

'The Future: a constitutional settlement for modern Britain?'

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"A bill of rights is what the people are entitled to against every government on earth." This is what Thomas Jefferson, a founding father of the American Bill of Rights, declared more than two hundred years ago.

But this wasn't the line of the journalists who contacted me last week. They asked "what do we need a bill of rights for? Don't we already have two knocking about on the statute book?"

On the face of it, it is hard to argue with this.

But if the 1689 Bill of Rights is the 'parliamentarian's bill of rights' and the Human Rights Act (HRA) is the 'stealth bill of rights' Gordon Brown's promises to be 'the people's bill of rights.'

After the new prime minister's route map statement last week I thought today could be very straightforward – I could simply agree with everything he said. I could even be cheeky and suggest Gordon Brown agreed with me and what I had written in my essay for the Smith Institute, *A bill of rights: what for?* But whilst on the surface consultation on a British bill of rights is very welcome, the approach suggested in the *green paper* is not quite as straight forward as it can appear.

Four questions immediately come to mind:

1. How compatible is consultation on a bill of rights with one of its *purposes*: protection for minorities – of all kinds – based on the principle that democracies value everyone equally even if majorities don't?

I agree with *Power* and others who suggest that consultation needs to be more than a ready made agreement by the great and the good which is put before people in a general election.

But what if a wider engagement unearths what we all know already – that it is not the idea of rights which is unpopular as is sometimes claimed in the debate on the HRA – but some of the groups who lay claim to them? What if 95% of responses say they believe in a right to a fair trial but not for terrorist suspects or people accused of child abuse. What if they support due process but not for travellers seeking planning permission?

If bills of rights are not about bottom line ethical values they are about nothing.

How have other jurisdictions which have consulted on bills of rights addressed this issue?

Every post-war bill of rights – certainly in democracies – is based on a human rights treaty emanating from the UN (and I included the European Convention on Human Rights (ECHR) in this as it is a creature of the Universal Declaration of Human Rights (UDHR); adapted largely by British lawyers). Canada, New Zealand, the various Australian states now introducing rights charters, have all based

their bills of rights on international human rights treaties. None of the consultations I have ever looked at – and some have been pretty extensive – have started with a blank sheet, let alone a blank cheque.

In the Australian state of Victoria the consultation process started with a ‘statement of intent’. In Northern Ireland the terms of reference of the consultation on a NI Bill of Rights – going on for nearly a decade now – are established in the Good Friday agreement. These stipulate that any NI Bill of Rights will build on the ECHR; it will be ECHR plus. I am glad to say the green paper affirms this applies to the rest of the UK.

Not that a domestic bill of rights could be anything else, in reality, if we stay within the Council of Europe and European Union .

Anyone who tells you that a British bill of rights can be used as a get out clause from the ECHR is talking....”Xenophobic and legal nonsense” (to coin a phrase¹). If we want to change the treaty – and I’m not recommending this – that has to be done through intervening in a case at the European Court of Human Rights (which the UK government is currently doing²) or negotiating a new protocol with the Council of Europe. The ruling that the judges should not deport people where they have evidence that there is a genuine risk they will be tortured or executed³ applied before the HRA was introduced and would continue to apply if we repealed it tomorrow and replaced it with the British bulldog bill of rights or anything else.

And that is without considering the foreign policy implications of such a stance. The message to the rest of the world – that a domestic bill of rights can be used to opt out of a global commitment to fundamental human rights – could be quite catastrophic. Any dictatorship would have carte blanche to do likewise. I have lost count of the number of people from all over the world who have said this to me in the last couple of years.

2. So what do we mean by a British – or home grown – bill of rights?

I have used these terms myself; I was part of the process that developed Labour policy under John Smith which supported following the incorporation of the ECHR with a so-called ‘home grown’ bill.

But given that we already have what is effectively a bill of rights on the statute book, the HRA, and the intention is to build on the ECHR, what does a specifically *British* bill of rights signify?

Perhaps it means British pedigree rights – like the right to jury trial or protection from ID cards (though I am not sure that is what the new PM has in mind exactly).

Perhaps it means a modernised bill of rights – which would include independent living rights, children’s rights, carer’s rights, a stronger equality clause and maybe some social and economic rights – this would also make us distinctive.

That’s all fine but the terms British citizen and British society are used pretty interchangeably in the green paper. They are not the same thing and this confusion needs to be clarified in any consultation.

¹ Ken Clarke, quoted in the *Guardian*, 29 June, 2006

² *Ramzy v the Netherlands* and more recently *Saadi v Italy*.

³ *Chahal v UK*, 1996.

Whilst election rights and access to some public services and benefits might be restricted to citizens, citizenship is not a signifier of fundamental civil and political rights in democracies.

The US government built Guantanamo Bay so as to opt out of the due process protections that apply to everyone on US soil through the American bill of rights.

It is one thing to use a bill of rights to clarify the rights of citizens; it is another to use one as a Trojan horse to narrow the protections of people who are not citizens in the UK. I am sure this is not the intention but it needs clearing up.

3. What does the green paper mean by duties?

I have no problem with a bill of rights and duties in principle, provided this is a means of clarifying that human rights can only be protected if we all treat each other with dignity and respect.

The duties might take the form of a declaration for use in citizenship ceremonies and schools or as a preamble to a bill of rights [or even the HRA]

- It is rare, but there have been a few bills of rights [notably the Soviet Bill and African UN Charter] which do enunciate *legal duties*. This is conceivable, although tricky, if restricted to what the green paper describes as “civic responsibilities” like jury trial or paying taxes, which are already established in law.
- But if the reference to duties is taken to mean only the dutiful and deserving are eligible for rights – quite a popular idea – this would effectively mean using a British bill of rights to resile from human rights values now accepted by the whole of the democratic world.
- modern bills of rights everywhere distinguish between the legitimate and necessary need to limit *rights*, to protect the rights of others and the common good, and limiting categories of *people – the undutiful or irresponsible – who are ineligible* to claim rights in any circumstance.

It was the philosophy of the undeserving or untermechen that bills of rights were designed to counter in the first place – from the US bill of rights to UDHR.

4. How will a British bill of rights be used to establish a “stronger shared national purpose”; one of Gordon Brown’s stated aims?

Bills of rights throughout history and throughout the globe have been used for this purpose. But there are different pulls at work here in addressing the ‘national question’ and the government’s so-called “hearts and minds strategy”.

Although they can overlap, nation building – the forging of a national identity – is not the same as society binding or creating a greater sense of common purpose regardless of plural identities.

The 1982 Canadian Charter of Rights and Freedoms failed as an exercise in nation building – Quebec still secessionist – but was very successful as an exercise in society binding. Over 80% of Canadians consistently point to Charter values as signifying what it means to be Canadian – even though the Charter is based on an international human rights convention, as virtually all post war bills of rights are.

If the South African and American bills of rights – admittedly introduced in very different circumstances to ours – have, by contrast, helped to nation build as well as society bind, this is because they are based on common values not kith and kin. They are an attractive signifier of what it means to be part of those nations and they have played that iconic role without denying rights to non citizens or claiming that the rights they uphold have a specific nationality.

The green paper refers to a British statement of values not a statement of British values. I think that is absolutely the right way of putting it.

Jack Straw, now Secretary of State for Justice, acknowledged in a recent Chatham House essay that values like freedom, fairness, and tolerance are not exclusively British or western but are the values common to humanity. They are drawn from all the great religions and philosophies, east and west, and are reflected in the human rights charters of the UN.

Former South African minister, Kader Asmal, who spent many years in the UK, made a similar point in a Chatham House lecture last year. He said “a shared vision of national identity” could, if based on a “mythical past”, rather than the future, bring with it “the alienation of many immigrants and communities” whose experience belies the “imagining” of a Britain “that has *always* held dear the values of liberty, tolerance and social justice”.⁴

People will feel British if we make it attractive enough – but in the final analysis you can be mandated to obey the law but identities are made in the heart and soul, not to order.

The strongest case for consulting on a British bill of rights in this period of ongoing debate on our national identity, is that we have no iconic equivalent to the American or South African bills of rights to turn to at times of national tension. Yet there has arguably never been a time in modern history where a foundational document is more necessary; a charter that reinforces the right to choose to be ‘different’, as well as the bottom line values of fairness, equality and respect that are definitive of modern British democracy. A bill of rights can provide a unifying force in a diverse society, but it will not do this if it suggests that liberty has a nationality or ignores the contribution of many nations, and most religions and cultures, to the human rights values recognised throughout the world today, however crucial Britain’s role has been.⁵

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⁴ Chatham House, 10 November 2006.

⁵ The UDHR reflects the insights and values of all major religions and cultures and directly spawned the ECHR, in spite of its European designation.