**COMMISSION ON A BILL OF RIGHTS**

**SECOND SUBMISSION**

**DR AUSTEN MORGAN**[[1]](#footnote-1)

**Introduction**

1. On 15 September 2011, I sent a first – 33 pages – submission to the commission on a bill of rights. I refer to this as my ‘first submission’, but do not otherwise repeat any of the seven general arguments.
2. In December 2011, I published an article based on this first submission, in the *Commonwealth Lawyer*;it is now available on my professional website: <http://www.austenmorgan.com/Assets/PDFs/Articles/UKBORR.pdf>. The article summarizes my position.
3. On 19 July 2012, Sir Leigh Lewis, attaching a second consultation document, invited additional submissions by 30 September 2012.
4. For the avoidance of doubt, I continue to support a UK bill of rights (including reference to responsibilities). I remain perplexed at the commission minority wedded to Strasbourg, since this will most likely deliver an important 2015 election issue to the larger coalition party. Meanwhile, I take the view that constitutionalists (lawyers and others) should proceed with detailed work.
5. I do not repeat the questions in the second consultation paper. I refer to the Human Rights Act 1998 as HRA 1998.

**Question 1**

1. The principal advantage of a UK bill of rights is (or would be): democratic legitimacy. The HRA 1998 remains identified with the first Blair government, and unloved by some of its original promoters. It is significant that the conservative party did not buy into the reform (as oppositions invariably do with the passage of time), before David Cameron – as a new leader - made his seminal speech in June 2006.
2. Human rights may have been criticized, fairly or unfairly, before and since, by some of the print media (and oversold by others); regardless, this area of law now badly needs rehabilitating.
3. I see a UK bill of rights – presented ideally consensually by the political class - as a codified individual rights cornerstone of a future UK written constitution (this is not conservative policy but it might be adopted by the labour opposition in the future).
4. The principal disadvantage of a UK bill of rights is: its contribution to the long-term waning of Strasbourg. But the council of Europe is under separate serious challenge from the European Union (‘EU’), with its own charter of fundamental rights: first submission, paras 21 to 25.
5. I remain convinced that *R v Horncastle* [2009] UKSC 14 [2010] 2 WLR 47 – which forced Strasbourg to retreat on 15 December 2011 (Al-Khawaja and Tahery v UK, grand chamber, paras 51-62 & 118-51) – remains an important UK case, as regards the jurisdiction of the European court of human rights. This was subsidiarity – the key constitutional concept of the court - in action, from both the UK and Strasbourg sides.
6. Sir Nicholas Bratza, I submit, as the president of the court, during the UK’s six-months chairing of the council of ministers, misjudged his response to the reform process which led to the Brighton declaration of 20 April 2012.[[2]](#footnote-2) He erred in seeking to ally with the human rights community – ensconced in higher education, selected media, quango-land, and even parts of the civil service – against Ken Clarke and Dominic Grieve, who were only trying to save the court from its unwanted achievement (the still-rising backlog of applications). I have consciously – as a practising lawyer who takes human rights points almost daily – come to feel the need to point to this vested interest[[3]](#footnote-3), and its unthinking anti-tory response to the Cameron challenge to collectively fashion a domestic bill of rights. These crusaders are the actual conservatives today, with Strasbourg still shining bright in their (international) statist view of the world.[[4]](#footnote-4)
7. Weighing the principal advantage and principal disadvantage, the latter ironically tips the scales in the same direction, in favour of constitutional reform.
8. I cannot envisage a third alternative, to the status quo of the HRA 1998, or a UK bill of rights, since that process, if it is to progress, would encompass any other good practical ideas.
9. I do favour the repeal of the HRA 1998, for symbolic, but mainly practical, reasons, conscious of parliamentary counsel’s predilection for amending existing statutes; the UK bill I envisage would begin again: first submission, paras 67 to 76.

**Question 2**

1. The European convention on human rights (‘ECHR’) is not incorporated in domestic law. The long title of the HRA 1998 refers to giving it ‘further effect’ domestically. This is because the ECHR did, between 1953 and 2000, have a domestic effect: *R v SoS, ex parte Brind* [1991] 1 AC 696, 747-8 & 760. The convention rights – in schedule 1 of the HRA 1998 – remain ‘out there’, along with Strasbourg jurisprudence etc. It was ironically the legal remedies, with the ability to take a human rights point in any court at home, which were incorporated (though transformation of international remedies into domestic ones would have been a more appropriate term).
2. I accept that incorporation of the E CHR has become shorthand, including judicial shorthand, for the domestic effects created by the HRA 1998.
3. Since I favour repealing the HRA 1998 (but not in isolation), this would have the logical effect of reverting to the position before 2 October 2000.
4. The real question, I submit, is whether the UK should cut itself off from Strasbourg, or keep the ECHR in play. This is not a realistic choice. Denouncing the ECHR, under article 58, would have consequences for EU membership: TEU arts 2 & 6; Polish/UK protocol. Withdrawal is not an option, and the European Union Act 2011 is about managing anti-EU sentiment in a continuing member state.
5. So, the ECHR will continue to survive out there. That prediction is dependent upon what happens generally to the council of Europe. And it is worth mentioning what might happen generally to the EU. I favour a reference to the ECHR in the preamble of a UK bill of rights. And, of course, the right of individual petition, under art 34, would continue. But UK courts, and Strasbourg, could separately chip away at the idea of a fourth right of appeal (from the UK supreme court to Strasbourg). Strasbourg has a practical interest in subsidiarity, and the UK supreme court could, under domestic law, impose a requirement of permission to go further in the context of a UK bill of rights.

**Question 3**

1. I have indicated already that I favour the repeal of the HRA 1998. But one could still create a UK bill of rights without, for very specific reasons (probably more international than domestic), doing away with the HRA 1998. It could remain a foundation for a new legal structure. There would be layers of human rights law, but complexity has never been an obstacle to law reform in the UK.

**Question 4**

1. I favour different language, for a number of reasons (including novelty), but working off the ECHR. I have argued previously that the drafters of a UK bill should compile a corpus of domestic bills of rights from other common law jurisdictions, and look for human rights consensus. It is there. The EU’s fundamental charter, it is rarely remarked, set out to modernize the ECHR (from 1950 to 2000). That is a precedent for not sticking to the language of 1950, which sounds outdated: for example, ‘…private and family life, his home and his correspondence’ (ECHR art 8). The EU’s article 2 on the right to life – ‘(1) Everyone has the right to life. (2) No one shall be condemned to the death penalty, or executed.’ – is better, because clearer, than the equivalent in the ECHR, though the fundamental charter does not, because of the terms of the Lisbon treaty, touch upon the position in wartime (where some council of Europe member states continue to retain capital punishment).
2. Different language could be problematic. But that is only way another of stating that the drafting would have to be skilful (and not comprise the sort of political fixes which often disfigure EU secondary, if not primary, law).

**Question 5**

1. The principal advantage would be better communication, in keeping with my overriding aim of democratic legitimacy. I do not, by the way, hold that all controversy about human rights decisions will be ended, simply that argument will proceed in a context of our own constitutional tradition.
2. The principal disadvantage, which would be mitigated by no longer being in thrall to the human rights community, would be human rights over-prescription, namely articulating just about everything desired in the language of rights. That would be controlled by following the idea of human rights consensus (and not political shopping lists), articulated in answer to question 4, and the admission that a constitutional set of human rights flows from 1215 and all that (Magna Carta).

**Questions 6 and 7**

1. I do favour a limited number of additional rights, because of a lacuna in the ECHR, and also because of the need to modernize. Eight instances are given in the consultation paper; these may be reorganized.

*Equality*

1. Article 14, with an applicant coming within a substantive right, goes some way to prohibit discrimination, with the grounds not being closed. The council of Europe sought to provide for a general equality right, in protocol number 12, which entered into force on 1 April 2005. However, the UK (and a number of other member states) declined to sign in 2000 or subsequently, and then ratify, meaning that protocol number 12 does not bind the UK.
2. While there is a preambular hint of reverse discrimination, in protocol number 12, with a defence of justification, it would – I submit – go some way to countering the the gold plating of EU anti-discrimination law in the UK, to become equality law.
3. It is intellectually necessary to get back to equality before the law, and away from diversity in so-called tie-breaking cases[[5]](#footnote-5) (where some employers find it easy to state a number of applicants meets all the necessary criteria, meaning selection should be on the basis of diversity).

*Justice Rights*

1. These, I think, follow from a constitutional specification of the judicial branch of government. But a UK bill of rights would not substitute for the legislation which governs our criminal law and civil (including administrative) law.
2. The question of criminal trial by jury, or not, in England and Wales and in Northern Ireland, but not in Scotland, has been discussed as a distinct right. There is no problem putting such a right (and its limitations) in a UK bill of rights, and leaving Scotland out (if that is what the parliament in Edinburgh desires). In a sense trial by jury, whether derived from Magna Carta or not, confirms the Diceyan view of the English/British constitution as distinguished from nineteenth-century European written constitutions, with armies of state officials substituting for the ordinary law-abiding citizen.
3. Victims of crime are provided for in criminal and civil justice legislation, and could well be mentioned in such a right.

*Gender and Human Dependency*

1. Article 8 of the ECHR has been the focus of a huge jurisprudential expansion, since the 1970s. The assumptions of a man’s world, from 1950, are now long gone, especially in the more democratic parts of Europe. We now talk of men and women, and this is a unique diversity principle in the EU treaties (which is not followed in domestic law): TEU arts 2, 3(3) & 8 (plus declaration 19); TFEU arts 79(2), 83(1), 153(1), 157(3)-(4) & 165(2); CFR art 23.
2. To the difference between men and women may be added domestic (or private or family) dependence, through children, the elderly and the disabled (?) (the former are mentioned in TFEU arts 79(2) & 83(1) and CFR arts 14, 24 & 32, the elderly in CFR art 25 and the disabled in CFR art 26). The EU treaties, particularly CFR art 2, do not allude to ‘the unborn’, and CFR art 24 only protects children born alive. No doubt this is because – in the secular as opposed to religious worlds – the biological dependence of an embryo/foetus on its mother, throughout gestation, is pre-social, and different from other forms of family interdependence.
3. I have come to the view that gender and human dependence could be unpacked from article 8 (and 12), as in the charter of fundamental rights, with article 7 (private and family life) and even 9 (the right to marry), on the one hand, and then, on the other, articles 23 to 26.
4. I do not generally favour groups with particular rights, but there is an argument that male/female equal treatment and human dependency (the modern family?) – with the court of justice just as committed to men (*Case C-236/09 Association belge des Consommateurs Test-Achats ASBL v Conseil des ministres* [2012] 1 WLR 1933) – could form the basis of an additional article in a UK bill of rights.

*Socio-economic Rights*

1. I do not favour socio-economic rights. International human rights standards, and in particular the second, 1966, UN convention on economic, social and cultural rights, as deployed by the human rights community, has done a great deal to re-present traditional left-wing political thinking in, as it is said, the language of rights.
2. The second 1966 convention was a product of the cold war. And it remains to be seen whether the EU is a survival of a moment in history (the third quarter of the twentieth century). Rights are principally civil and political, even though the concept of socio-economic rights arguably exists in our legislation; for example, section 1(2) of the National Health Service Act 1946: ‘The services so provided shall be free of charge, except where any provision of this Act expressly provides for the making and recovery of charges.’ This gave rise, I submit, to a practical right (which persists after nearly seven decades), even if the law was more equivocal. Socio-economic rights would be articulated ambiguously, and could well be of little practical significance.

*Environment*

1. The environment, including the non-human animals it contains, do not have human rights. That is as much a rational view, as a religious one. Insofar as the environment is an aspect of socio-economic life, the above argument applies equally to the environment.

**Question 8**

1. Just about all rights are, or should be, qualified, because human beings live in society with others.
2. Article 3 (and 4) of the ECHR are often singled out as absolute. But article 17 (prohibition of abuse of rights) could have been better developed in Strasbourg jurisprudence.
3. Article 33(2) of the 1951 Geneva convention relating to the status of refugees[[6]](#footnote-6), excludes terrorists and criminals from protection against *refoulement*. And there is an argument that the ECHR – agreed months earlier in Rome by leading UN member states – should be interpreted as containing a similar implied exclusion (in addition to article 17 on the abuse of rights).
4. Under the HRA 1998, the principal conflict of rights had been between article 8 (privacy) and the freedom of expression protected under article 10.
5. A bill of rights is not a good vehicle for giving guidance. That would be more appropriate for an institution created under the statute, or the equality and human rights commission. But, again in the preamble, it could be stated that rights often conflict, and that it will be the job of the courts to resolve such issues case by case.

**Question 9**

1. Some statutes seek to specify organizations. The HRA 1998, in section 6(3) and (5), defines public authority in terms of functions. This was deliberate. And it has worked, despite the problem of public functions being privatized.[[7]](#footnote-7) It does not need amending.
2. But one virtue of a UK bill of rights might be the development of a horizontal effect – person versus person – in human rights law, which some saw as indirectly implicit in section 6(3)(a) of the HRA 1998. This is related to some of the points under question 8 above. However, it must be admitted that, since 2000, there has been little horizontality in the cases.
3. This remains perplexing. If A kills B, it is A who abuses the latter’s article 2 right to life. It becomes increasingly fanciful to blame the UK state (or a public authority), simply because of an inadequacy of protection (which has to be proved). The state or public authority is only in the firing line, because the ECHR emerged in international law as a treaty made by member states, where there was also a state versus state jurisdiction.

**Question 10**

1. Responsibility (along with duty) is mentioned, in the plural, in article 10(2), limiting freedom of expression. But the concept is not otherwise developed in the ECHR.
2. This was not unreasonable, in 1950, regarding the individual victims of Nazism and (to a lesser extent) communism. However, since the 1970s, with the expansion of Strasbourg, the human rights victim has often been a person threatening other individuals or groups.
3. It is therefore time, I submit, to spell out again the contractual nature of the idea of society. It gives us rights. But each individual has a minimum duty, or responsibility, towards others.
4. I do not favour a list of responsibilities. I do favour a preambular statement, which could be simply the need for a commitment to the rule of law: first submission, para 76.

**Question 11**

1. I have referred above to *Horncastle*. This does a great deal to construe section 2(1) of the HRA 1998 properly. In his Bingham centre lecture, at university college, London, on 14 December 2011, Lord Irvine of Lairg – as the architect of the HRA 1998 – stated that it had never been intended that the UK courts would bolt on Strasbourg case law to the common law.
2. One wonders why it took so long? The answer probably is; that the judiciary had moved already against the HRA 1998 in 2009-11, at least to the extent documented in paras 31 to 41 of my first submission. If judges are to start citing Lord Irvine of Lairg as a judge extra-judicially (and he did preside over the house of lords appellate committee between 1997 and 2003), then they will have to deal with Lord Bingham’s dictum of no more, but certainly no less, in terms of domestic courts tracking Strasbourg jurisprudence: *R (Ullah) v Special Adjudicator* [2004] UKHL 26 [2004] 3 WLR 23, para 20.

**Question 12**

1. This is a big question, of greater significance than human rights. If one is talking about a written constitution, or even a human rights cornerstone, then it would be possible to allocate powers constitutionally to the legislature, the executive and the judiciary.
2. However, we are living with the legacy of Dicey, and the idea of parliamentary sovereignty. That creates judicial deference (which is not always healthy when there is fundamental law), and where the courts will formally, if not always through the content of decisions, act in accord with the intention of parliament (as interpreted by the courts).
3. Strasbourg has shifted this focus to some extent, but not to the degree that EU law has done so. That is because Strasbourg case law remains part of international law, while EU law is part of domestic law.

**Questions 13, 14 and 15**

1. I have referred at relative length to devolution, and its relationship with human rights: first submission, paras 49 to 66.
2. Those paragraphs may be revisited, and not repeated. I make only the point again, perhaps with more verve: there is no problem (other than one got up by vested interests[[8]](#footnote-8) joining the anti-Cameron camp).
3. Question 14 refers to paras 80 and 81 of the consultation paper. The problem with para 80 is that it fails to appreciate the point that, in Wales, Scotland and Northern Ireland, the HRA 1998 is Westminster-imposed fundamental law, like the European Communities Act 1972.
4. I am not aware that powers to create new rights have been devolved to Cardiff, Edinburgh and Belfast.
5. I am not opposed to the idea of additional rights, in para 81, but, again, giving rights making, or approving, powers to the three devolved administrations is contrary to the architecture of the 1998 devolution legislation as amended.
6. It would appear that the commission has listened long to supporters of Welsh, Scottish and Northern Ireland devolution (making them anti-metropolitan political actors), and not yet looked at the UK legal model, whereby London – and the sovereign parliament – has succeeded in keeping many powers (including human rights) at the centre.

Austen Morgan,

28 August 2012

1. Barrister, 33 Bedford Row. Also barrister in Northern Ireland. Independent member, David Cameron’s commission, 2007-10. Website: [www.austenmorgan.com](http://www.austenmorgan.com). [↑](#footnote-ref-1)
2. Speech at Brighton, 19 April 2012. [↑](#footnote-ref-2)
3. First submission, para 48. [↑](#footnote-ref-3)
4. Baroness Deech, a legal academic, made the point well, in a parliamentary debate on the equality bill, which was enacted in 2010: ‘Equality, human rights and freedom have become in themselves a religion or philosophical belief – almost organised, in fact, given the number of bodies that exist to enforce them.’ (HL, *Hansard,* vol. 716, col. 1230, 25 January 2010) [↑](#footnote-ref-4)
5. Equality Act 2010 ss 158 & 159. [↑](#footnote-ref-5)
6. To be read with council directive 2004/83/EC of 29 April 2004, on minimum standards for refugees, art 12 (exclusion), plus: *Joined Cases C-57/09 and C-101/09 Federal Republic of Germany v B; Same v D* [2012] 1 WLR 1076. [↑](#footnote-ref-6)
7. YL v Birmingham City Council [2007] UKHL 27. [↑](#footnote-ref-7)
8. Supporters of a bill of rights for Northern Ireland and supporters of Scottish independence. [↑](#footnote-ref-8)