

The Rationality of the Conservative Party's Proposal for a British Bill of Rights

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‘The Conservative Party, under my leadership, is determined to provide a hard-nosed defence of security and freedom. And I believe that the right way to do that is through a modern British Bill of Rights that also balances rights with responsibilities.’¹

The Labour Party’s manifesto commitment to give further effect [in the words of the preamble to the Human Rights Act 1998 (HRA)] to the European Convention on Human Rights (ECHR) was meant merely to pave the ground for a constitutional Bill of Rights. This proposal continued, albeit in watered down form, in the document with which the Labour Government introduced its proposed Human Rights Bill in 1998, which contained a brief reference to an autochthonous Bill of Rights.² The Department of Constitutional Affairs’ review of the HRA³ (the DCA Review) appeared until 2007 to represent the Government’s corporate position⁴ that enthusiasm for a second stage Bill of Rights within government had waned considerably. However, in 2007 Jack Straw⁵ announced he will consider plans for a Bill of Rights and Responsibilities, providing a clear set of values, including a provision for greater equality, ‘which will help forge a sense of what it means to be British.’⁶

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¹ Cameron, D ‘*Balancing freedom and security – A modern British Bill of Rights*’ Speech to Centre for Policy Studies, 26 June 2006.

² Jack Straw and Paul Boateng, ‘*Bringing Rights Home: Labour's Plan to Incorporate the ECHR into UK Law*’ (Labour Party 1996).

³ ‘*Review of the Implementation of the Human Rights Act*’ (Department for Constitutional Affairs now the Ministry of Justice June 2006).

⁴ ‘The views expressed in the [DCA Review] are not the views of one Government Department; they express the views of the Government.’ Lord Chancellor, evidence to Joint Committee on Human Rights, 30 October 2006, Q17; but the position appears to have changed with the appointment of Gordon Brown as Prime Minister.

⁵ Secretary of State for Justice and Lord Chancellor.

⁶ Interview on the Today programme, 29 June 2007. This policy was expanded upon in the Green Paper entitled ‘*The Governance of Britain*’ launched jointly by Gordon Brown and Jack Straw days after Brown became Prime Minister in July 2007, and by Jack Straw in his evidence to the Joint Committee on Human Rights (JCHR) on a British Bill of Rights on 21 May 2008.

However, the UK human rights framework and the HRA itself have been on the end of some attacks (both direct and implicit) by senior members of the Government, including the former Prime Minister⁷ and the Home Secretary⁸. This no doubts reflects (and probably informs) the fact that public have, on balance, a negative view of the HRA.

It was in a sometimes remarkably similar tone to both parts of the DCA review, and also the attacks on the HRA by individual ministers, that David Cameron launched his proposal to set up a policy commission in the Conservative Party to consider repealing the HRA and replace it with a 'British Bill of Rights,' whilst remaining a signatory to the ECHR. The HRA had failed, in Cameron's view, adequately to protect liberty, and it had undermined the state's ability to provide its citizens with security. What was needed was a document which defined 'the core values which give us our identity as a free nation' and spelt out 'the fundamental duties and responsibilities of people living in this country both as citizens and foreign nationals.'⁹

The Bill of Rights debate has gained airtime in other quarters too; the Liberal Democrats have reaffirmed their commitment to introducing a Bill of Rights, as part of a Written Constitution,¹⁰ JUSTICE have published a comprehensive report into the issue¹¹ following a discussion paper¹² and the Parliamentary Joint Committee on Human Rights (JCHR) has heard evidence in the course of an inquiry into a British Bill of Rights.¹³

The political climate is now quite different from that in which the Labour party set out its proposals in 1993. Then, their motivation in *Bringing Rights Home* was to stem the tide of British cases going to the European Court of Human Rights at Strasbourg (ECtHR) and to allow the decisions of British courts to contribute to ECHR jurisprudence. Robin Cook's much

⁷ 'Should legal obstacles arise, we will legislate further including, if necessary, amending the Human Rights Act in respect of the interpretation of the European Convention on Human Rights' Tony Blair, Press Conference announcing anti-terror measures in wake of 7 July London bombings, 5 August 2005.

⁸ 'And let's be clear. It cannot be right that the rights of an individual suspected terrorist be placed above the rights, life and limb of the British people. It's wrong. Full stop. No ifs. No buts. It's just plain wrong' Dr John Reid, Speech to Labour Party Conference, 28 September 2006. See also John Reid's speech to the 'G6' Conference of interior and home affairs ministers in Venice on 12 May 2007, in which he referred to gaps and inadequacies in the international human rights framework which make it difficult to counter the terrorist threat.

⁹ Cameron (n 1).

¹⁰ Simon Hughes, 'Liberal Democrats Shadow Attorney General and Secretary of State for Justice' Hansard HC col 117 (19 Feb 2007).

¹¹ 'A British Bill of Rights: Informing the debate.' The final report of the JUSTICE constitution committee, 19 November 2007.

¹² JUSTICE Consultation Project, 'A Bill of Rights for Britain' (February 2007). Lord Kingsland, Shadow Lord Chancellor and a Vice-Chairman of JUSTICE commented, 'when JUSTICE and the Conservative Party simultaneously think there is a problem, it must be a problem worth looking at' see Hansard HL col 1405 (22 March 2007).

¹³ 3 December 2007, 14 January 2008, 28 January 2008, 3 March 2008, 10 March 2008 and 21 May 2008 (Report yet to be published as at July 2008).

heralded ‘ethical foreign policy’ seemed to encapsulate the priority given to Human Rights by the new Labour government. The situation is radically different now. The terminology of human rights, at least when employed by Labour and Conservative politicians, now focuses not on the rights of individuals, but on the proposition that those rights must be balanced against the rights of the community as a whole.¹⁴

In this essay, I shall examine the each of the reasons, both explicit and implicit, behind the Conservatives’ proposals¹⁵ in order to ascertain whether those proposals are rationally connected to the reasons I identify.

History of the Conservative Party’s Attitude to Bills of Rights

In order to examine the reasons behind the Conservative Party’s recent proposals for a Bill of Rights, it is useful to consider the history of the Party’s attitude to Bills of Rights and to incorporation of the ECHR into British law.

The modern history of the Bill of Rights debate¹⁶ can be said to have begun in the late 1960s with Anthony Lester’s pamphlet entitled *Democracy and Individual Rights*,¹⁷ in which he argued that the solution to the increasing examples of the denial of individual freedom by Parliament¹⁸ was to enact a Bill of Rights (which would not, at first, be enforceable by the Courts). The first heavyweight Conservative contribution to the debate was, in the same year, in the form of a pamphlet¹⁹ by the Conservative Opposition Front Bench Spokesman on Home Affairs, Quintin Hogg. Hogg famously characterised parliamentary democracy having become no more than an *elective dictatorship*. He argued, amongst other things, that there was now a requirement for some form of Bill of Rights, which should set out a general declaration of individual rights in order to safeguard against the *arbitrary rule of the modern Parliament*. His proposal was to incorporate the ECHR into English law so as to make it justiciable by British Courts.

¹⁴ It is interesting to note the government’s attitude to whether the EU Charter of Fundamental Rights becomes legally binding: it was one of Blair’s ‘red lines’ which the UK would not accepted be crossed at the EU summit in Brussels June 2007.

¹⁵ I am not concerned herein with the Labour Party’s proposals, which seem unlikely to be the subject of a Bill before the next General Election, given the Government’s commitment to a long period of consultation. See *The Governance of Britain* (n 6) para [213].

¹⁶ Michael Zander, *A Bill of Rights for Britain* (4th edn 1997) 1-39.

¹⁷ 1968.

¹⁸ Such as the succession of Commonwealth Immigrant Acts in the 1960s, the last of which (1968) deprived British citizens from the Commonwealth of their prior right to enter the United Kingdom; the delegation to the executive of sweeping powers such as allocation of Council housing (decided on the basis of unpublished criteria); and the system of security vetting decisions for a Government employee in which he could not be represented.

¹⁹ ‘*New Charter*’ (Conservative Political Centre No 430 1969). The document was expressed to be the views of the author, and not those of the Conservative Party.

The next major Conservative figure to advocate a Bill of Rights was Sir Keith Joseph.²⁰ He argued that a Bill of Rights was needed to protect the rule of law from parliament.²¹ By this he meant that the courts should be able to protect individual freedoms as against the executive, for example by protecting property from planning law, and by limiting taxation. He proposed a Constitutional Court with the power to vet legislation for compatibility with such individual freedoms.

Lord Hailsham re-entered the debate in the same year with a series of articles²², and then, in 1976, a lecture in which he argued for a written constitution and, as part of it, an entrenched Bill of Rights ‘containing as a minimum the rights defined by the European Convention to which we are already parties.’²³ At around the same time, the Society of Conservative Lawyers published a report²⁴ which, whilst neutral on a Bill of Rights, endorsed the incorporation of the ECHR in a manner in which it would have precedence over domestic law.²⁵ Then, it appeared that incorporation of the ECHR seemed to have been taken up more formally by the Conservative front bench when Leon Brittan²⁶ (unsuccessfully) moved amendments to the Scotland Bill on its second reading in 1978 designed to provide Scotland with a Bill of Rights based on the ECHR.²⁷

This apparent direction of the Conservative leadership found what was to prove (until now) its highest point in Margaret Thatcher’s election manifesto of 1979.²⁸ In the context of claims that the Labour Government had allowed outside groups, such as strike committees and pickets to usurp some of its democratic functions, and the traditional role of the legislature having suffered from the growth of government, stated that if elected, they would wish to discuss a possible Bill of Rights with all parties.

However, by 1985, the Conservative Government was stating that ‘the time was not yet ripe’ for any all party talks,²⁹ and in 1986, the Conservative

²⁰ Member of Edward Heath’s shadow cabinet at the time, and later to become Secretary of State for Education and Science under the Thatcher government and chief architect of the application of monetarist economics to British political economics, and in developing Thatcherism.

²¹ *Freedom Under Law* (Conservative Political Centre 1975).

²² *The Times* 2nd, 16th, 19th and 20th May 1975.

²³ ‘*Elective Dictatorship*’ (The Richard Dimbleby Lecture 1976) reproduced in Robert Blackburn, *Towards a Constitutional Bill of Rights for the United Kingdom* (1999).

²⁴ ‘Another Bill of Rights’ in *Society of Conservative Lawyers* (Conservative Political Centre 1976) 18 reproduced in Blackburn (n 23). He also supported incorporation in evidence to the House of Lords Select Committee on a Bill of Rights 1977 referred to in *Zander* (n 16).

²⁵ This reveals the writers’ assumption that such incorporation would not amount to enacting a Bill of Rights.

²⁶ Shadow Spokesman for Devolution.

²⁷ Hansard HC (1 Feb 1978) quoted in *Zander* (n 16).

²⁸ ‘*Election Manifesto*’ Conservative Manifesto (1979) 21 reproduced in Blackburn (n 23).

²⁹ Lord Elton, Minister of State for Home Office, response to Parliamentary Question (PQ) from Lord Hylton as to whether they will initiate constitutional discussions between all parties concerning a Bill of Rights, Hansard HC col 159 (12 Mar 1985) col 159 reproduced in Blackburn (n 23).

Government opposed a Bill introduced by a Conservative peer, Lord Broxbourne,³⁰ on the basis that it would destroy the political impartiality of judges.³¹ In 1989, Thatcher stated that

‘[The Government] is committed to...the principles of Human Rights in the [ECHR] but we believe it is for Parliament rather than the judiciary to determine how these principles are best secured.’³²

John Major confirmed this as the Government’s position in similar terms in 1993.³³

Following Labour’s election in 1997, and the passing of the HRA, the Conservative’s position seemed to harden even further. Prior to the 2005 election, Michael Howard promised to *reform or repeal* the HRA.³⁴

There is little of genuine principle governing the Conservatives’ record on a Bill of Rights and incorporation of the ECHR (two issues which must be kept distinct). The closest person to come to setting out a principled ideological position was Keith Joseph. This is no surprise. On at least one view, Thatcherism should favour the rule of law to the extent that it can impose restrictions on the power of the state over individual freedom. Hailsham, on the other hand, appears to have been motivated by his liberal sensibilities as a lawyer, rather than party ideology, in his moments of pro-incorporation advocacy.³⁵ A further muddying factor is the effect of the state of opposition on how a party views measures which limit the power of the executive. Governments are unwilling to limit their own power. It is salient to note that it was during periods of opposition in the 1970s, and now under Cameron, that the Conservatives have pushed human rights protection onto the agenda. However there is perhaps an underlying instinct in Conservative politicians (notwithstanding public perception of the nature of human rights as being from the left of the political spectrum) which should support, as Joseph did, legislation which protects individual freedom against the power of the state. Even if it contributes little to the reasons why the Conservative Party is now advocating a British Bill of Rights (which I

³⁰ The Human Rights and Fundamental Freedoms Bill (1986).

³¹ Sir Patrick Mayhew, Solicitor-General, Hansard HC col 1272 (6 Feb 1986) quoted in *Zander* (n 16).

³² Response to PQ from Graham Allen asking whether the PM would support incorporation of the ECHR, Hansard HC cols WA251-2 (6 July 1989) reproduced in *Blackburn* (n 23).

³³ Response to similar PQ from Clive Soley, Hansard HC col WA822 (15 Jan 1993) reproduced in *Blackburn* (n 23).

³⁴ ‘MPs angry at ‘Bill to end all Bills’ *Daily Express* 18 March 2005.

³⁵ Dominic Grieve, the then Shadow Attorney General, appears to have similar motivations. Grieve appears to have primary responsibility for the Conservative Bill of Rights project (a responsibility which appears to have survived his promotion to shadow Home Secretary).

shall argue are primarily based on current political pressures), that instinct is evident in Cameron's speech in June 2006.³⁶

Cameron's commitment to producing a draft 'British Bill of Rights' is therefore, on the face of it, a radical departure from the Conservatives' position since the early 1980s. It is also self-evidently a heavyweight new policy. What, then, are the factors which lead to the new Conservative leader taking this position, and will their substantive proposals achieve their aims?

Cameron's Speech

Cameron's speech in June 2006 made a dramatic impact.³⁷ There was extensive press coverage. Critics claimed that scrapping the HRA would be pointless if the UK remained a signatory to the ECHR.³⁸ The Director of Liberty said the plans lacked clarity.³⁹ Michael Mansfield QC labelled the plans a 'complete nonsense.'⁴⁰ Kenneth Clarke described the proposal as 'xenophobic and legal nonsense.'⁴¹ Lord Lester agreed.⁴² Cameron's old tutor at Oxford, Professor Vernon Bogdanor⁴³ was critical of the coherence of Cameron's proposals.⁴⁴ In his speech, Cameron begins by setting out what he sees as the fundamental challenge to 21st century governments; striking the right balance between security and liberty.

[We] are fiercely determined to protect Britain's security with tough and intelligent action to fight crime and fight terrorism. But in doing so we will never be casual about our freedoms.'

He characterises Labour's security legislation since 1997 as '[failing] to protect our security but which in the process undermines our civil liberties.' Cameron set out three possible solutions to the problems he identified:

- 1) Pulling out of the ECHR and abolishing the HRA.
- 2) Remaining bound by the ECHR but abolishing the HRA.

³⁶ For example he objects to the government's 'ill-judged attempt to criminalise religious hatred, which would have unacceptably restrained free speech,' and states, '[w]e understand that freedom is central to the British way of life. It is a vital part of our history and our heritage. We feel it in our bones.'

³⁷ No doubt partly because it was one of the first substantive policy announcements he had made since becoming leader of the Conservative Party on 6 December 2005.

³⁸ David Pannick QC, quoted in *The Times* (26 June 2006).

³⁹ Liberty Press Release in response to Conservative Party proposal to scrap the Human Rights Act, 26 June 2006.

⁴⁰ Quoted in *The Independent* (27 June 2007).

⁴¹ Quoted in *The Daily Telegraph*, 28 June 2007.

⁴² Hansard HL col 1376 (22 Mar 2007).

⁴³ Professor of Government at Brasenose College, Oxford.

⁴⁴ Interview with Professor Bogdanor, *The Guardian*, 1 July 2006.

- 3) Remaining bound by the ECHR, but abolishing the HRA and enacting a 'British Bill of Rights' to replace it.

It was the last of these which he put forward as the right answer. He went on to announce a Policy Commission

‘of jurists and legal experts...to determine how the nature of our participation in the ECHR can be aligned with the principles and legal effect of our modern British Bill of Rights.’⁴⁵

The right balance between individual liberties and collective security is, as Cameron recognises, an issue which lies at the heart of the modern political discourse. That they are both prayed in aid of Cameron's project is, on the face of it, surprising, since they each normally represent the primary concerns of those from different sides of the human rights debate. I shall begin by examining whether Cameron's aims in respect of both of those ideas are achievable in the way he has proposed.

Liberty

Cameron argues that the HRA has not been effective in protecting fundamental rights in Britain.⁴⁶ This argument is repeated in a policy document on crime.⁴⁷ Further detail is provided by the content of a speech in October 2006⁴⁸ by Dominic Grieve⁴⁹ in which he repeated the call for a British Bill of Rights. He characterised it as a response to illiberal policies of

⁴⁵ Consisting of Lord Lyall (former Conservative Attorney General), Martin Howe QC, Jonathan Fisher QC, David Anderson QC, and Austin Morgan. Lord Lester has criticised the fact that the membership of the commission since it contains only male barristers, see Hansard HL col 1379 (22 Mar 2007).

⁴⁶ In particular, he identifies the attempt to criminalise religious hatred (in what became the Racial and Religious Hatred Act 2006 following a Government defeat in the Commons which forced the Act to contain free speech protections); new powers contained in the Regulation of Investigatory Powers Act 2000; the Civil Contingencies Act 2004; and the Government's proposals for Identity Cards.

⁴⁷ It's Time to Fight Back: how a Conservative Government will tackle Britain's crime crisis (28 August 2007). '[E]ven on its own terms the Human Rights Act has not proved to be effective in protecting fundamental rights in Britain. It has not protected the right to trial by jury and it did not prevent the right to free speech from being undermined in the Government's legislation on religious hatred.'

⁴⁸ Dominic Grieve, *Liberty and Community in Britain* Speech to Conservative Liberty Forum, 2 October 2006.

⁴⁹ *Grieve* (n 35).

the Blair government;⁵⁰ ‘a pragmatic legislative response to the dangers of excessive executive power and action in a period of discord.’⁵¹

The speech reads in parts like a classic liberal critique of an executive which, as Professor Ronald Dworkin wrote about the Thatcher Government, ‘makes freedom just another commodity’⁵² and mirrors JUSTICE’s call for vigilance against the executive’s increasing power.⁵³ Cameron and Grieve are both, it seems, from the liberal wing on the Conservative Party. They are joined by Lord Kingsland⁵⁴ who described the HRA as

‘useful camouflage for promoting legislation which undermines [Human Rights]...before the HRA was on the statute book no-one would have dreamt of questioning these very hard earned, long established, common law rules. Yet we are now told that these changes are human rights convention compatible.’⁵⁵

Repealing the HRA and doing nothing else would be portrayed as a deeply illiberal step. Cameron agrees; it would be ‘taking a backwards step on rights and liberties.’ It is inconceivable that the Conservatives, seeking to appeal to the centre ground of British politics, could repeal the HRA without replacing it with a new Bill of Rights. It is a necessary consequence of the political ground that they seek to occupy that they are proposing to enact a new Bill of Rights.

Grieve gives the clearest Conservative statement of intent as to what the rights in the new Bill of Rights will seek to achieve. He states,

‘while remaining compliant with the European Convention on Human Rights there will be an opportunity to define the rights under the European Convention in clearer and more precise terms.’⁵⁶

⁵⁰ He gives as examples the Government’s criminal justice and anti-terror legislation; pre charge detention; Proceeds of Crime Act; the attack on jury trials; ASBOS and dispersal orders; ID cards/information rights/DNA database; the Civil Contingency Act; and the Legal and Regulatory Reform Act.

⁵¹ He gives as examples Walter Wolfgang who was arrested for heckling under the Terrorism Act at the Labour Party conference; protestors at the Cenotaph who were arrested for reading out the names of the British soldiers who had died in Iraq; Brian Haw, the protestor whom the government sought to have removed from Parliament Square; the banned ‘Bollocks to Blair’ T Shirts.

⁵² Ronald Dworkin, *A Bill of Rights for Britain* (1990) 12.

⁵³ Discussion Paper [para 4].

⁵⁴ Shadow Lord Chancellor.

⁵⁵ Hansard HL col 1404 (22 Mar 2007).

⁵⁶ *Liberty and Community in Britain* (n 7).

He goes on to list certain rights as ‘core values in the area of civil liberties that should be identified and protected’ in a new Bill of Rights:

- 1) the right to trial by jury in indictable cases.⁵⁷
- 2) recognition of a new category of ‘constitutional’ statutes⁵⁸ for example that of limiting parliaments to five years.⁵⁹
- 3) the prohibition of the imposition of fines and penalties without prior conviction.
- 4) safeguards in relation to extradition, the interception of communications and the use of information held about citizens by public authorities.
- 5) additions to the right to freedom of expression so as to spell out that equality under the law prevents different groups having different laws applying to them.

Jonathan Fisher QC adds to that list the following:⁶⁰

- 1) the right of a person to be tried in Britain.
- 2) the right to be tried by a British court before being extradited.
- 3) the need to restrain the powers of Police to submit people to compulsory interrogation.
- 4) the protection of privilege against self-incrimination, and of legal privilege.
- 5) the need to make it harder to derogate from the right to freedom of assembly and from the right to freedom of speech.

⁵⁷ Lord Kingsland has agreed, ‘jury trial and evidential protections are unfamiliar on continent; the [ECtHR] has been reluctant to grapple with issues when they have been taken to Strasbourg. That is one of the reasons why talk of a home grown Bill of Rights is in the air,’ Hansard HL cols 1404-1405 (22 Mar 2007).

⁵⁸ A category recognised by Laws LJ in *Thoburn v Sunderland City Council* [2002] EWHC 195. Laws LJ suggests that ‘constitutional statutes’ possess a superior status, and ought not to be repealed absent express statutory wording.

⁵⁹ Grieve is referring to the five year maximum term a parliament may sit by virtue of the Septennial Act 1715 as amended by the Parliament Act 1911.

⁶⁰ Chairman of Research, Society of Conservative Lawyers and member of Cameron’s Policy Commission. Evidence to Constitutional Affairs Committee and Home Affairs Committee, 31 October 2006, Q21.

- 6) the need to strike a balance between the right to a private life and the right to freedom of expression. This, Fisher says, is for Parliament, not the courts.
- 7) the right to self defence, and to defence of the home and property.

Adding to the rights contained in the ECHR better to protect liberties in a new Bill of Rights is sometimes referred to as ‘ECHR plus.’⁶¹ Is a Bill of Rights containing ‘ECHR plus’ rights capable of meeting the challenges to liberty identified by the Conservatives?⁶² Where the courts’ interpretation of ECHR rights are not providing protections against infringements of civil liberties, then in theory new or more precise rights should be capable of doing so. The best example is a free-standing equality provision, lacking in the ECHR, which would allow individuals to claim redress merely on the basis that they had not been treated equally in any area of life, without having to rely on the fact that the unequal treatment is in relation another right guaranteed under the ECHR (for example, religion).

Further, the desire to protect liberty is at least partly causative of the Conservatives’ policy that the UK should remain bound by the ECHR. Cameron points to the fact that abolishing the HRA and pulling out of the ECHR without replacing it with a new Bill of Rights would leave only common law protection against abuse of executive power. Grieve agrees that the idea that the common law and ancient statutes such as Magna Carta and the Bill of Rights 1688 can protect collective and individual liberties is ‘a romantic fancy in today’s world.’⁶³

It seems therefore that the Conservatives’ proposals are consistent with a desire to protect liberty from recent attacks by the government. However, there is another call to arms in Cameron’s speech; security.

⁶¹ JUSTICE Discussion Document [para] 18. Some of the proponents of the HRA might have hoped that the HRA would allow judges to develop an ‘ECHR plus’ jurisprudence under the HRA. This has not happened. See *R (Ullab) v SSHD* [2004] 2 AC 323 para [20] (Lord Bingham) emphasising that the duty of the national courts is to keep pace with the ECtHR jurisprudence as it evolves: no more, but certainly no less. See also *Kay v Lambeth London Borough Council* [2006] 2 AC 465 para [88] (Lord Hope) emphasising the importance of the principle that the national courts should not ‘outpace the ECtHR.’

⁶² Until the new rights are set out in full, it is not useful to consider whether the new rights are *in fact* likely to increase liberty. Further, whether other rights such as social and economic rights, children’s rights, carers’ rights, a free standing equality provision or disability rights should be included in a new Bill of Rights is outside the scope of this essay.

⁶³ *Liberty and Community in Britain* (n 48).

Security

i) Crime

Cameron claims that the HRA has tilted the criminal justice system in favour of the criminal. His views were repeated in a policy document on crime.⁶⁴ Cameron gives the following examples:

- 1) A backlog of 146 cases in which individuals who have had their assets seized by the Assets Recovery Agency have brought HRA challenges to those seizures;
- 2) The claim by Andrew Bridges⁶⁵ in his report into the case of Anthony Rice⁶⁶ that those managing his case had been overly concerned with Human Rights considerations. This Cameron says is a wide trend whereby 'officials are now so frightened of being sued under the [HRA] that they try to protect themselves by making decisions which are often absurd and occasionally dangerous;'
- 3) The fact that police forces have refused to issue 'wanted' posters in relation to escaped prisoners.

The Anthony Rice case makes a useful case study. Although the DCA Review stated categorically, '[d]ecisions of the UK courts under the [HRA] have had no significant impact on criminal law, or on the Government's ability to fight crime,'⁶⁷ the Review makes a causal link between human rights considerations and the death of Naomi Bryant.⁶⁸ The JCHR Report is highly critical of this finding of a causal link.⁶⁹ Douglas Carswell⁷⁰ found the

⁶⁴ *It's Time to Fight Back* (n 47) 'In Britain today, people rightly sense that the criminal justice system is too often tilted in favour of the criminal and away from the victim.'

⁶⁵ Chief Inspector of Probation.

⁶⁶ A life sentence prisoner who was released on licence and subsequently murdered Naomi Bryant.

⁶⁷ DCA Review 1.

⁶⁸ DCA Review (2006) 27, referring to a finding of the Bridges Report as follows, 'Central to the Chief Inspector's findings is that the operation of the [HRA]...has sometimes caused staff to focus excessively on the rights of the individual at the expense of the protection of the public.'

⁶⁹ JCHR Report (2006) 14-15, 'We were unable to find any concrete evidence in the [Bridges] Report itself that any decision concerning the release or management of Anthony Rice was affected in any way by human rights considerations being given precedence over public protection...It therefore appeared to us that the concern repeated throughout the Report...is more in the nature of a general concern rather than one based on clear findings.' The JCHR wrote to Mr Bridges for clarification. He stated that it was a distortion of his findings to say that Rice was released in order to meet his human rights, and that he did not think that decision-makers are interpreting the HRA wrongly. The Lord Chancellor (in his evidence to the JCHR of 30 October 2006, Q8) found Bridges' letter 'difficult to align with his report.' The JCHR accepted it as confirmation of their view.

arguments of the JCHR ‘deeply offensive.’ Whether or not Anthony Rice was released because of his human rights, the fact that Bridges found, at the very least, evidence of the effect of human rights concerns generally on the normal operation of the parole process supports Cameron’s concern about the negative impact of the HRA on officials. It would only be if the Conservatives’ new Bill of Rights was properly applied in areas such as this that their proposals would be successful in allaying such concerns. How the Conservatives will achieve this is not clear.

ii) Terror

Cameron goes on to argue that the HRA has undermined the powers of the state to deal with terrorism, and in particular contributed to the difficulties in deporting individuals considered to be risks to national security to countries in which they may be at risk of torture or ill-treatment on return.

It is clearly wrong to argue that the HRA is even partly the reason why the British Government cannot deport suspected terrorists who face a real risk of ill-treatment or torture contrary to Article 3 ECHR in their home countries. That prohibition is entirely due to the UK’s international obligations as a signatory to the ECHR,⁷¹ which would apply even if the HRA were repealed. If the HRA were repealed, and the UK were still subject to the ECHR, the UK would be left in the extremely unsatisfactory position that human right claimants could still petition the ECtHR, whatever the statutory position of English law. As a result, some, perhaps best described as being on the other wing of the Conservative Party to Cameron, are sceptical of the coherence of his proposals as a result.⁷²

However, Cameron does in fact come close to acknowledging this problem. He fairly (albeit broadly) characterises the ECHR and its relationship with the HRA⁷³ and correctly refers to the fact that it is a

⁷⁰ Conservative member of the JCHR who produced a draft JCHR report (reproduced at pages 46-56 of the JCHR Report) calling for the repeal of the HRA and withdrawal from the HRA, which was not accepted by the JCHR.

⁷¹ Article 1 (Obligation to respect human rights) states: ‘the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’ The Convention Rights include Article 3 as interpreted by *Chahal* (n 74).

⁷² Douglas Carswell stated, ‘I do not believe it is enough simply to repeal the [HRA]. The UK must curtail courts’ ability to adjudicate on the basis of the ECHR, which necessarily involves withdrawing from the convention, and not merely unincorporating it from UK law,’ Hansard HC 19 col 110 (Feb 2007) a position repeated in his draft JCHR paper.

⁷³ ‘Britain played a leading role in drawing up the Convention, which provides for the collective enforcement of the liberties set out in the United Nations Universal Declaration of Human Rights...It is important today for us to understand not just the fact of Britain’s participation in the ECHR, but the nature of that participation...Until the Human Rights Act was implemented in 2000, any British citizen who felt that their rights had been infringed had to take their case to the European court of Human Rights in Strasbourg - a complex and time-consuming process... The Act was intended, in effect, to bring the ECHR home to enable our citizens to seek protection in our courts of their civil liberties under the European Convention...The idea was to

judgment of the ECtHR⁷⁴ that means that the Secretary of State cannot deport someone whose presence is ‘not conducive to the public good.’⁷⁵ Cameron states:

‘this difficulty is not caused by the [HRA]. But the [HRA] has made the problem worse...Because of the interaction of the [HRA] and the nature of our participation in the ECHR, [deportation] is not possible.’⁷⁶

These arguments were repeated by Henry Bellingham.⁷⁷ In fact he used the same phraseology as Cameron.⁷⁸ It is not clear what is meant by the HRA ‘making the problem worse,’ but I assume they are concerned with the fact that the British courts are applying ECHR jurisprudence directly. It is interesting in this regard to note the Government’s position as set out in the DCA review:

{[t]he HRA has had an impact on counter terror legislation. The main difficulties in this area arise not from the [HRA], but from decisions of the ECHR.’⁷⁹

Again, it is not entirely clear from the DCA review precisely how the HRA has effected counter-terror legislation. (Although they do agree that the HRA has not created any additional barriers to a deportation in the context

give people a clear sense of their rights in an increasingly complicated world...On the face of it, this seemed a logical step.’

⁷⁴ *Chahal v UK* (1997) 23 EHRR 413. On the face of the ECHR it does not apply to the dangers which someone removed from the UK might face in the country to which he is removed. Article 1 requires the state parties to secure the rights of those ‘within their jurisdiction.’ However, the ECtHR held in *Chahal* that what would be the equivalent of persecutory ill-treatment under Article 3 ECHR in the country to which an individual would be returned would make return a breach of the ECHR by the state returning the individual in all circumstances, including where that person presents a risk to national security. *Chahal* represents now a consistent jurisprudence which UK Courts should apply and not merely have regard to: *R (Ullah) v Special Adjudicator* [2004] UKHL 26.

⁷⁵ The wording of Section 3(5) of the Immigration Act 1971 under which the Secretary of State exercises his power to deport an individual on non-conducive grounds.

⁷⁶ Cameron (n 1).

⁷⁷ Shadow Minister for the Department of Justice, in a House of Commons debate on Human Rights following the publication of the DCA Review, the JCHR report on the DCA Review Joint Committee on Human Rights (The Human Rights Act: the DCA and Home Office Reviews Thirty-second Report of Session 2005-05 HL Paper 278 HC 1716 alternatively ‘*the JCHR Report*’) and the Government’s response (Cm 7011) Hansard HC col 74 (19 Feb 2007).

⁷⁸ ‘[B]ecause of the Human Rights Act, and the nature of our participation of the ECHR, that was not possible.’ Hansard HC col 79 (19 Feb 2007).

⁷⁹ DCA Review (2006) 10.

of a real risk under Article 3 than those already provided by the ECHR⁸⁰). In reference to the *Belmarsh case*⁸¹ the DCA Review states

‘whilst the HRA may have brought forward the moment of decision, ultimately the compatibility of the 2001 Act with the [ECHR] could in any event have been tested before the [ECtHR] ... [t]he combined view of the security agencies is that, although there are significant resource implications in servicing the structures set up to deal with dangerous terrorist suspects, these result not from the [HRA], but from decisions of the [ECtHR].’⁸²

It may be that both the government and Conservatives, therefore, are not concerned with any legal problem with the HRA in itself; rather they are concerned with the direct enforcement of ECHR jurisprudence by the courts.

Why then would the Conservatives not want to withdraw from the ECHR? There are very good reasons. International law does not recognise the right of a signatory to a treaty unilaterally to withdraw from the obligations it has assumed under that treaty, unless there is such a provision in the treaty itself. There is such a ‘denunciation’ provision in the ECHR.⁸³ However Dworkin, rightly considers that the UK is subject to the ECHR as a matter of moral obligation as well as (absent any denunciation) international law.⁸⁴ Most commentators consider that it would be political suicide to withdraw from the ECHR.⁸⁵ Cameron seems to agree. He says,

‘the act of leaving the ECHR would send a message to all those countries that we encouraged to sign up to it that you cannot have rights and security at the same time.’⁸⁶

⁸⁰ *Cm 7011* (n 4).

⁸¹ *A & Others v SSHD* [2005] 2 AC 68, in which the House of Lords found that Part 4 of the Anti-terrorism, Crime and Security Act 2001 (under which the Secretary of State had the power to detain without trial suspected foreign terrorists) was incompatible with Article 14 ECHR because it discriminated on the ground of nationality or immigration status.

⁸² The same might be said of the challenges under Articles 5 and 6 ECHR to the Control Order regime set up by the Prevention of Terrorism Act 2005 (due to be heard by the House of Lords on 5 July 2007).

⁸³ Article 58, which merely requires 6 months’ notice to be given (although withdrawal would not have any retrospective effect).

⁸⁴ *A Bill of Rights for Britain* (n 52) 24.

⁸⁵ Professor Francesca Klug who describes denunciation as ‘an extraordinary thing to...it would be inconceivable to the rest of the world, because we fight wars in the name of democracy and human rights, to disown the most successful human rights treaty in the world’ (evidence to Constitutional Affairs Committee and Home Affairs Committee, 31 October 2006, Q13).

⁸⁶ There are other issues surrounding denunciation of the ECHR which, because it does not appear to be what the Conservatives are proposing, are outwith the scope of this essay: namely whether it would be possible to end the right of individual petition to the ECtHR without

Cameron is also there hinting at another reason why leaving the ECHR is inconceivable. Whilst membership of the Council of Europe is not a formal condition of the UK's membership of the European Union, the fact that the EU now requires new potential entrants to the EU to ratify the ECHR means that it would at the very least make its continued membership of the EU extremely difficult if the UK denounced the ECHR.⁸⁷

The DCA Review,⁸⁸ unsurprisingly, agrees with those positions, as do JUSTICE.⁸⁹ So if the Conservatives do not propose leaving the ECHR, they are left with the following problem. Given that the main issue raised by the Conservatives in relation to security concerns the problems caused by the interpretation of *Chahal* by the ECtHR,⁹⁰ any such more precise definitions are likely to be inconsistent with settled interpretation of the ECHR.⁹¹ In those circumstances, is the proposal to remain bound by the ECHR workable? The answer to that question depends on whether, if there is a conflict with the interpretation of ECtHR rights and the necessary interpretation of a new right, the ECtHR would inevitably find against the UK Government when a case raising the question reaches the ECtHR. Taking Cameron's principal security example, would the ECtHR do anything other than follow *Chahal* if a new Bill of Rights contained a provision permitting the Home Secretary to balance the likelihood of an individual being tortured on return to a foreign country with the risk he poses to national security?

To answer this, Cameron puts forward an argument based on the ECHR doctrine of the 'margin of appreciation' whereby, to the extent that there are

denouncing the treaty; whether it would be possible make any new reservations from the ECHR; and the consequent issues of denunciation for the devolutionary settlements (the ECHR is entrenched in respect of the three devolved assemblies).

⁸⁷ See Professor Klug 'you do have to ratify the [ECHR] to be a member of the EU' (evidence to Constitutional Affairs Committee and Home Affairs Committee, 31 October 2006, Q19); Rabinder Singh goes further, 'membership of the European Union today requires adherence to the [ECHR]. That is certainly, as I understand it, what we expect of potential new entrants, so I think it is a matter of legal obligation' [my emphasis] (*Ibid.* Q63); Jonathan Fisher disagrees: his view is that if the UK enacted its own 'Bill of Rights and Obligations' then the UK's duty under Article 6 of the EU Treaty to respect fundamental rights would be satisfied (*Ibid.* Q41); the Lord Chancellor has the best view, 'the way the relevant treaties are drafted does not express it as a condition, but to all intents and purposes, I believe it is not possible to be a member of the [EU] and to have...denounced the [ECHR]' (*Ibid.* Q96).

⁸⁸ 37-38.

⁸⁹ JUSTICE views the UK's relationship with the Council of Europe and its ECHR [membership] as a political reality and as non-negotiable. Moreover, our continuing membership of the European Union is effectively conditional on compliance with the ECHR' (Discussion Paper para [17]).

⁹⁰ See discussion of *Chahal and Article 3* (n 74). In order to allow the Secretary of State to take into account an individual's risk to national security when assessing whether he should be deported notwithstanding a risk of treatment contrary to Article 3, a Bill of Rights would have to give an expressly different interpretation to the Article 3 right from that currently given by the ECtHR.

⁹¹ It will not be possible to consider the extent to which the new rights are in fact consistent with ECHR rights until a draft of the new Bill of Rights can be examined.

rights in the new Bill of Rights which are inconsistent with the ECHR, the ECtHR would allow the UK to rely on the balance it had struck, by means of a Bill of Rights, between the rights of individuals and the community as a whole. Cameron cites the example of Germany where, he claims, the ECHR defers to German 'Basic Law'⁹² in conflicting situations. Grieve and Fisher make similar claims.⁹³ Professor Klug argues that this claim is false because (1) Germany does not receive any greater width from the ECtHR than other countries; and (2) margin of appreciation is a concept which only applies where there is no consensus between signatories.⁹⁴ JUSTICE states that they are unaware of any argument to support Cameron's claim.⁹⁵ There is however at least some case law in which German Basic Law does not appear to have been given any specific weight so as to increase the normal margin of appreciation allowed by the ECtHR to states: the case of *Von Hannover*.⁹⁶ In that case, the ECtHR set out the principle that the German state has a margin of appreciation to strike the balance between the competing interests of the individual and of the community as a whole in the context of the right to privacy and freedom of the press.⁹⁷ The ECtHR went on to find that the state was not acting within its margin of appreciation. They appear to give no weight in applying the margin of appreciation principle to the fact that the German Constitutional Court had interpreted its Basic Law to dismiss the appeal to it by the applicant. This clearly does not mean that the ECtHR would never allow a state a margin of appreciation on the basis that it had applied its own Bill of Rights. However, in *Von Hannover* no such principle is articulated in relation to German Basic Law.

A further problem is that, prior to the HRA, the courts had shown definite signs that they were prepared to begin the process of judicial incorporation of the ECHR. The government might find that they are called to account on ECHR principles in UK courts even having repealed the HRA.⁹⁸ The Conservatives would have to argue that English courts would

⁹² The Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) is the constitution of Germany.

⁹³ *Liberty and Community in Britain* (n 48); evidence to Constitutional Affairs and Home Affairs Select Committees, 31 October 2006, Q21.

⁹⁴ Klug's second reason does not appear to be correct. The ECtHR does not limit its application of the concept to situations where there is no consensus; rather it is applied in certain specific decision-making areas, e.g. social and economic policy. For example see *Burden & Burden v UK* (2007) 44 EHRR 51 in relation to inheritance tax policy).

⁹⁵ JUSTICE Discussion Paper [para 18].

⁹⁶ *Von Hannover* (2005) 40 EHRR 1. The case concerned photographs of Princess Caroline of Monaco. The claim was against the state for failing in its positive obligation to protect the Princess's right to privacy after she had failed in a series of applications in the German courts to prevent publication of the photographs.

⁹⁷ *Ibid.* para [57].

⁹⁸ *R v SSHD ex parte Brind* [1994] 1 AC 696 in which the House of Lords held that, absent any contrary indication, parliament would be assumed to have been legislating in accordance with the ECHR.

take the same view of margin of appreciation for the proposal to be fully viable.

Since there seems to be no settled view, the Conservatives cannot be certain that their argument based on the margin of appreciation will provide them with the magic pill to cure the difficulties that their insistence on maintaining ECHR membership causes. The theory will certainly require litigation before the ECtHR to establish it.⁹⁹ Consistent defeat at the ECtHR, even on a relatively small number of issues, in a situation where a Conservative government had passed constitutional legislation in order to secure a certain result, would leave that government in a very difficult position indeed.

Cameron also touches on a further role his Bill of Rights would play in protecting security. He states, it could ‘help us promote active citizenship and forge a renewed sense of national cohesion making a lasting contribution to the general wellbeing of our country.’ This argument, however, receives far more emphasis in Grieve’s speech.¹⁰⁰ He argues that success in tackling deep problems with community cohesion in Britain,¹⁰¹ and the threat of home-grown terrorism,¹⁰² is dependent on

‘winning the struggle for hearts and minds and in identifying those shared values which unify us...[A new Bill of Rights] has the potential to play a beneficial role in promoting a common identity.’

This ambitious aim is mirrored by the recent statements of the Gordon Brown’s administration.¹⁰³ It is certainly rational but whether it is achievable is another question.

⁹⁹ However the Government’s strategy is already to litigate in order to secure the interpretations it considers appropriate. For example, the UK has been permitted to make observations jointly with Lithuania, Portugal and Slovakia in two national security/Article 3 deportation cases currently before the ECtHR (App No 37201/06 *Saadi v Italy* and App No 25424/05 *Ramzy v The Netherlands*) in order to argue that *Chahal* was wrongly decided and that states should not have to dismiss national security concerns as irrelevant once a real risk of Article 3 treatment on return is found. Cameron is seeking to do something very similar, but by different means: ‘But a British Home Secretary must have more flexibility in making judgement in the public interest, balancing the rights of terror suspects against the rights of British citizens. I believe it is wrong to undermine public safety – and indeed public confidence in the concept of human rights – by allowing highly dangerous criminals and terrorists to trump the rights of the people of Britain to live in security and peace.’

¹⁰⁰ 2 October 2006 (n 48).

¹⁰¹ Caused, Grieve claims, by mass migration and a failed policy of multiculturalism.

¹⁰² Such as the 7 July London bombings.

¹⁰³ *The Governance of Britain* (n 6).

The Unloved HRA

Cameron acknowledges that some of the impact of the HRA has been positive.¹⁰⁴ However, Grieve has said that the ‘disenchantment [with the HRA] which I pick up from my postbag is the single most important political phenomenon of the last few years’ mentioning, in particular, the amount of correspondence he receives on the subject of the perceived assistance Article 8 ECHR gives to gypsies resisting eviction.¹⁰⁵ The perception seems to be that the HRA, incorporating the ECHR which is enforced ultimately in a foreign court, increases the rights of the undeserving. The campaign against the HRA has at times been vicious, but it has also sometimes been based on inaccurate understandings of court decisions.¹⁰⁶ This has had a corrosive effect on the popular acceptance by the HRA.¹⁰⁷ Due to this perceived unpopularity of the HRA, the Conservatives principally see the HRA as presenting a *political* rather than a legal problem. Grieve has made explicit reference to this.¹⁰⁸ This lends support to an analysis of Cameron’s speech on political rather than legal terms. If the HRA is perceived as damaging security *notwithstanding its terms* then the critique that the Conservatives wrongly blame the HRA on its terms as damaging security, loses much of its force.

Recognition of this political problem appears across the political spectrum, including by the former Prime Minister.¹⁰⁹ The DCA Review, in more considered terms, states that the HRA has been

‘widely misunderstood by the public, and has sometimes been misapplied in a number of settings. Deficiencies in training and guidance have led to an imbalance where too much attention is paid to individual rights at the expense of the wider

¹⁰⁴ He cites as example the right of elderly married couples not to be separated in different care homes, and the right of families of the deceased to be represented at coroners’ inquests. See also the comments of Lord Kingsland, ‘Many things of real constitutional value have flowed from the arrival of the HRA on our statute book’ Hansard HL 22 Mar 2007 col 1404.

¹⁰⁵ Debate with Shami Chakrabarti, ‘*A British Bill of Rights*’ (Gray’s Inn, 13 March 2007).

¹⁰⁶ For example, *The Sun*’s campaign started on 12 May 2006 to ‘rip up the [HRA].’ This followed the judgment of Sullivan J in the Afghan hijackers’ case (*S v SSHD* [2006] EWHC 1111). The Afghans had hijacked a plane and landed at Stansted, They had successfully appealed to an immigration Adjudicator against removal on Article 3 ECHR. The Government had accepted that finding. The Secretary of State changed his policy on discretionary leave and granted them temporary admission. The Afghans applied for judicial review. The judge (whose decision was upheld on appeal) found the new policy unlawful. *The Sun*’s campaign therefore appeared to be based on a misunderstanding of the nature of the proceedings before Sullivan J.

¹⁰⁷ Lord Lester complains that the legitimacy of the HRA is under sustained and unfair attack by the tabloid press (Hansard HL 22 Mar 2007 col 1375). Liberty agrees (letter to JUSTICE in response to their Discussion Paper, 7 May 2007). Lord Falconer also agrees: ‘I think they are doing significant damage to the way the Act is perceived in the Country’ (evidence to JCHR 21 May 2007, Q69).

¹⁰⁸ *Debate with Shami Chakrabarti* (n 105).

¹⁰⁹ *Blair Press Conference* (n 7).

community. This process has been fuelled by a number of damaging myths about human rights which have taken route in the popular imagination.¹¹⁰

The JCHR Report broadly agrees with this assessment; however it lays great emphasis on the adverse effect of unfounded assertions by very senior ministers who use it as a scapegoat for administrative failings in their own departments. In particular, it draws attention to the comments of the former Prime Minister¹¹¹ and the former Home Secretary¹¹² concerning HRA decisions, which, in the JCHR's view 'only serves to fuel public misperceptions of the [HRA] and of human rights law generally.'¹¹³

Others have made similar points. Lord Kingsland¹¹⁴ said,

'the HRA has not commanded the public respect that it ought to have done and that it deserves... [due to] foolish or misplaced decisions...by public servants...[and] lukewarm endorsement from ministers.'¹¹⁵

Baroness Whitaker stated, 'the Act has not become part of the national culture fully enough yet.'¹¹⁶ JUSTICE agrees that 'political and cultural entrenchment have become mixed.'¹¹⁷ Liberty go further, and state that calls for a new Bill of Rights stem from the fact that the HRA:

¹¹⁰ DCA Review p.29 and ff. where the Review sets out why myths about the HRA have been a driver for attacks on the HRA using it as a proxy for other issues. The Review considers that there are three different types of myth in play: cases never brought (e.g. Dennis Nilsen's judicial review against the decision to refuse him access to pornography whilst in prison, which failed at the permission stage. It is interesting that the Review describes this as a 'case never brought' – it clearly was a case brought, albeit unsuccessfully!); urban myths (such as the supposed provision of Kentucky Fried Chicken to Barry Chambers whilst he was avoiding arrest); and misrepresentations of the HRA (e.g. the Afghan hijackers case (n 71) and Article 8 ECHR decisions involving Gypsies and Travellers).

¹¹¹ 'We can't have a situation in which people who hijack a plane, we're not able to deport back to their country. It's not an abuse of justice for us to order their deportation, it's an abuse of common sense frankly to be in a position where we can't do this' (Tony Blair, Press Conference, 10 May 2006). As set out in footnote 71, this appears to be a misunderstanding of the decision of Sullivan J.

¹¹² 'When decisions which appear inexplicable or bizarre to the general public, it only reinforces the perception that the system is not working to protect or in favour of the vast majority of ordinary decent hard-working citizens in this country.' (John Reid, quoted by BBC, 11 May 2006). This statement appears to be less inaccurate in relation to the decision of Sullivan J, to the extent that it is a comment on the perceptive effect of the decision.

¹¹³ The Lord Chancellor, in evidence to the JCHR (30 October 2006, Q1 and Q2), confirmed that the official position of the Government was that the hijackers should not be returned, given that the Immigration Adjudicator had found on the facts that there was a real risk of treatment contrary to Article 3 ECHR on return, for as long as that risk subsisted.

¹¹⁴ Shadow Lord Chancellor and a Vice-Chairman of JUSTICE.

¹¹⁵ Hansard HL 22 Mar 2007 col 1404.

¹¹⁶ Hansard HL 22 Mar 2007 col 1377.

¹¹⁷ *JUSTICE discussion paper* (n 95) 3.

‘has been the target of a concerted media campaign which has unfairly portrayed the [HRA] and the rights it contains as a charter for criminals and terrorists and a threat to public safety. Prominent politicians have attacked, as an abuse of common sense, judicial decisions to protect even the most fundamental human right, the absolute prohibition against torture.’¹¹⁸

A further reason for the problem of perception has been identified as the lack of consultation in the initial stages of the HRA, which has led to a lack of ‘ownership’ by the people.¹¹⁹

A significant theme in adverse press coverage of the HRA is a perception that the HRA is somehow a ‘European’ measure. Herein lies the motivation for the emphasis in Cameron’s speech on a *British* Bill of Rights, presumably in contradistinction to the *European* Convention on Human Rights. The Government have acknowledged this as an aspect of the public perception of the HRA.¹²⁰ Much of the response to that emphasis has focussed on the fact that British government lawyers were heavily involved in the drafting of the ECHR.¹²¹ However, this point is not always validly prayed in aid by defenders of the Britishness of the ECHR. Richard Shepherd¹²² quotes the Labour Lord Chancellor¹²³ at ratification of the ECHR in March 1951 as

¹¹⁸ Liberty’s response to JUSTICE’s discussion paper, letter dated 7 May 2007.

¹¹⁹ *Grieve* (n 34) and *Shami Chakrabarti* (n 105).

¹²⁰ ‘It is an irony that bringing our rights home, in the sense of making them enforceable here rather than in Strasbourg, somehow conspired to make rights to which we are all accustomed seem more alien and foreign.’ Vera Baird, Under-Secretary of State for Constitutional Affairs, Hansard HC 19 Feb 2007 col 69. Contrast with Lord Irvine’s (Labour Lord Chancellor who introduced the Human Rights Bill into Parliament) comment that the task was to ‘find a distinctively British approach for our British Parliament and British Courts’ (Keynote address to the Conference on a Bill of Rights for the United Kingdom, University College London, 4 July 1997, quoted in K.D Ewing, ‘The Human Rights Act and Parliamentary Democracy’ [1999] 62 *MLR* 79)

¹²¹ ‘Why do we have the campaign against the [HRA]? One reason is the allergy to the word ‘European.’ The fact that the name of the convention is the European convention on human rights leads some who are ill informed to assume that it is the spawn of the European devil: the European Union. It is not of course...If anything it was the creation of the British Government and the British judiciary after the war, very much supported by Sir Winston Churchill at the time, although not perhaps by Atlee.’ David Heath, Liberal Democrat MP, Hansard HC 19 Feb 2007 col 88: ‘It is the modern Magna Carta. Why are we not as proud of the [HRA] as the Americans are proud of their Bill of Rights?...partly because of its novelty...[and] partly because [the ECHR] contains the dreadful word ‘European’...even though it was largely drafted by British lawyers lead by David Maxwell-Fyfe [Conservative Attorney General in 1945, and subsequently Lord Chancellor as Viscount Kilmuir]’ Lord Goodhart, Liberal Democrat Lord Chancellor and Chairman of JUSTICE, Hansard HL 22 Mar 2007 col 1388.

¹²² Conservative member of the JCHR.

¹²³ William Jowitt, the First Earl Jowitt.

writing in a memorandum to the Cabinet Committee that acceptance of the ECHR, although a political necessity was ‘an unqualified misfortune.’¹²⁴ A less partisan analysis by Dr. Elizabeth Wicks concludes that the Government of the time saw it as an instrument of limited application.¹²⁵ Professor Danny Nicol¹²⁶ suggests that the British negotiators saw the draft as a means to ensuring that Europe should never again be menaced by totalitarian regimes. Since all the prospective signatories were democracies, the aim was therefore to preserve the status quo. This led to a ‘minimalist’ approach, requiring a short list of political rights, rather than (as others wanted) a dynamic, living instrument which was capable of reflecting new, as yet unascertained, rights as time went on. The ‘minimalists’ were successful in negotiations, and the majority of the Articles of the ECHR were drafted to contain detailed provisions. The result is, of course, a very different instrument, expressly interpreted by the ECtHR as a ‘living instrument.’¹²⁷ Appeals to the *Britishness* of the ECHR as currently interpreted on the basis that it reflects the intentions of its British drafters are therefore misplaced.

But could a new Bill of Rights solve the Conservatives’ political problem concerning public perception of the HRA? In order to do so, their Bill of Rights would not only have to allow British liberty and security to be better protected, but also to achieve cultural entrenchment by means of a universally accepted set of norms which define the relationship between the individual and the state.

The Government, recognising the same perceptive problem with the HRA have taken a policy decision to remain fully committed to the HRA (and ECHR).¹²⁸ Instead of repealing the HRA, they proposed:¹²⁹

- 1) to conduct a review of how the police, probation, parole and prison services balance public protection and individual rights (and if necessary legislating to prioritise public protection).

¹²⁴ Quoted in Hansard, HC 19 Feb 2007 col 96.

¹²⁵ Wicks, ‘The UK Government’s Perceptions of the ECHR at the Time of Entry’ [2000] *PL* 438.

¹²⁶ Nicol ‘Original Intent and the European Convention on Human Rights’ [2005] *PL* 152.

¹²⁷ This norm of treaty construction is made possible by the fact that the ECtHR is not bound by its previous decisions.

¹²⁸ However, the DCA Review does consider amendment of the HRA as a possible solution to situations where public officials get the balance wrong in applying the HRA. The JCHR was unimpressed by this proposal: ‘None of the three cases which sparked controversy [Afghan hijackers, Rice, deportation of foreign prisoners]...demonstrates a clear need to consider amending the [HRA]’ (JCHR Report, 16). Lord Falconer was forced to row back from any commitment to amend (evidence to JCHR, 3 October 2006, Q10, Q57 and Q58).

¹²⁹ DCA Review, 1-2. The lead was to be taken by the DCA.

- 2) to provide better and more consistent advice and training on human rights within departments and for public sector managers, with emphasis on safety arguments.¹³⁰
- 3) to take a pro-active and coordinated approach to human rights litigation.
- 4) to better inform the public about human rights.¹³¹

It has taken the courts (on both sides of the bench) some time to reach a stage where the HRA is being routinely, accurately and efficiently argued and applied as a matter of course (for the most part). The last 7 years have seen extensive development of human rights law based on the direct application of the ECHR in English law.¹³² As evidenced by the DCA review, people's understanding of their human rights is already limited, without the confusion which would flow from repealing the HRA. For these, practical but extremely important reasons, repealing the HRA without replacing it with an instrument which incorporated (but then built on) ECHR rights could have a chaotic and damaging effect on the administration of justice. It would also therefore further damage people's confidence in and understanding of a legal culture of human rights. It is obvious for this reason why the government have launched a robust defence of the HRA. For the Conservative project to be workable, it must therefore be cast as building on the HRA, not as an alternative to it.

There are two further aspects of popular acceptance of a new Bill of Rights which the Conservatives point to. In his speech Cameron states that his British Bill of Rights would define our core values, setting out our fundamental duties and responsibilities, and balancing them with each other. Grieve considers that a statement of the obligations of individuals to the wider community

‘could provide a benchmark in the balancing exercise that the judiciary must carry out in reconciling the rights of the individuals to the rights of the wider community.’¹³³

¹³⁰ *Making sense of human rights: A short introduction* (DCA, 30 October 2006) ‘is designed for officials in public authorities to assist them in working with the Human Rights Act 1998 and to raise their awareness of human rights; *Human Rights: Human Lives A Handbook for public authorities*’ (DCA, 30 October 2006) ‘has been designed to raise staff awareness of the different rights and freedoms protected by the Human Rights Act’ (DCA website).

¹³¹ Lord Falconer launched the Ministry of Justice's human rights campaign *Human Rights: Common Values, Common Sense* at the Harry Street lecture at Manchester University on 9 February 2007.

¹³² To take as only one example the application of the ECHR principle of ‘proportionality,’ in addition to common law principles, to the standard of review to be carried out by the Courts in judicial review by the House of Lords (*R (Daly) v SSHD* [2001] 2 A.C. 532).

¹³³ *Liberty and Community in Britain* (n 48).

Aside from the jurisprudential question of whether duties are *capable* of being balanced against rights by a court adjudicating on entitlement to those rights,¹³⁴ if the Conservatives are successful in their drive to secure public ownership of a new Bill of Rights through consultation¹³⁵ then a statement of responsibilities tied to rights might go some way to removing the stigma attached to human rights instruments as charters for the undeserving, and allow acceptance of a new Bill of Rights. Labour agrees, as Jack Straw has now made clear.¹³⁶

A second aspect of popular acceptance of any new Bill of Rights concerns its status in law. If an instrument is to be appealed to as a document which defines the citizens of a country, it must be seen to be above party politics. This matters in the manner of its enactment, and also the extent to which it can be amended to suit the short term political aims of a party which happens to be in power. Bills of Rights are both political and legal documents; to treat them in the same category as the Dangerous Dogs Act, for example, would be to lessen their capacity for cultural entrenchment. For this reason, some form of parliamentary entrenchment which places the instrument above the easy reach of the executive should be considered. Grieve, Fisher and Cameron have suggested 'soft entrenchment' whereby the operation of parliament acts is excluded in relation to the new Bill.¹³⁷ They appear not to advocate fully entrenching a new Bill of Rights so that it cannot be amended by parliament.¹³⁸ They cite the doctrine of parliamentary supremacy. However, Dworkin disagrees that a parliament cannot limit the power of a future parliament.¹³⁹ He asks what the authority for that proposition is, and suggests that for parliament not to be able to limit its own power in the future would itself be a limitation of the power of parliament. This argument has some force. If a parliament made a simple declaration against future amendment,¹⁴⁰ then a future parliament would

¹³⁴ Although there has been some comment by Conservative lawyers, in particular by Jonathan Fisher QC in his paper '*A British Bill of Rights and Obligations*' (Conservative Liberty Forum, 31 October 2006), on the nature and justiciability of such obligations, discussion in depth of those proposals is outside the scope of this essay.

¹³⁵ Grieve says we should: 'engage in a national debate as to what aspects of our legal and constitutional framework constitutes core values in the area of civil liberties that should be identified and protected...if the document we draft is well-worded and is perceived to provide protection to our rights and freedoms, then it will become effective in defining common values so that all British citizens of different backgrounds feel common ownership of it;' see *Liberty and Community in Britain* (n 48). This is remarkably similar to the government's current proposals.

¹³⁶ *The Governance of Britain* (n 6).

¹³⁷ This would mean that the House of Lords would have full veto powers over any proposed amendments.

¹³⁸ Grieve says, '[I]t will therefore be possible to repeal or override part or all of a Bill of Rights in exactly the same way as the Government has routinely done to Habeas Corpus and Magna Carta.' See *Liberty and Community in Britain* (n 48).

¹³⁹ *A Bill of Rights for Britain* (n 52) 26.

¹⁴⁰ As they did, for example, in the Acts of Union 1707 and 1800 (example used by JUSTICE in their Discussion Paper).

have to face up squarely to what it was doing, which would at least in theory mean that there would have to be clear popular support for amendment or repeal. For the time being, however, the Conservatives at least recognised that some form of entrenchment is required for their conception of the role a new Bill of Rights would play to work.

The Role of the Judiciary

Some Conservatives have expressed deep dissatisfaction with what they see to be the shift in the constitutional balance¹⁴¹ that the HRA has caused as between the judiciary on one hand, and parliament and the executive on the other.¹⁴² It is not clear where the leadership stand, but often criticism by politicians of decisions under the HRA has implied that judges are straying on the territory of parliament and, worse, the executive. This argument is misconceived. The courts are merely carrying out the function assigned to them by an Act of Parliament passed by elected representatives of the people. Further, the assertion of rights by citizens against the state in court is itself a fundamentally democratic right in itself: it amounts to direct participation in the outcome of decisions which affect those citizens. Dworkin quotes the French historian François Furet as saying that the single triumph of our time is the growing acceptance of a crucial idea; that democracy is not the same thing as majority rule.¹⁴³ In a similar vein, Laws LJ in a famous article wrote that those who govern must have limits set to what they can do; it is a function of democratic power that it is not absolute.¹⁴⁴

The Conservatives propose to retain the ingenious architecture of the HRA which, broadly, allows the courts to adjudicate on rights asserted by individuals, but allows parliament the final say on whether to amend ECHR incompatible legislation.¹⁴⁵ So the constitutional balance which has developed under the HRA would be likely to persist. Certainly some members of the Conservative Party see this shift in balance as part of the political problem with the HRA. If the Conservatives, similarly to members

¹⁴¹ Professor K.D. Ewing comments that the HRA represents ‘an unprecedented transfer of political power from the executive and legislature to the judiciary’ [1999] 62 *MLR* 79; but c.f. the DCA Review which states ‘has not significantly altered the constitutional balance;’ the view of a senior judge (Maurice Kay LJ – evidence to Constitutional Affairs Committee and Home Affairs Committee, 31 October 2006, Q67) is that at the very least the HRA has drawn judges into new territory as shown by the question at issue in *A & Others* (the lawfulness of the UK’s derogation from an international obligation), although in the event great deference was shown by majority in that case.

¹⁴² e.g. (amongst many examples of Conservative criticism of judicial activism) Martin Howe QC has written that the HRA has allowed the Courts to decide questions which are essentially political and that if this is to continue we should recognise that political factors should play a part in the appointment of judges (*‘A British Bill of Rights’* Conservative Liberty Forum 9 July 2006).

¹⁴³ *A Bill of Rights for Britain* (n 12) 13.

¹⁴⁴ Laws J, ‘Law and Democracy’ [1995] *PL* 72, 81.

¹⁴⁵ Grieve has stated that the new Bill of Rights would retain ss. 2, 3, 4 and 6 of the HRA.

of the government, are not content with where the balance now lies, their Bill of Rights will have to shift that balance once again. For the time being, however, it seems the leadership agrees with Lord Lester when he says,

‘[t]here is no risk in this country of a government of unelected judges. They have approached the Strasbourg jurisprudence through rather than round British law, weaving the Convention rights into the fabric of the British system. That is vital if we are to command public confidence.’¹⁴⁶

Conclusions

The coherence of the Conservative project, in terms of the relationship between the reasons for it and the measures it advocates, is at present mixed.

It wrongly appeals to the *Britishness* of the ECHR. It does not make clear how deficiencies in the application of the HRA by public officials will not be repeated in a new Bill of Rights. The argument, on which much rests, in relation to the margin of appreciation to be applied by the ECtHR is apparently unsubstantiated. Most crucially, their decision to attack the HRA rather than seeking to build on its successes (even if by repealing it), risks further failure to entrench a culture of human rights; as the Director of Liberty has said ‘beware of permanent revolution.’¹⁴⁷

However, Bills of Rights are both political and legal documents. The Conservatives have recognised (as others have) the political problem which currently exists in relation to human rights. They have proposed a measure to solve that problem which seeks to further the protection of civil liberties. Their proposals are consistent with their ideology. They are committed to remaining bound by the ECHR. Perhaps most importantly, they aim to seek wide consultation and ownership of their new Bill of Rights, and see in it (as others do) a means to foster a greater understanding of the relationship between the individual and the state in order to increase national cohesion. Their proposals, for these reasons, are at least capable, once fully developed, of solving the problems they have identified.

¹⁴⁶ Hansard HL 22 Mar 2007 vol 609 col 1375.

¹⁴⁷ Debate with Dominic Grieve (*supra*) amongst other places.

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