill of Rights that would achieve the same benefits? If you think that there are disadvantages to a UK Bill of Rights, do you think that the benefits outweigh them? Whether or not you favour a UK Bill of Rights, do you think that the Human Rights Act ought to be retained or repealed?*

1. So far as I am aware, though there have been various ministerial speeches and statements on the subject, both from the present Government and from its predecessor, the advantages or disadvantages of a UK Bill of Rights have never been formally set out in a systematic way – and it would be helpful to have had some rather clearer idea of the present Government's thinking.

In that connexion, I am conscious of a recent exchange at House of Commons Oral Questions to the Ministry of Justice:

**“Dr William McCrea** (South Antrim) (DUP): Is it not long overdue that the Government move to ensure that the courts of the United Kingdom, rather than the European Court [*of Human Rights*], have supremacy in the area of human rights, including protection of Christian liberties and freedoms?

**Mr Clarke:** We are taken to the Court much less than other members and we lose only about 2 per cent. Sometimes that 2 per cent includes cases where there is widespread support here for the decision, such as the holding of DNA and other information belonging to people who have never been convicted of a criminal offence, which was a recent judgment.

The Convention still has a very important role to play across Europe. It is hugely significant in the 47 member states and it enables standards to be applied in places all the way from Russia, Turkey and Azerbaijan across to us and Iceland. *We have always been subject to the rule of law. We have always bound ourselves under the Convention to accept the judgments. These are the standards that we all agreed upon after the Second World War, which were not challenged in this country till 10 or 15 years ago, when some judgments here began to annoy sections of the media.* [Commons *Hansard* 3 July 2012: my emphasis].

2. Perhaps that is an appropriate place from which to start. On current evidence, the *advantages* of a UK Bill of Rights are not at all clear. As to the *disadvantages*, it depends on what such a Bill might contain. If it were merely the Human Rights Act 1998 with a respray, it is difficult to see

what purpose re-enactment would serve. If it were the “ECHR plus”, then it is difficult to see what the “plus” might be.

3. But what if it turned out to be “ECHR minus”? Unless it made the necessary derogations from the Convention, as a signatory the UK would presumably remain bound by the ECHR as a matter of international law, whatever the domestic legislation said. In the event that a UK Bill of Rights purported to reduce Convention rights those rights would, presumably, still be recognised in Strasbourg – but they would not be justiciable before the domestic courts. That, in my view, would be the worst of the three outcomes and, as I suggest below, might put us in conflict with European Union law.
4. In short, I am not convinced that there are compelling reasons to replace HRA 1998 with new legislation at all. As the Lord Chancellor pointed out, we have always been subject to the rule of law, we have always bound ourselves to accept judgments under the ECHR if taken there and we have been doing so since the Commission (as was) and the Court were established. Even before 1998 the domestic courts regarded Strasbourg jurisprudence as persuasive authority. So what has changed?

*Q2: In considering the arguments for and against a UK Bill of Rights, to what extent do you believe that the European Convention on Human Rights should or should not remain incorporated into our domestic law?*

5. The ECHR should certainly continue to be incorporated in domestic law: the alternative would (presumably) be that, at least in principle, the domestic courts would no longer be obliged take account of the rulings of the ECtHR. If that were to happen, Convention rights could only be asserted in Strasbourg – in which case the only claimants who would be able to assert those rights would be institutional litigants, the very rich or those who were legally-aided.
6. A further issue is the backlog of cases at the ECtHR and the length of time that it would take for human rights points to be resolved should the Convention cease to be justiciable in the domestic courts. One might reasonably ask whether a system that only allows human rights points to be adjudicated right at the very end of the process and after (possibly) several years litigation provides “a fair and public hearing within a reasonable time” in terms of Article 6.
7. The suspicion, however, is that whether or not the ECHR remains incorporated in domestic law, the UK courts will *still* tend to take account of it and of Strasbourg jurisprudence as persuasive authorities – as they did to a greater or lesser extent prior to 1998 – for three reasons:
  - partly to avoid the embarrassment of being, in effect, reversed by the ECtHR on a human rights point;
  - partly because Article 6(2) and (3) of the Treaty of Lisbon provides that the Union “shall accede” to the ECHR and that “[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law”; and
  - partly because the Preamble to the Charter of Fundamental Rights of the European Union (CFREU), in effect, incorporates the ECHR into EU law by declaring that the Union

“reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, *the European Convention for the Protection of Human Rights and Fundamental Freedoms*, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights”.

8. Under s 2(1) European Communities Act 1972:

“All ... rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly”.

9. If EU law takes precedence over domestic law, do Article 6(2) and (3) of the Treaty of Lisbon and the Preamble to the CFREU constitute “rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties” – and if they do, are they not at least in some sense mandatory?

10. Surely a key question is this: to what extent are the arguments espoused by the then Government when HRA 1998 was enacted still valid?

*Q3: If there were to be a UK Bill of Rights, should it replace or sit alongside the Human Rights Act 1998?*

11. It depends what is meant by “replace”. If there is to be a UK Bill of Rights it would be preferable for its provisions to be additional to the HRA 1998 rather than a replacement for it; in technical legislative terms, however, it would be preferable for the content of the HRA to be repealed and re-enacted with the new material as part of a single, comprehensive statute (which would then include the UK Bill of Rights provisions *alongside* the HRA provisions) so that potential claimants and their advisers had to consult only one Act rather than two. A single statute would also avoid the (possibly inevitable) debate in the courts about the precise relationship between the new Bill of Rights and HRA.

12. And what if – however careful the drafting – the proposed Bill of Rights and the HRA were implicitly inconsistent? Would the conclusion of Laws LJ in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) about the “implied repeal” doctrine be relevant? In paragraph 69 he stated that the European Communities Act 1972 was a constitutional statute that could not be impliedly repealed and went on to declare (at para 69) that that fact “[was] derived, not from EU law, but purely from the law of England: the common law recognises a category of constitutional statutes”.

13. Is the HRA 1998 a “constitutional statute” in the terms understood by Laws LJ? And would the proposed Bill of Rights be such a “constitutional statute”?

Q4: *Should the rights and freedoms in any UK Bill of Rights be expressed in the same or different language from that currently used in the Human Rights Act and the European Convention on Human Rights? If different, in what ways should the rights and freedoms be differently expressed?*

Q5: *What advantages or disadvantages do you think there would be, if any, if the rights and freedoms in any UK Bill of Rights were expressed in different language from that used in the European Convention on Human Rights and the Human Rights Act 1998?*

14. I can see no good reason for expressing “human rights” in terms different from those in the ECHR (and the HRA). Even if the UK changes the language it will still – if my reading of EU law is correct – be bound by the terms of the ECHR. And would the “rights and freedoms in any UK Bill of Rights” be inalienable *human* rights inhering in the claimant’s humanity or *civic* rights inhering in the claimant’s citizenship? The distinction is an important one which is often lost sight of on *both* sides of the human rights argument.

15. And what about the effect of the CFREU? So far as I am aware it is not *at the moment* directly justiciable in the domestic courts; however, given that it virtually replicates within itself the content of the ECHR – though its terms, overall, are wider – under the current arrangements it is presumably simpler to cite the ECHR than the CFREU. But if the provisions of the ECHR ceased to be directly justiciable, might not claimants begin to cite the CFREU instead, arguing for the direct applicability of its provisions under s 2(1) European Communities Act 1972, as “rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties”? And, if they were to do so, might that bring into play the wider provisions of the CFREU that are not included in the ECHR?

Q6: *Do you think any UK Bill of Rights should include additional rights and, if so, which? Do you have views on the possible wording of such additional rights as you believe should be included in any UK Bill of Rights? Some of the rights suggested are:*

- *a right to equality;*
- *a right to administrative justice;*
- *a right to trial by jury;*
- *rights in criminal and civil justice;*
- *rights for victims;*
- *socio-economic rights;*
- *children’s rights; and*
- *environmental rights.*

16. For a general answer, see below. On the specific drafting point, I would suggest that any enumeration of new rights ought to follow the lines of basic model of the ECHR, ie:

**“Right to [cricket]**

1. Everyone has the right to [*play and watch cricket*], either alone or in community with others and in public or in private, [*in any form that has been duly authorised by the International Cricket Council*].

2. The freedom to [*play and watch cricket*] shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

Q7: *What in your view would be the advantages, disadvantages or challenges of the inclusion of such additional rights?*

17. Many of the suggested rights in Q6 are the subject of treaty obligations to which the UK is already a signatory. As Aoife Nolan has pointed out:

“Like the majority of European and other countries, the UK has volunteered to be bound by a range of such rights as a result of ratifying a number of international human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ratified by the UK in 1976); the Convention on the Rights of the Child (ratified in 1992) and the European Social Charter (ratified by the UK in 1962). While these treaties haven’t been made part of our domestic law in the way the European Convention on Human Rights has been as a result of the Human Rights Act, they impose a range of human rights obligations on the UK. The government reports back periodically to the UN expert committees that monitor the implementation of these treaties” [see <http://ukhumanrightsblog.com/2012/07/17/dont-believe-everything-you-read-there-is-a-case-for-socio-economic-rights-professor-aoife-nolan/>].

18. *The advantage* of including additional rights would be that their inclusion would clarify their status in domestic law.

19. *The disadvantage* would be that – however desirable they might be as aspirations – some of the rights under those treaties are virtually unachievable in practice. For example, the Preamble to the UN Convention on the Rights of the Child states that “the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding”. No-one would dispute that: but how is the state to guarantee that implied right and by what mechanism might a child who, for example, is currently looked after by a local authority assert that implied right in practice – even if it were written into domestic law?

20. *The challenge* is one of *Realpolitik*: could the present Government realistically hope to legislate to extend the current range of rights justiciable under domestic law without antagonising a large number of its own backbenchers?

21. As to detail, in the case of (eg) a “right to trial by jury”, surely the *right* under Article 9 ECHR and Article 47 CFREU is to “a fair and public hearing within a reasonable time by an independent and impartial tribunal [previously] established by law”? Were the Diplock courts in Northern Ireland not “fair and public”? Realistically, would any Government wish to extend the right to jury trial beyond its present limits – against the direction of travel – by, for example, extending the very narrow range of civil jury trials?

22. Similarly, what would “rights in criminal and civil justice” actually mean, over and above the right to a fair trial? Every baby law-student learns that *ignorantia iuris haud excusat* – but what does that mean in practice for a lay person confronted with the complexities of the Value Added Tax Act 1994 or the Companies Act 2006? What about, for example, ready access to legal texts: might the Ministry of Justice seek to support such access by giving (much needed) financial support to BAILII? Moreover, to what extent would “rights in criminal and civil justice” extend to a right to be legally-represented? And if it *did* extend to civil justice, what about civil legal aid?

Q8: *Should any UK Bill of Rights seek to give guidance to our courts on the balance to be struck between qualified and competing Convention rights? If so, in what way?*

23. I am exceedingly doubtful about any such proposal, for three reasons.

- First, where the claimant is seeking to enforce a right *against the State*, it would be unfortunate if s/he were to find the claim in some way hindered by guidance emanating *from* the State, even if it had been endorsed by Parliament in the process.
- Secondly, would putting such guidance into statute end the matter anyway? Surely it would run the risk of providing yet another piece of human rights law which would then be the subject of further argument in the domestic courts – and, presumably, would be ultimately reviewable by Strasbourg.
- Thirdly, if the underlying implication of this question is “should there be a hierarchy of rights?” an affirmative answer would depend on whether or not there could ever be any general agreement on an order of precedence for such a hierarchy. For my part, I believe that Article 14 ECHR (prohibition of discrimination) is far more important than Article 1 of the Fourth Protocol (prohibition of imprisonment for debt). But the recent arguments in, for example, *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 and *McFarlane v Relate Avon Ltd* [2010] EWCA Civ B1 – and, more especially, the public comments on the two cases – suggest that there are conflicting views as to whether or not Article 9 (freedom of thought, conscience and religion) should take precedence over Article 8 (right to respect for private and family life) and Article 14. In short, there is a perennial problem of “clashing rights” which I suspect is irresolvable.

Q9: *Presuming any UK Bill of Rights contained a duty on public authorities similar to that in section 6 of the Human Rights Act 1998, is there a need to amend the definition of ‘public authority’? If so, how?*

24. Not so far as I am aware.

Q10: *Should there be a role for responsibilities in any UK Bill of Rights? If so, in which of the ways set out above might it be included?*

25. I have noted elsewhere<sup>1</sup> that the Roman Catholic *Codex Iuris Canonici 1983* always speaks of “duties and rights” rather than “rights and duties” and that the Roman Catholic model does not proceed exclusively from the common law assumption that “if A has a right, B has a corresponding duty” since, in addition, the *Codex* assumes that a right may imply a duty subsisting in the same person. In the social theology of *Pacem in Terris* (1963) at para 44, for example:

“[M]an’s awareness of his rights must inevitably lead him to the recognition of his duties. The possession of rights involves the duty of implementing those rights, for they are the expression of a man’s personal dignity”.

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<sup>1</sup> F Cranmer: ‘Human Rights and the Christian Tradition: A Quaker Perspective’ in N Doe and R Sandberg (eds) *New Directions in Law and Religion* (Peeters: Leuven 2010) 133–158. And I should say for the avoidance of doubt that I am a Quaker, not a Roman Catholic – but there is a lot in Roman Catholic social teaching that Quakers would sign up to.

26. When he was Lord Chancellor Jack Straw warned against the “commoditisation” of rights: that rights tended to become

“... yet more items to be ‘claimed’. This is demonstrated in how some people seek to exercise their rights in a selfish way without regard to others – which injures the philosophical basis of inalienable, fundamental human rights”.<sup>2</sup>

Further:

“In a democracy, rights tend to be ‘vertical’: guaranteed to the individual by the state to constrain the otherwise overweening power of the state. Responsibilities, on the other hand, are more ‘horizontal’: they are the duties we owe to each other, to our ‘neighbour’ in the New Testament sense. But they have a degree of verticality about them too, because we owe duties to the community as a whole”.<sup>3</sup>

27. The idea of coupling responsibilities with rights is very attractive, even if only in order to provide a series of benchmarks for good citizenship. But the drafting would be difficult and, in any event, the responsibilities enumerated would presumably have to be aspirational rather than obligatory. Suppose, for example, one promulgated a “duty to nurture and support one’s children” – a duty in line with the UN Convention on the Rights of the Child and one with which only very few would disagree – would parents who, because of personal inadequacies, were incapable of caring for their children lose some or all of their rights as well as losing custody of their children? Equally, would a hypothetical “right to healthcare” imply a corresponding duty not to drink more than a fixed weekly number of alcohol units?

Q11: *Should the duty on courts to take relevant Strasbourg case law ‘into account’ be maintained or modified? If modified, how and with what aim?*

28. If the underlying issue is whether or not the courts should be bound by Strasbourg jurisprudence in the strict sense, then I should prefer not to disturb the present situation. “*Argentorum locutum, iudicium finitum*” may apply where the facts before a domestic court are on all fours with a previously-decided case at Strasbourg – but how often does that happen in practice? The duty on the domestic courts to take relevant Strasbourg case law “into account” provides them with a proper degree of flexibility.

29. In that connexion, I note Recommendation 12(d) of the Brighton Declaration that

“... the interaction between the Court and national authorities could be strengthened by the introduction into the Convention of a further power of the Court, which States Parties could optionally accept, to deliver advisory opinions upon request on the interpretation of the Convention in the context of a specific case at domestic level, without prejudice to the non-binding character of the opinions for the other States Parties... “.

30. Perhaps a mechanism for advisory opinions could make it easier for the domestic courts to take relevant Strasbourg case law “into account” – always provided that such requests did not merely join the Strasbourg backlog and protract the process of litigation even further.

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<sup>2</sup> Jack Straw: *Mackenzie-Stuart Lecture* (Cambridge, 25 October 2007): see <http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/news/sp251007a.htm>.

<sup>3</sup> *Modernising the Magna Carta* (Washington DC, 13 February 2008): see [http://www.labour.org.uk/modernising\\_the\\_magna\\_carta](http://www.labour.org.uk/modernising_the_magna_carta).

Q12: *Should any UK Bill of Rights seek to change the balance currently set out under the Human Rights Act between the courts and Parliament?*

31. Certainly not. Those who “criticise the fact that Parliamentary sovereignty is in their view undermined by the mechanism of a declaration of incompatibility, since Parliament is effectively bound by the judgments of the Strasbourg Court” are missing the point, which is that *human rights often have to be enforced against the state itself*. It was not a local greengrocer in Istanbul who imprisoned Mr Savda for refusing on grounds of conscience to serve in the Turkish Army: it was the Government of Turkey.<sup>4</sup> Likewise, it is not I that is denying convicted prisoners the right to vote, contrary to the ruling in *Hirst (No. 2)*: it is HMG and the House of Commons. There is not a great deal of point in being a signatory to the ECHR if Parliament can simply set aside any bits of the Convention that it does not particularly like.

Q13: *To what extent should current constitutional and political circumstances in Northern Ireland, Scotland, Wales and/or the UK as a whole be a factor in deciding whether (i) to maintain existing arrangements on the protection of human rights in the UK, or (ii) to introduce a UK Bill of Rights in some form?*

Q14: *What are your views on the possible models outlined in paragraphs 80-81 above for a UK Bill of Rights?*

Q15: *Do you have any other views on whether, and if so, how any UK Bill of Rights should be formulated to take account of the position in Northern Ireland, Scotland or Wales?*

32. This is a rather difficult issue. In my brief response to the previous consultation I wrote that, though I had a certain degree of sympathy with the arguments of the Scottish Government about Justiciary appeals to the Supreme Court on human rights points, the ultimate justification for the present system was that it is the UK Government, not the Scottish Government, that guarantees – and is accountable in Strasbourg for – human rights in Scotland. I cited *Tyrer v United Kingdom* [1978] ECHR (Application No. 5856/72), in which the UK Government found itself in the embarrassing situation of being obliged to defend judicial birching (which had been abolished in the UK itself) under the law then current in the Isle of Man.

33. My conclusion is that, so long as the UK is a more-or-less unitary state, the primary responsibility for the protection of human rights has got to remain with the Westminster Government – on the grounds that it is HMG that is held accountable in the various international courts, not the devolved administrations. The devolved administrations cannot become members of the Council of Europe in their own right, nor can they accede to the ECHR: and if HMG is to carry the can for alleged breaches of the Convention, HMG must be in control of human rights compliance. The alternative is responsibility without power.

34. The corollary is that domestic legislation, at whatever level of government, needs to be consistently ECHR-compliant across the whole of the United Kingdom, not excluding the Crown Dependencies. The Isle of Man long ago abolished judicial corporal punishment – which is just as well, because no-one would want to go through *Tyrer* again. Would they?

**Frank Cranmer**

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<sup>4</sup> *Savda v Turkey* [2012] ECHR 42730/05 (12 June 2012) [French text only].