A Bill of Rights or an excuse for nationalism ?
Lecture given 20 April 2010[1]

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As the complexity and interconnectedness of our world increases, it is understandable that politicians should pander to (and indeed encourage) societal fears, promising simple and clear solutions, irrespective of whether they can be delivered.

This is in my view why Labour and the Conservatives are both proposing a 'British Bill of Rights' now (albeit that Labour has apparently not mentioned it in its manifesto), and why Labour at least, is promising this as a vehicle by which the nature of 'Britishness' can be identified and defined. This is intended to be 'unifying process'; the recent green paper[3] suggests that the instrument "could act as an anchor for people in the UK"; Dominic Grieve (shadow Minister for Justice[4]) suggests that it could 'promote a popular sense of ownership". The two Government Green Papers[5] suggest that part of the anchoring objective could be by setting out the responsibilities of individuals to each other within the United Kingdom. While Grieve has argued against such symbolic legislation, he says that for his Party one of the key reasons for a Bill of Rights would be to "wrest power away" from international bodies and indeed even to restrain British judges; the ultimate goal is to return power to the politicians.[6]

I draw two themes from this discourse. The first is a nationalist theme; an attempt to define 'Britishness', set out 'values', and take adjudicative power away from international bodies. The second is a theme connected with power; an understandable attempt by politicians to try and maintain ultimate control by reference to the argument that judges do not have democratic legitimacy (and certainly not international judges). This tends to be based on an assumed 'truth', (one that has nevertheless been rejected by most other States), that Parliamentary sovereignty protects and ensures British democracy.

I am going to suggest that these themes, in addition to being antithetical to rights concepts, are historically misguided and fail even to reflect today's reality. Certainly, they provide no coherent basis for setting out themes and ideas

[1] This is the adapted text of a lecture given at the Times/Matrix seminar on a Bill of Rights on 20 April 2010.
[2] Barrister, Matrix chambers
[3] 'Rights and Responsibilities: developing our constitutional framework', March 2009 CM7577.
[4] Now Attorney General
[5] 'The Governance of Britain', July 2007, CM 7170, in particular paragraphs 185-210 and 'Rights and Responsibilities: developing our constitutional framework', March 2009 CM7577.
[6] Middle Temple lecture 30 November 2009 and EHRC debate 1 March 2010.

intended to protect our society from tomorrow's problems. These, I would suggest lie in European and international rights instruments and enforcement mechanisms, which were adopted not only to protect individuals from state abuse, but also to prevent the scourge of nationalism and national self-interest leading to wars.

Theme 1: nationalist sentiment

As to the first theme (the nationalist theme), in relation to the suggestion that we could articulate 'British values' by defining 'responsibilities' in a 'Bill of Rights and Responsibilities', for me there are two big questions. First, whether it is possible to define 'British' values at all, let alone in a way that is compatible with 'freedom'. Secondly, whether such a defining process would have a unifying effect, as is said to be its objective or in fact, would have the converse result. Personally, I have serious doubts about whether it is possible to define British values at all; certainly in a way that is inclusive and does not impinge on our individual freedom to determine on our own moral values. But perhaps more importantly, I fear that this emphasis on 'British' values, and 'British' rights risks in fact, defining divisions and differences. It risks not only suggesting that Britain and Britishness are different but also implying that others do not have what might otherwise be accepted as 'human' rather than 'national' or 'cultural' values. It is perhaps understandable that this might draw objections even from those living within Britain, many of whom do not solely or even primarily define themselves as 'British', or may not do so in a way that chimes with the Government's definition.

Moreover, it is hard to see how a reductionist approach to 'Britishness' could ever aptly describe our society or our world, where individual identities and allegiances are complex, where people move and make relationships across borders, cultures and religions, and where the conduct of one state impacts on that of another? Norman Tebbit's cricket metaphor is surely as unhelpful today as it ever was; but attempting to define British 'values' risks setting up just such a Norman Tebbit cricket test. As Amartya Sen, said in his book: "identity and violence"[7]:

> "The world has come to the conclusion – more defiantly than should have been needed – that culture matters. The world is obviously right – culture does matter. However, the real question is "How does culture matter ?" The confining of culture into stark separated boxes of civilisations or of religious identities [discussed in the last two chapters], takes too narrow a view of cultural attributes. Other cultural generalisations, for example

[7] Identity and Violence, the Illusion of Destiny. Amartya Sen, penguin 2006.

> about national, ethnic, or racial groups, can also present an astonishing limited and bleak understanding of the characteristics of the human beings involved. When a hazy perception of culture is combined with fatalism about the dominating power of culture, we are, in effect, asked to be imaginary slaves of an illusory force."

His thesis, shared by Michael Ignatieff in his powerful book "the Warrior's Honour,"[8] is that by seeking to define single identities, we risk creating divisions that are nothing but illusions. Such illusory forces have repeatedly resulted in violence between people, despite the longevity of their shared experience (for example recently in Yugoslavia, during Indian partition, in Rwanda and numerous other examples).[9] Sen argues strongly, that politicians should not define or designate identity. Individuals must be free to choose as they will from the very many elements that make up their identity and free to choose the extent to which one or more parts should be given precedence.

I wonder in fact whether the language of 'values' (in what purports to be rights based context) is in reality not simply a useful smokescreen for what might otherwise be considered unacceptable political rhetoric. On 31 March of this year Gordon Brown was reported in the Guardian as having said:

> "to those migrants who think that they can get away without making a contribution, without respecting our way of life, without honouring the values that make Britain what it is, I have only one message for you: you're not welcome."

Even if one treats the 'values' discourse as benign, can the values that '*make Britain what it is*" really be written down; and can people's adherence to them then be tested or indeed, even required ? If one looks at the values proposed in the 2009 Green Paper, as I will in a moment, is it not entirely unacceptable to suggest that they somehow need to be written down to help 'migrants' (or indeed any of us) to understand, let alone comply with them.

The 2009 Green Paper suggests that key moral responsibilities, which we all owe each other as members of UK society, should be set out in a succinct form, as should the imperative to observe them. I find this astonishing. Is it really being suggested that our 'Bill of Rights' will provide a higher constitutional status not

[8] The Warrior's Honour, Ethnic War and the Modern Conscience, in particular, chapter 2: the Narcissism of Minor Difference. Chatto and Windus1998.

[9] As Ignatieff notes: "Nationalism creates communities of fear, groups held together by the conviction that their security depends on sticking together. People become "nationalistic when they are afraid; when the only answer to the question "who will protect me now?" becomes "my own people." Ibid. p. 45.

just for the protection of individuals from abuse of state power but to individual moral standards, as defined by the Government of the day ? If so, we are entering dangerous territory. Is this not a threat to the freedom we hold most dear; the freedom to do what we are not prohibited from doing, according to our own moral values and without harm to others ?

Setting down moral standards as to how individuals should behave in a legal instrument of 'constitutional status', whether enforceable or not has echoes of totalitarian regimes where moral codes have been set out for the people (and then used against them).[10] Amusingly however, (and benignly, no doubt), the first example of what such responsibilities could include is a duty to treat NHS staff and other public sector staff with respect. I despair rather at the prospect of a country whose Bill of Rights provides for this. Some things should remain unsaid. Less benignly perhaps, is the second suggestion that we would be subject to an explicit responsibility to "safeguard and promote the wellbeing of children in our care". Why would the articulation of what is so self-evidently true, have the effect of diminishing its deep profundity ? Is it the fact that it somehow takes away from our power and responsibility as 'free' individuals to think and act rationally within our own private sphere for such a duty to be provided for in a Constitutional document, over which the State has ultimate authority?

The cornerstone of the enlightenment thinking was individual responsibility; the power of reason as the driver of action. Ultimately, our responsibilities to eachother are grounded in reason (a human, rather than British attribute). Marcus Aurelius noted 2000 years ago: "a property of the rational soul is love of one's neighbour, truth, self reverence and to honour nothing more than itself."[11]

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[10] For example, the Constitution of Iran provides at Article 8: "In the Islamic Republic of Iran, al-'amr bilma'ruf wa al-nahy 'an al-munkar is a universal and reciprocal duty that must be fulfilled by the people with respect to one another, by the government with respect to the people, and by the people with respect to the government. The conditions, limits, and nature of this duty will be specified by law. (This is in accordance with the Qur'anic verse; "The believers, men and women, are guardians of one another; they enjoin the good and forbid the evil" [9:71]). Article 10 provides: " Since the family is the fundamental unit of Islamic society, all laws, regulations, and pertinent programmes must tend to facilitate the formation of a family, and to safeguard its sanctity and the stability of family relations on the basis of the law and the ethics of Islam." My point is evidently an over-simplification; all law reflects morality and 'human rights' can be seen as the expression of ultimate 'universal' morality, in the sense of identifying the 'categorical imperative' described by Kant in his first rule: "Act only according to that maxim whereby you can at the same time will that it should become a universal law." Kant, Immanuel; translated by James W. Ellington [1785] (1993). Grounding for the Metaphysics of Morals 3rd ed. Hackett. pp. 30. ISBN 0-87220-166-x. Human rights could equally be considered as founded on principles of utilitarianism. Indeed, although 'human rights' derived from the concepts of 'natural law', the preamble to the Universal Declaration of Human Rights indicates utilitarian concerns, namely the reasons why actions should comply with the rights set out in the declaration.

[11] Meditations, Oxford World's Classics, translated by A.I. Farqharson, OUP 1989

It is through effective education, which teaches people to think (and not just mindlessly to compete), rather than through dictats in constitutional instruments, that individuals can build a just society. As Thomas Paine said: "society is a blessing; Government is a necessary evil". Governmental intervention in the private moral sphere is not a prospect any of us should relish.

Turning then to the second element of the nationalist theme, the rejection of international human rights instruments or at least, the rejection of the idea that international bodies should adjudicate on rights. The objection to this seems largely to lie in a belief that for rights to have 'legitimacy' they must be defined and determined at the national level.[12] Within Europe that approach is particular to Britain and this I suggest, lies perhaps in Britain's historical position, (most importantly) and most recently during the Second World War but also before that.

When the Human Rights Act was brought into force, the White Paper was called: "Bringing Rights Home". "*Home*": the United Kingdom, Great Britain, England; "this sceptred isle". Much emphasis was placed on the role a British Man had had in drafting the European Convention – it was felt somehow that the population (or the politicians) or maybe even the Judges and lawyers needed to be persuaded that this was a very British thing. There was much discussion about how the common law had always protected rights anyway, about how rights were fundamentally "British", even about how we did not need rights here. Once the judges came to interpreting the Convention rights, some Judges felt the need to describe them as "British". Indeed, in the Belmarsh case[13] Lord Hoffman went so far as to describe freedom from arrest and arbitrary detention as "quintessentially British".

Indeed this nationalist attitude is epitomised in his Judicial Studies Board Annual Lecture on 19 April 2009 that caused such dismay in Strasbourg. The derisory tone of that piece and its wholesale attack on foreigners (some even coming from little states "with a combined a population slightly less than the population of Islington"), 'aggrandising' themselves by casting judgment on rulings of national Constitutional Courts, is unconstructive. According to Lord Hoffman, Bentham's nasty and childish attack on the French 'vanity' in declaring the 'rights of Man' rather than the 'rights of Frenchmen', raises a "very important point" about "the essentially national character of rights". Even when it comes to considering the 'margin of appreciation' Lord Hoffman cannot but resist referring to that concept as "an unfortunate Gallicism". What exactly is

[12] See for example Lord Hoffman's speech to the Judicial Studies Board, 19 March 2009, paragraph 14.
[13] A v Secretary of State for the Home Department [2005] 2 AC 68; §88

unfortunate about a 'Gallicism'? It is easy to claim that this is not 'populist Euroscepticism' (as he does) but difficult to see what else it is.

The legitimacy of any legal system (and indeed any Judge) is open to question, as is the correctness of any judicial ruling, however high it may be, and that is just as much the case at a national as at a supra-national level. Ultimately however, we have to ask ourselves whether subjecting the judgments of imperfect national courts to the review of an imperfect international court, is better in the overall scheme of things, than not doing so. For reasons on which I will expand, I think it is.

The nationalist approach to rights seems to rest on a deeply held belief in this country that Britain has protected individual freedoms more consistently and for longer than other states and so necessarily, that we are somehow better at it. This is epitomised by Bentham, quoted with approval by Lord Hoffman,[14] who wrote:

> "it is in England, rather than in France that the discovery of the rights of man ought naturally to have taken its rise; it is we – we English, that have the better right to it…Our right to this precious discovery, such as it is, of the rights of man, must, I repeat it, must have been prior to that of the French."

One can only hope Bentham was being ironic. To seek to attribute the provenance of 'rights' to any particular nation is bad enough; to set up a competition as to who was first, is absurd. Ironically, the consequence of this sentiment seems to be hostility to legal instruments that protect rights, individual rights being considered as the source of our constitution and as such, requiring no articulation. As Dicey said:

> "The rule of law, as described in this treatise, remains to this day a distinctive characteristic of the English constitution. In England no man can be made to suffer punishment or to pay damages for any conduct not definitely forbidden by law; every man's legal rights or liabilities are almost invariably determined by the ordinary Courts of the realm, and each man's individual rights are far less the result of our constitution than the basis on which that constitution is founded."[15]

I accept that we have been fortunate in this country to have been relatively free from oppressive Governments over the past 300 years. The worst breaches of

[14] Speech to the JSB, 19 March 2009, paragraph 8
[15] Dicey, Introduction to the Law of the Constitution, 8th Ed, 1885

human rights by the British have not been committed on this Island but overseas, away from the direct experience of most people who live here.[16] British colonial rule is still largely portrayed as having been 'benign' and the detail is conveniently forgotten; it is worth reading the American Declaration of Independence for a snapshot of how Britain was perceived as having behaved in the United States prior to its independence. But it is convenient and comfortable for politicians and the populace to live under the illusion that we have some cultural or racial attribute, which means that we need neither to be protected from the abuse of state power, nor indeed, to ensure that others, including those overseas are protected from such abuse. How else can one explain why only 46% of Britons recently surveyed by the EHRC thought that the right to express their views freely was important (to them) and why only 58% thought the right to a fair trial was an important human right generally (only 28% that it was important to them personally)?[17] (Unless of course, we conclude that our population is simply very badly educated).

By contrast, no such illusion is open to those living in Continental Europe, who have, within living memory, been directly subject to (and part of) the most extreme abuses of human rights' imaginable: Hitler, Mussolini, Franco, Vichy, the communist regimes in central and Eastern Europe, Milosevic, Karadzic; Ceaucescu. Even in those states that were occupried rather than allied with the Nazis, there was collaboration in sending Jews, gays and the disabled to the death camps. After the Vichy regime in France, Maurice Papon[18] ordered an attack on a peaceful Algerian demonstration. An unknown number of Algerians were killed and thrown into the Seine.[19] In these States, individuals experienced at first hand not only what Governments were capable of, but what they as 'French', 'Dutch', 'Hungarian, 'Italian' Spanish individuals were also capable of. It is unsurprising then that individuals in these nations are alive to the need, in the interests of all of us, for some higher principles and mechanisms of protection that are outside the nation-state.

This was the main driver for the creation of the European Union and the Council of Europe; both of which were intended to be mechanisms whereby States would co-operate with eachother, so as to avoid the greatest infringement of human rights: war. In addition to states co-operating, it was recognised that individuals

[16] By saying this, I am not diminishing the significant experiences of those who suffered, for example during Bloody Sunday, but such incidents cannot be compared with tyranny, occupation and collaboration, suffered in many Continental States.
[17] Public perceptions of human rights; Equality and Human Rights Commission, Ipsos MORI Social Research Unit, June 2009.
[18] Maurice Papon, the head of the Parisian Police in 1961 was convicted in 1998 on charges of crimes against humanity due to his role under the Vichy collaborationist regime during World War II.
[19] In 1998 the Government acknowledged 40 deaths but there are estimates of up to 200.

needed to be able to control state power by reference to individual rights that could be claimed first within their country but ultimately, if this was not successful, by recourse to a supra-national body. The Second World War led to a realisation on the Continent that it was not sufficient for a State to be based on the rule of law; higher norms were required to protect the State from repressive law instituted by the legislature or executive. It was this realisation that led to the freedoms and fundamental rights being given supra-legislative and supra-national status in most European States.

This acceptance of the setting of international standards mirrored the enlightenment thinkers' views on universality. As Voltaire said over 200 years ago, in his essay entitled 'Fatherland':

> "It is clear that one country cannot gain without another's losing, and that one cannot conquer without bringing misery to another. Such then is the human state, that to wish greatness for one's country is to wish harm to one's neighbours. He who wished that his fatherland might never be greater, smaller, richer or poorer, would be a citizen of the world."

Similarly, Diderot said of nationalist thinkers:

> "these people do not realise that they occupy only a single point on our globe and that they will endure only a moment in its existence. To this point and to this moment they would sacrifice the happiness of future ages and that of the entire human race."

The Declaration of the Rights of Man of 1789, a great document, which says it all (or just about), was not the 'French' Declaration of the Rights of the 'Frenchman'; it addresses the situation of man in any and all States. Far from being "vanity in the French heart" as Bentham said, this was a reflection of the scope of philosophical, artistic and scientific discourse at the time: Kant, Paine, Condorcet, Locke, Rousseau, Voltaire,[20] Montesquieu, Hume, Pope, Newton, to name but a few. Those thinkers drew on the thoughts of their contemporaries and predecessors, the nationality of the thinker being of little significance. In 'On Liberty', John Stuart Mill, himself a utilitarian thinker who interestingly was educated in France from the age of 14 and refused to go to Oxford because he did not want to take Anglican orders, considered that "every single improvement which has taken place in the human mind or in institutions in Europe may be traced back" to one or other of three periods of intellectual thought:

[20] Indeed, Voltaire wrote 'Letters Concerning the English Nation' in 1733, which included one: 'On Locke' paying homage to Locke's seminal contribution to theories of the mind.

> "…the time immediately following the Reformation; another, though limited to the Continent and to a more cultivated class, in the speculative movement of the latter half of the eighteenth century; and a third, of still briefer duration, in the intellectual fermentation of Germany during the Goethian and Fichtean period. These periods differed widely in the particular opinions which they developed; but they were alike in this, that during all three the yoke of authority was broken. In each, an old mental despotism had been thrown of, and no new one had yet taken its place. The impulse given at these three periods has made Europe what it is."

'Rights' as we know them today do not have a particular national provenance; they are an accumulation of human wisdom from across the globe, some of it written down by known thinkers and leaders, some coming from unknown authors of religious texts or other sources[21] and some of it necessarily coming from those entrusted with their interpretation today. We rely on men and women who decide what rights mean and how they should be applied to have not just legal knowledge, which as the William Godwin said "fixes the mind in a stagnant condition" and substitutes permanence for progress,[22] but on wisdom founded in learning and experience. Is there any good reason why we should find greater wisdom in the minds of the national judiciary than in the collective knowledge and experience of a supra-national body ?

Even assuming one rejects the idea of 'collective wisdom' and prefers the approach of national legitimacy expounded by Lord Hoffman in his 2009 lecture, I would suggest that to meet the narrowest objectives of fundamental rights (the protection of individuals from state oppression), the rights discourse must necessarily be European and international.

When France adopted its post-war constitution in 1946 the first element of its preamble was equality between men and women. But its second was that every man persecuted by reason of his actions in favour of freedom, has the right to asylum in France. Significantly, it then provided that France would conform to the rules of public international law and would not conduct wars of conquest or employ force against the freedom of any people. This preamble was incorporated into the 1958 constitution of the 5th Republic. The Constitution itself looked outwards not just inwards.[23]

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[21] It is beyond the scope of this article even to touch on the global contributions to 'human rights' as we view them today. For this, see the History of Human Rights, by Micheline R Ishay, University of California Press.

[22] William Godwin, Enquiry Concerning Political Justice, Book VII, p. 688 (1793) Penguin Classics (1985)

[23] Notably, however, it was not until 1971 that the Constitutional Court first struck down French legislation as unconstitutional.

It is for the good not only of itself but of other countries and the individuals who live there that Britain must abide by (and actively support) an internationally defined human rights framework. If it is necessary to look at things from the perspective of personal benefit, it is not difficult to see that in Britain we benefit from the protection of rights across Europe. The recent wars in Yugoslavia required our military involvement; how much better for Croatia, Bosnia and Serbia to be within the Council of Europe and for their laws and actions to be subject to the scrutiny of the European Court. Evidently, the Court cannot ultimately prevent war but by considering individual cases, the Court is able to expose unacceptable state practices, allowing for wider political pressure. These forces work together to maintain peace. It is in Britain's interest actively to support the supra-national bodies that guarantee individual freedoms in Europe; the most important of course being the European Court of Human Rights.

Let us not forget in this respect two points:

First, that some of the most repressive regimes have provided for full domestic constitutional protection of fundamental rights; a good example is the 1936 Soviet Constitution. Individuals need to be able to petition an international body in addition to domestic courts. It is the right of individual petition that exposes the truth behind laws and legal systems that on their face appear to protect rights.

Secondly, that Britain is not the only country that thinks it has particular cultural needs that foreigners do not understand. This is precisely what Berlusconni said about the Roma, and what the Hungarian Jobbik party is currently saying. Many states would prefer to deal with their problems (whether it be the Roma or the Arabs) "their way" and many states say that others cannot understand their problems. The risks of allowing this are too great. Would it not be pragmatic to accept that where "we" are unhappy with a particular view Strasbourg has taken on a particular case, this is really only a minor irritation compared with the overall benefit of having a supra-national body 'controlling' or providing a right of recourse for individuals in all States within Europe?

<u>Theme 2: returning power to Parliament.</u>

This brings me on to the second theme in the rights debate, namely the suggestion that power needs to be returned to Parliament and wrested away from international bodies and Judges in particular. I have two points on this.

First, that it is unsurprising that politicians are not willing to give up 'Parliamentary sovereignty' in its widest sense; this is their bulwark against judicial control. But is this concept able to ensure democracy, which necessarily

requires compliance with fundamental rights norms ? I do not think so. It is surely not insignificant that 'the rule of law, meaning 'law' as enacted by democratic legislatures' (which is effectively what 'Parliamentary sovereignty" is used to connote) was rejected across Europe after the Second World War; it being clear that national legislatures and Constitutions, including the liberal constitution of the Weimar Republic, had been unable to ensure democracy and freedom or prevent war.

It is hardly surprising that politicians claim 'parliamentary sovereignty' to be fundamental to our democracy.[24] Few ask however, what it means and whether it is relevant to today's world. The mantra that is trotted out is that because politicians are elected, they are more 'democratically' legitimate than judges.

The 2009 Green paper states unquestioningly that it "resides at the heart of our Constitutional arrangements" and that "Parliament rightly claims legitimacy to exercise power, make laws for courts to apply and hold the executive to account." Tellingly, the subsequent paragraph describes "the executive" as being the same thing as "the State" (which of course, it is not). Dominic Grieve, in his lecture to Middle Temple in November 2009 similarly emphasised the importance of Parliamentary sovereignty as if the point was self-evident and required no further consideration.

But as Lord Bingham said in his 1998 Earl Grey Memorial Lecture, Parliamentary Sovereignty derives from a settlement *not* between the citizen and Parliament but between Parliament and the Crown. Parliamentary sovereignty should mean nothing more than Parliament being supreme over the executive (the Crown).

At best Parliament can express the views of the majority of the population (although even that is rare). It cannot effectively represent individuals or minorities. Parliament's power to safeguard individual rights is necessarily therefore limited by the need for popular (or majority) legitimacy.

But as Ignatieff points out, rights do not acquire legitimacy by the consent of the governed; such an idea is not coherent because most rights *restrain* the majority.[25] If they are to be protected therefore, they must be given a higher constitutional status, which can only be protected by the courts. For the reasons I have already explained, there needs to be both a domestic court system that can give effect to

[24] Nor is it surprising that those in majority control in Parliament (even if elected by a minority) are not willing to change the voting system to ensure that Parliament does in fact represent the majority of the electorate, despite the repeated claim that Parliament's sovereignty derives from its democratic legitimacy.

[25] Human Rights as Politics and Idolatry, Michael Ignatieff, Princeton University Press, 2001, p. 108

rights but in addition, should that fail, there must be an international enforcement mechanism (at least for the core fundamental rights).

Both Grieve and Straw however, suggest not an increase in judicial power but a wide ranging discussion regarding the relationship between the Courts and Parliament, Grieve talking of the need for "reconsideration and re-calibration of the relationship" and Straw talking of consideration being given to the extent to which "executive power should be *fettered* by the courts."[26]

The use of the word 'fettered' is telling. Courts do not fetter the executive. The executive has to comply with the law. And the State is not the executive, as the Green Paper suggests.[27] It includes Parliament and the Courts. We can talk about the detail of how judges and Ministers should be appointed (and whether there should be some requirement for elections in relation to both of these posts); we can talk about electoral systems and whether MPs should be elected on a different basis. What we cannot do (if we want to live in a democracy) is to allow politicians to imply that Courts are undemocratic and that rights are what the popular mandate decides. Jack Straw recognised the threat that this involved in his 2008 speech to the Judiciary, in which he stated that "Members of Parliament, let alone Government Ministers, should not criticise the decisions of the judiciary."[28]

The post-war legal revolution on the Continent, namely that it was not enough for States to be subject to the rule of law; the law itself had to be subject to higher rules, is slowly coming to the UK. Only the Liberal Democrats however, have gone so far as to commit to a written Constitution. The slowness of the journey is unsurprising; as Ignatieff points out: "holders of power will not be persuaded of the universalist nature of rights."[29]

My second point is that Parliament is not and has not been sovereign (in anything more than theory) for a long time. Since 1972 we have accepted legislation from Brussels and the domestic courts have been required to strike down conflicting domestic legislation. Since 1966 individuals have had a right of petition to Strasbourg and the UK has been required, as a matter of international law, to comply with that Court's judgments, even if that meant setting aside Parliamentary legislation. Yes, judgments of Strasbourg can be ignored, as is the case currently with voting rights for prisoners, but this is nevertheless unlawful.

[26] Paragraph (xi) of the Forward to the 2009 Green Paper,
[27] Ibid, paragraph (xvi)
[28] Speech at Lord Mayor's Annual Judges' Dinner 15 July 2008
[29] See footnote 20

To the extent that Parliament decided to cede powers to the EU, within the scope of EU law, those entitled have gained the rights contained in the Charter of Fundamental Rights (which ironically derive from largely from the French and German Constitutions). Government does not willingly admit to the limits on its competence since to do so, is to diminish its authority. Nevertheless, if there is to be a sensible debate on a Bill of Rights it must be founded on a realistic understanding of this situation, something that politicians seek to avoid. It is now a trite oversimplification to say that Parliament is 'sovereign'. In any area within the scope of EU law, a 'British Bill of Rights' would have to comply not only with the European Convention but also with the EU Charter on Fundamental Rights.

It may well be that it is now time for us to start thinking about a Constitution whereby Parliament and the executive are made subject to a higher law. That is quite different however, from the current 'Bill of Rights' debate, where nothing of substance is being proposed that adds to what we have in the Human Rights Act. If there are additional rights that Parliament wishes to add, for example the right to trial by jury, as indicated by Dominic Grieve,[30] these can quite simply be added to Schedule 1 of the Human Rights Act; there is no need for repeal of the Act. We should avoid an arid and costly debate about a Bill of Rights motivated by parochial sentiments, which do not fairly reflect the wide and varied experience of those who live in Britain. Let us debate a written Constitution but for the moment, leave the Human Rights Act well alone.

[30] Middle Temple Lecture 30 November 2009