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## "Solidity or wind?": what's on the menu in the bill of rights debate?

**Article (Accepted version)  
(Refereed)**

**Original citation:**

Klug, Francesca (2009) *"Solidity or wind?": what's on the menu in the bill of rights debate?* [Political Quarterly](#), 80 (3). pp. 420-426. ISSN 0032-3179

DOI: [10.1111/j.1467-923X.2009.01997.x](https://doi.org/10.1111/j.1467-923X.2009.01997.x)

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This version available at: <http://eprints.lse.ac.uk/25118/>

Available in LSE Research Online: April 2015

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## ***“Solidity or Wind?” What’s on the menu in the bill of rights debate?***

[This article was written before the government published the Green Paper *Rights and Responsibilities: developing our constitutional framework* in March 2009 and provides a political context to it.]

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? After decades of implacable opposition both the Labour Government and Conservative Opposition have expressed support for a Bill of Rights and Responsibilities for Britain.

Perhaps surprisingly, it is the Liberal Democrats, the long time supporters of a bill of rights, who have expressed strong reservations about the way the current debate is being 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 UK political parties took the view that, unlike most of the rest of Europe, it should not become part of domestic law (although the consequence of ratifying the ECHR was that successive governments – but not public authorities or the courts – became subject to the rulings of the European Court of Human Rights in Strasbourg). After a sustained campaign over many years, spearheaded by pressure groups like Charter 88 and Liberty, the New Labour government relented and passed the HRA.

The HRA was always intended to be more than the incorporation of a human rights treaty into domestic law. 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.<sup>1</sup>

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<sup>1</sup> 26 declarations of incompatibility have been made; 18 are still standing, 8 have been overturned on appeal.

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” (s.2 HRA). 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 a speech to the IPPR in 2000 the then Home Secretary, Jack Straw, described the HRA as “the first Bill of Rights this country has seen for three centuries”. He was expressly supported in this view by some Conservative MPs, who opposed the Act for that very reason.

Speaking in defence of the HRA on the 60<sup>th</sup> Anniversary of the Universal Declaration of Human Rights in December, Nick Clegg, leader of the Liberal Democrats, pronounced that “We need 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.”

To make sense of the pronouncements and positions of the leading political parties on this issue it is useful to have in mind George Orwell’s *Politics and the English Language* published in 1946. “Political language”, Orwell 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”.

‘Solid,’ or ‘wind’, – how do we judge the main arguments in support of a British Bill of Rights and Responsibilities? The case is advanced around five main issues: security, the judges, parliamentary sovereignty, responsibilities and ‘British’ rights and values.

### Security

In 2006 David Cameron, the leader of the Conservative Party, kicked off the current ‘debate’ with a promise to “replace” the HRA with a British Bill of Rights whilst staying signed up to the ECHR; a policy his Secretary of State for Business, Ken Clarke dismissed as “xenophobic and legal nonsense”.<sup>2</sup>

Cameron has repeated this commitment to “abolish” the HRA several times since. Why? The most consistent argument advanced is that the HRA “has made it harder to protect our security. It is hampering the fight against crime and terrorism”.<sup>3</sup> 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

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<sup>2</sup> Ken Clarke quoted in *Daily Telegraph*, 27.6.06.

<sup>3</sup> David Cameron, ‘Balancing freedom and security – A modern British Bill of Rights’, Centre for Policy Studies, 26/06/06.

people who would put the country at risk.”<sup>4</sup> This is the same restriction on executive power that led former Labour Home Secretary John Reid to regret that his government had ever introduced the HRA<sup>5</sup> (although the government has subsequently reinforced its support for the Act).<sup>6</sup>

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 Inaugural 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 *Chahal v UK*, a European Court of Human Rights ruling which preceded the HRA) all revolve around a concern that the deportees will be killed or tortured if they are returned to their home country.

### The judiciary

The second, and perhaps even more unusual argument for replacing the HRA with a Bill of Rights and Responsibilities proposed by the Conservative Party, 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.<sup>7</sup>

There is considerable muddle in this argument. Unless the UK were to leave the Council of Europe (and, in all probability, by extension the European Union), of which there is no realistic prospect, the government would remain bound by the decisions of the Strasbourg court, even if the HRA were repealed. In that scenario, the ECHR would be de-incorporated from domestic law, individuals would not be able to assert Convention rights in our courts and public authorities would no longer be required to act compatibly with the values and standards the Convention upholds. But that would not exempt the government from complying with unpopular judgments from the European Court of Human Rights, including the prohibition on deportations to countries where there is a risk of torture; the subject of so much controversy in recent years.

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<sup>4</sup> Cameron on Cameron: *Conversations with Dylan Jones*, Fourth Estate, 2008

<sup>5</sup> Interview in *News of the World*, 16 Sept 2007.

<sup>6</sup> See Prime Minister’s speech on the anniversary of the Universal Declaration of Human Rights, Lancaster House, London, 10 December 2008.

<sup>7</sup> Benjamin Goold, Liora Lazarus and Gabriel Swiney, *Public protection, proportionality and the search for balance*, University of Oxford, 2007.

Even if Cameron were right, and the repeal of the HRA were somehow to lead to the 'get out clause' from European Court rulings that he seeks, 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 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.

### Parliamentary sovereignty

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 maintained that "essentially political questions" should be "decided by Parliament" not judges.<sup>8</sup> This is a perfectly credible argument for *opposing* bills of rights altogether, not for introducing one!

Herbert is right that the HRA has made the executive more accountable to the courts, but it is a fact that the HRA does not allow the judges to strike down Acts of Parliament, precisely to preserve 'parliamentary sovereignty'. This is why Jack Straw, when he was Home Secretary, used to call the unique approach to enforcement adopted by the HRA 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'?

### Responsibilities

Whilst Labour and the Conservatives express contrasting positions on the future of the HRA (however lukewarm the Government's support for the Act has appeared at times), they are united in supporting the inclusion of responsibilities in any new bill of rights. David Cameron 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." Dominic Grieve, Shadow Justice Secretary, was also quoted in the Northern Ireland *News Letter* in January as saying that the Conservative 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.

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<sup>8</sup> Nick Herbert, *Rights without Responsibilities - a decade of the Human Rights Act*, British Library lecture, 24.11.08.

Giving evidence to the Joint Committee on Human Rights (JCHR) in January, Justice Secretary Jack Straw's 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".<sup>9</sup> 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". Members of the JCHR had difficulty tying down what such references to responsibilities implied, with Straw insisting, that "we have never said that rights are contingent on responsibilities; that would be an absurdity and an affront to democratic society". In reality, any bill of rights and responsibilities which complies with the ECHR and does not overturn the framework of the HRA cannot make rights contingent on responsibilities or remedies dependent on good behaviour. However, there is room for taking the behaviour of a claimant into account when deciding the level of any damages to award, in line with the already established approach of the European Court of Human Rights approach (see for example *Johnson v UK*).

Critics of the HRA would 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. But if there is evidence that such a culture has developed, it would be a travesty of the post war vision of human rights which requires us all to "act towards one another in a spirit of brotherhood" (Universal Declaration of Human Rights 1948, Article 1). As Human Rights Minister Michael Wills has acknowledged on many occasions, responsibilities are "inherent, and on occasion explicit", in the HRA.<sup>10</sup> The Government's concern appears to be to make these 'more explicit,' rather than to introduce new legally enforceable duties through the vehicle of a bill of rights. If that is the case, 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 in his Inaugural speech 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".

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<sup>9</sup> *Uncorrected Evidence* to the JCHR, 20 January 2009.

<sup>10</sup> Michael Wills, *Uncorrected Evidence* to the JCHR, 20 January 2009

## ‘British’ rights and values

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. (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.) It is not clear what other ‘British rights’ are proposed by the Conservatives. In his lecture at the British Library Nick Herbert referred to “rights to government information” – 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.

Whilst, as the Director of Liberty, Shami Chakrabarti, said in the Guardian in January, no bills of rights are magic wands, 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. The Civil Liberties Trust in the early 1990s 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. Included alongside a right to jury trial, was asylum, data protection, freedom of movement and children’s rights.

Linked to the idea of adding new ‘British’ rights is the proposal to codify the principles of the welfare state and such ‘British’ institutions as the NHS. The government has expressed support for the inclusion of economic and social 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” appears to be what they have in mind.<sup>11</sup> 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 JCHR in January, Jack Straw said in terms that there would be no legislation this side of an election.

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<sup>11</sup> Jack Straw, Uncorrected Evidence to the JCHR, 20 January 2009.

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, presented the Government in December 2008 with a proposed Bill of Rights for Northern Ireland which included a range of supplementary rights to the HRA, including economic and social rights. Dominic Grieve, was quoted in January in the Northern Ireland newspaper, *News Letter*, 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”. We wait to see if the government has any appetite for including any of the additional justiciable rights the NIHRC proposes.

The second aspect of the ‘British’ rights and values argument concerns procedure. The greatest benefit of introducing a new 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.<sup>12</sup> Both the government and the Conservatives talk about using the process of consultation as a vehicle to gain support for a new bill of rights.

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 of Human Rights. The Charter 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

Any consultation on a fresh bill of rights has to start from a position of honesty and leadership; the kind of leadership shown by President Obama in his Inaugural speech, who declared that when we “stand up for human rights, by example at home and by effort abroad... We also strengthen our security and well being”. In contrast, Jack Straw, ‘the father’ of the HRA, was quoted in the Daily

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<sup>12</sup> See Dominic Grieve, ‘Liberty and community in Britain’, *speech* to the Conservative Liberty Forum, 2 October 2006.

Mail last December as saying there is a perception that the Act is “a villains' charter or that it stops terrorists being deported or criminals being properly given publicity,” without adequately addressing this charge. It is self evident that the Labour Government has never given the HRA the *sustained* leadership it requires and has sometimes disparaged it. In 2005, when the then Prime Minister Tony Blair made a statement on anti-terror measures and 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”.

The government has belatedly reinforced its commitment to the HRA. Michael Wills told the JCHR in January, “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.” This is a much stronger commitment than the low threshold test of conformity with the ECHR, as promised by the Conservatives. The JCHR stated in its 2008 report *A Bill of Rights for the UK?*, “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.”

In December 2008 the Prime Minister said 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”.<sup>13</sup> If this is the case, then any consultation must provide a coherent explanation as to *why* we are seeking to adopt a new bills of rights? 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’. 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).

Since the Second World War virtually every State in the world has formally accepted a set of values which reflects this understanding of democracy. This has to be the starting point for a consultation on a bill of rights. Not just because the European Court of Human Rights requires it, 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.

### Conclusion

The simple truth is that no bill of rights that respects these human rights values will look very different to the HRA, certainly not weaker. A cursory glance at any

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<sup>13</sup> Above, note 6.

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.<sup>14</sup> 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.

Chris Huhne, Lib Dem Home Affairs spokesman, warned in February that "It is essential that we don't abolish the Human Rights Act... we must remember why the Human Rights Act is so important, as opposed to British rights.... Any society at some point in the future can decide who its citizens are and who they are not. That is what happened in Nazi Germany...If we define rights as British, that is the risk that we run again and we must not allow that to happen."<sup>15</sup>

When David Cameron says that we need “a clear articulation of citizens’ rights that British people can use in British courts”<sup>16</sup> 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?

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<sup>14</sup> Above, note 3.

<sup>15</sup> Speech at the Convention on Modern Liberty, 28 February 2009.

<sup>16</sup> Above, note 3.