"Solidity or Wind?" What's on the menu in the bill of rights debate?

Many of us in the UK will have felt a twinge of envy when Barack Obama, in his Inaugural speech, affirmed "the ideals of our forbears" and the need to stay "true to our founding documents." These American forbears had, of course, fought '*our*' British forbears to gain their freedom and, with no written constitution, we have precious few founding documents to turn to.

How tempting, therefore, to reflect that if we can't have a British Obama, we could at least have a British bill of rights. And why not? I joined the constitutional reform group, Charter 88, twenty years ago and as Director of the Civil Liberties Trust (the charitable research arm of the civil rights group, Liberty) was part of a broad lobby that campaigned long and hard for a bill of rights for the UK. Nowadays, it shouldn't be difficult to achieve. After decades of implacable opposition both the main political parties seem to be in favour – the Prime Minister, Gordon Brown and the leader of the Conservative Party, David Cameron, the Justice Secretary, Jack Straw and his Tory 'shadow' Dominic Grieve, have all gone on record as supporting a British Bill of Rights and Responsibilities.[1]

It is the Liberal Democrat frontbenchers, the long time supporters of a bill of rights, who have been expressing the greatest reservations about the way the current debate is framed.

Why? Well partly because it feels like only yesterday that the Human Rights Act (HRA), which incorporated the European Convention on Human Rights (ECHR) into UK law just 8 years ago, was itself widely regarded as a bill of rights. When the ECHR was drafted after World War Two, largely at the behest of the British government, all political parties took the view that, unlike most of the rest of Europe, it should not become part of domestic law (although the UK became subject to the rulings of the European Court of Human Rights in Strasbourg). After a sustained campaign, spearheaded by groups like Charter 88 and Liberty, the New Labour government relented and passed the HRA.

The Lib Dem leader, Nick Clegg, in a speech at the end of last year, called for "a clear and responsible stand on the Human Rights Act….Human rights are not something you pick up one day and put down the next. They are the unwavering,

[1] Interestingly, the term 'British' has lately been dropped from Ministry of Justice descriptions of the proposed bill, presumably in recognition of the fact that Northern Ireland has its own process and that Scotland is likely to want a Scottish Bill if the government proposes a British one.

unshakeable commitment to the dignity of people. They are the principles by which we can call ourselves civilised."[2]

The HRA was always intended to be more than the incorporation of a human rights treaty. Like all bills of rights, it was deliberately crafted as a 'higher law', to which all other law and policy must conform where possible. It empowers the judges to hold the executive to account and review Acts of Parliament in a manner without precedent in British constitutional history, but stopping short of allowing unelected courts from striking down Acts of Parliament; 18 statutes have been declared incompatible with human rights.[3]

The HRA does not bind the UK courts to follow the judgments of the European Court of Human Rights; only to take them into account. Our judges can, and have, developed their own case law while generally keeping pace with the European Court: declaring indefinite detention without trial incompatible with the HRA, reducing the scope of 'control orders', extending both free expression and personal privacy and providing landmark rulings for elderly and disabled people, gay and lesbian families, asylum seekers, Gypsies and Travellers and others who have no alternative means of protection. These features explain why in 2000 the then Home Secretary, Jack Straw, described the HRA as "the first Bill of Rights this country has seen for three centuries".[4] He was supported in this view by Conservative MPs, who opposed the Act for that very reason.[5]

But maybe the Lib Dems are also wary because they have read George Orwell. *"Political language"* he observed *"and with variations this is true of all political parties, from Conservatives to Anarchists, is designed… to give an appearance of solidity to pure wind".*[6]

'Solid,' or 'wind', – how do we judge the main arguments in support of a British Bill of Rights and Responsibilities by our current political leaders? The case is advanced around five issues: security, the judges, the constitution, responsibilities and 'British' rights and values.

In 2006 David Cameron kicked off the current 'debate' about a Bill of Rights with a promise to "replace" the Human Rights Act with a British Bill of Rights and Responsibilities whilst staying signed up to the European Convention on Human

[2] Speech at Amnesty International to mark Human Rights Day, 10 Dec 08 Other front bench spokespeople, and the former Lib Dem leader, have made similar remarks.
[3] 26 declarations of incompatibility have been made; 18 are still standing, 8 have been overturned on appeal.
[4] *Speech,* IPPR, 13 January 2000.
[5] Francesca Klug, *A bill of rights –what for?* In *Towards a New Constitutional Settlement,* Chris Bryan MP (ed), (2007), p137.
[6] *Politics and the English Language,* 1946

Rights; a policy his new Secretary of State for Business, Ken Clarke dismissed as "xenophobic and legal nonsense".[7]

But Cameron has repeated this commitment to "abolish" the HRA several times since. Why? Because the HRA "has made it harder to protect our security. It is hampering the fight against crime and terrorism".[8] Of particular concern to Mr Cameron is the (exaggerated) belief that "we've got to a position where the Home Secretary doesn't seem able to deport people who would put the country at risk";[9] the same restriction on executive power that led former Labour Home Secretary John Reid to regret that his government had ever introduced the HRA.[10]

It is difficult to think of a precedent outside the former Soviet Union where the case for constitutional rights has been made on the back of *increasing* the powers of the state. The contrast with Obama's reassertion of America's constitutional values could not be clearer "Our security emanates from the justness of our cause; the force of our example; the tempering qualities of humility and restraint," he memorably said in his Inauguration speech. Two days later he proceeded to sign Orders to close Guantanamo Bay and other secret detention centres around the world and pledged not to deport detainees to countries where they face torture. The (relatively few) deportations that have been prevented by our courts (stemming from a European Court of Human Rights ruling which preceded the HRA[11]) all revolve around a concern that the deportees will be killed or tortured if they are returned to their home country.

The second, and perhaps even more unusual argument for replacing the HRA with a British Bill of Rights and Responsibilities, relates to the power of the judiciary. Cameron has advanced the case that a British Bill of Rights would somehow allow UK governments to ignore European Court of Human Rights rulings it does not agree with, a proposition which has been demolished by research from Oxford University which demonstrated that, if anything, the reverse applies.[12] There is, for example, no way that the UK could defy the European Court's decision regarding deportations where there is a risk of torture whilst remaining a party to the ECHR, something which Cameron has maintained he would do. Even if Cameron were right, to argue for a bill of rights on the basis that this would help to 'free' the UK from our international human rights obligations –specifically with regard to deportations to alleged places of torture – is the reverse of the direction that President Obama is taking America. The Bush administration's arguments for American 'exceptionalism' are

[7] Ken Clarke quoted in *Daily Telegraph,* 27.6.06.
[8] David Cameron, 'Balancing freedom and security – A modern British Bill of Rights', Centre for Policy Studies, 26/06/06.
[9] *Cameron on Cameron: Conversations with Dylan Jones,* Fourth Estate, 2008
[10] Interview in News of the World, 16 Sept 2007
[11] *Chahal v UK* (1996) 23 EHRR 413
[12] Benjamin Goold, Liora Lazarus and Gabriel Swiney, *Public protection, proportionality and the search for balance*, University of Oxford, 2007.

beginning to be dismantled just as ours are growing. Obama has indicated that he will abide by international human rights and humanitarian law; faithfulness to the American constitution is not sufficient.

Former Shadow Justice Minister, Nick Herbert, proposed an even more original constitutional argument for a bill of rights than his Leader. Describing "one of the greatest impacts of the [Human Rights] Act" as "the undermining of Parliamentary sovereignty" by "transfer[ing] significant power out of the hands of elected politicians into the hands of unelected judges," Herbert argues that "essentially political questions" should be "decided by Parliament" not judges.[13] This is a perfectly credible argument for *opposing* bills of rights, not for introducing one! Herbert is right that the HRA has made the executive more accountable to the courts, but the HRA does not allow the judges to strike down Acts of Parliament, precisely to preserve 'parliamentary sovereignty'. This is why Jack Straw used to call the unique approach to enforcement adopted by the HRA as the 'British model'. If, under Herbert's approach, a bill of rights were to involve *less* judicial scrutiny than the HRA would it be legally or constitutionally a bill of rights at all? Or would it be more like 'the Emperor's clothes' or Orwell's aforementioned 'wind'?

In response, advocates of a 'British bill of rights and responsibilities' point to the 'British rights' that are currently missing from the HRA, such as jury trial which can be traced back to the Magna Carta (it is not clear what other 'British rights' are proposed – Nick Herbert has referred to "rights to government information"[14] – but any cursory reading of the various speeches that have been made in support of 'British rights' will be struck by the brevity of the list). Although, as Shami Chakrabarti has said, no bills of rights are magic wands[15], and all of them have to balance different rights and interests, it is perfectly possible to suggest additional rights to add to, and improve on, the rights in the HRA. When I was Director of the Civil Liberties Trust in the early 1990s we drafted *A People's Charter*, a model bill of rights which drew on a far wider set of international human rights instruments than the ECHR. The Institute of Public Policy Research and human rights bodies in Scotland and Northern Ireland did likewise. I think we all included a right to jury trial, along side asylum, data protection, freedom of movement and children's rights.

The government has hinted at support for inclusion of economic, social and cultural rights in a bill of rights, albeit ones that are not enforceable as individual entitlements, or even as rights to be 'progressively realised' as in the South African model. A 'declaration of rights and responsibilities' setting out "in a single document that to which people are entitled and that to which people owe"

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[13] Nick Herbert, *Rights without Responsibilities - a decade of the Human Rights Act,* British Library lecture, 24.11.08.
[14] Ibid
[15] *Guardian, 22.1.09*

appears to be what they have in mind.[16] There is a credible argument that such an addition would be valuable, provided it had at least some minimal legal effect as an interpretative tool for the courts. It could even help to bed down the rights in the HRA (assuming they are not tampered with) because of the wide appeal and relevance of social and economic rights. But, in evidence to the Joint Committee on Human Rights (JCHR) in January, Justice Secretary Jack Straw said in terms that there would be no legislation this side of an election. There has been no support for the inclusion of such rights in a bill of rights by the Conservative party; nor, for well rehearsed ideological and philosophical reasons, is there ever likely to be.

In line with the Good Friday Agreement, The Northern Ireland Human Rights Commission (NIHRC), which has been consulting on a bill of rights for ten years, has recently presented the Government with a proposed Bill of Rights for Northern Ireland with a range of supplementary rights to the HRA, including economic and social rights. The new Shadow Justice Secretary, Dominic Grieve, was quoted in a Northern Ireland newspaper as saying that there is no need for a Bill of Rights for NI as envisaged and that "what the Northern Ireland Commissioner has come up with makes my hair stand on end".[17] We wait to see if the government has any appetite for including any of the additional justiciable rights the NIHRC proposes.

Listening to Jack Straw give evidence to the JCHR in January, his main focus was to use the vehicle of a bill of rights to underline "the responsibilities we owe to each other and owe to the community".[18] He expressed himself "struck" with the similarities between what the government is proposing and the Netherlands who "have their equivalent to the Human Rights Act embodied in their constitution" and are now considering a "Charter for Responsible Citizenship".[19] The Justice Secretary also alluded to "the law of equity" where "people's own behaviour…was considered as part of the overall judgements of the courts as to what remedies should be offered[20]". Members of the JCHR had difficulty tying down what these allusions implied; Straw insisting, that "we have never said that rights are contingent on responsibilities; that would be an absurdity and an affront to democratic society".[21] The reference to principles of Equity would appear to belie

[16] Jack Straw, Uncorrected Evidence to the Joint Committee on Human Rights, 20 January 2009.
[17] 'Rights culture is out of control – Tory MP', *News Letter*, 10 January 2009.
[18] David Cameron also said in a speech in 2006, "A modern British Bill of Rights…should spell out the fundamental duties and responsibilities of people living in this country both as citizens and foreign nationals."
[19] *Uncorrected Evidence* to the JCHR, 20 January 2009.
[20] Dominic Grieve was likewise quoted as saying in January that the Conservatives Party intend to create a UK Bill of Rights which would have in-built safeguards to prevent those "whose own behaviour is lacking" from abusing its powers. *News Letter,* 10 January 2009.
[21] U*ncorrected Evidence to JCHR,* 20 January 2009.

this: a well-known principle of Equity is that a person who seeks a remedy must come to the court "with clean hands".

I have considerable sympathy with the Justice Secretary's concern about the 'commoditisation' of rights, as he puts it, where rights are talked of in the same breath as consumer goods, to be chosen and discarded at will . This is a travesty of the post war vision of human rights which requires us all to "act towards one another in a spirit of brotherhood".[22] As human Rights minister Michael Wills has acknowledged on many occasions, responsibilities are "inherent, and on occasion explicit", in the HRA.[23] If the concern is to make these 'more explicit,' the obvious point of departure is the philosophy of the HRA, and the values of mutual respect and duties to the community in the Universal Declaration of Human Rights which it enshrines. This is an issue of education and of leadership – principled and consistent leadership. There are no references to responsibilities or the rights of others in the American Bill of Rights, and precious few (express) limitations on individual liberties. But this did not deter the new President of America from using the ethical values it signals to conjure "a new era of responsibility – a recognition, on the part of every American, that we have duties to ourselves, our nation and the world".[24]

The greatest value in a bill of rights, we are told, is in the process that would lead to it. The HRA was never consulted upon and that has been its downfall. It is seen as a foreign import and what we need is a specifically 'British' bill of rights for the British people to feel 'ownership' of it.[25]

At one level this is unarguable and is a crucial point. But it requires careful thought and consideration. The American Bill of Rights was not widely consulted upon in its day; and certainly not by the people who live more than 200 years later. The same goes for the French Declaration of the Rights of Man and the constitutions that were bequeathed to countries all around the world with the demise of the British empire. Even the Canadian Charter of Fundamental Rights and Freedoms, often pointed to as an exemplar of consultation, is largely drawn from the UN's International Covenant on Civil and Political Rights, another 'child', like the ECHR, of the Universal Declaration. (It was also very 'unpopular' in its first decade; and particular decisions of the Supreme Court are still controversial today – this underlines a fundamental point, no bill of rights will last long if it is buffeted by some contentious court decisions made under it – the

[22] 1948 Universal Declaration of Human Rights, Article 1.
[23] Michal Wills, Uncorrected Evidence to the Joint Committee on Human Rights, 20 January 2009
[24] Inauguration speech
[25] See Dominic Grieve, 'Liberty and community in Britain', *speech* to the Conservative Liberty Forum, 2 October 2006.

values underlying a bill of rights mean that the whole is greater than the sum of the parts.) If we are to embark on a consultation on a fresh bill of rights then we have to start from a position of honesty; both with ourselves and others. We also have to start from a position of leadership. Leadership which declares that when we "stand up for human rights, by example at home and by effort abroad… We also strengthen our security and well being";[26] in contrast to leadership which apparently seeks to douse fears (but risks inflaming them) by declaring that "there is a sense that [the HRA is] a villains' charter or that it stops terrorists being deported or criminals being properly given publicity".[27] The truth is that the Labour Government has never given the HRA the *sustained* support it requires and has sometimes disparaged it.[28]

Any consultation on a bill of rights must keep faith with the current government's repeated commitment to build on the safeguards in the HRA;[29] a much stronger commitment than the low threshold test of conformity with the ECHR, as promised by the Conservatives.[30] The Prime Minister could not have put it better when he said in December that "we should never forget that the universal rights enshrined in the Universal Declaration and in our Human Rights Act are a shield and a safeguard for us all".[31] If this is the case, then any consultation must start with an honest explanation of *why* we are seeking to adopt a new bills of rights? Beware, as Shami Chakrabarti warns us, of "bills of right light.[32]" There is no point in pretending that their purpose is to replicate what the democratic process can do anyway – which is give voice to the 'will of the majority'. We have to be honest that bills of rights are there to defend individuals and minorities, of all kinds, whose voices will never be given equal weight through the ballot box. They are there to make a reality of democracy's boast to represent the needs of *every* individual, however marginal or unpopular (up to the point that this breaches the rights of others).

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[26] Barack Obama, Inauguration Speech, January 2009
[27] Jack Straw, Interview in Daily Mail, 8 Dec 2008
[28] In 2005, when Tony Blair told us "the rules of the game are changing", he also said "Should legal obstacles arise, we will legislate further, including, if necessary amending the Human Rights Act". *Statement on anti-terror measures*, 5 August 2005
[29] Michael Wills said to the JCHR in January 2009 "Just so that we are absolutely clear, we will build on the Human Rights Act. There is no question of changing it, so that legal certainty remains."
[30] The JCHR stated in its Bill of Rights report: "the issue is not whether the Bill of Rights is going to be compliant with the ECHR, which is a fairly low threshold, but whether it is going to be 'HRA-plus', that is, add to and build on the HRA as the UK's scheme of human rights protection." *A Bill of Rights for the UK*? 29th report of session 2007-08.
[31] Speech on the anniversary of the Universal Declaration of Human Rights, Lancaster House, London, 10 December 2008.
[32] *Guardian,* 22 January 2009.

Since the second world war every democracy in the world has signed up to a set of values which reflects this understanding of democracy. If we are to consult on a bill of rights this has to be our starting point. Not just because the European Court of Human Rights tells us so, but because this is the vision inherent in the post-war settlement that every member of the UN commits to as a condition of membership.

The simple truth is that no bill of rights that respects these values will look very different to the Human Rights Act, certainly not weaker. A cursory glance at any post-war bill of rights will tell you this. The only significant departure is whether, as in the case of South Africa, they include economic, social and cultural rights which is not on the agenda of the likely next government.

When the leader of the Conservative Party promises "a new solution that protects liberties in this country that is home-grown and sensitive to Britain's legal inheritance" he conjures a different image.[33] One that suggests that 'British liberties' are somehow fundamentally different to the human rights in the HRA, rather than an integral part of them. One that ironically ignores the richness of this country's legacy which led Eleanor Roosevelt to proclaim the Universal Declaration as the "Magna Carta" of all mankind and Winston Churchill to dream up the idea of the ECHR which was drafted largely by British lawyers.

When we are told that we need "a clear articulation of citizen's rights that British people can use in British courts"[34] this suggests, even if unfairly, that eligibility for this new bill of rights might depend on 'citizenship' rather than 'humanity' – that individuals who live here might be subject to the power of the state but not the fundamental rights of its citizens. Above all it suggests that the global discourse on human rights, which has become the lingua franca of liberty struggles throughout the world, does not sit comfortably in these islands. Where have we heard this before; this argument for "exceptionalism" from universal human rights norms? In America after 9/11? In Zimbabwe following a sham election? In Israel in response to rocket attacks? If we were to become the first country in the democratic world to contemplate introducing a national bill of rights on the back of repealing a bill of rights which enshrines universal human rights norms, what does this say to the rest of the world?

Francesca Klug, Professorial Research Fellow, LSE.
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[33] David Cameron, 'Balancing freedom and security – A modern British Bill of Rights', Centre for Policy Studies, 26/06/06.
[34] Ibid.