

British Institute of Human Rights

Lunchtime Lecture – 5th May 2009

The Bill of Rights and Responsibilities and the role of a Freedom Bill

By Chris Huhne MP

Introduction

Thank you very much for your introduction, and for inviting me here to speak today. Lectures such as this, and the wider work of the British Institute of Human Rights, are vitally important in the current climate. Global terrorism is a challenge. The global economic downturn is unlikely to improve the climate of tolerance. Our commitment to human rights will come under fire on a near daily basis.

Of course, this lecture does not happen in a vacuum or coincidentally. As Michael Wills pointed out here just weeks ago, this is an important time to be discussing human rights in this country. I too believe that we are at a potentially great turning point in the history of human rights in Britain. This has ignited debate on the subject – what rights we should have, how they should be legislated for, and indeed what the very essence of a right really is. These are extremely important questions to ask ourselves, and I am very glad to be here today to contribute to the debate.

I want to discuss two closely related topics. The first is the Human Rights Act and the recent Green Paper launched by the Government on a Bill of Rights and Responsibilities. The second is the Liberal Democrats' Freedom Bill. The aim of this draft Bill is to claw back some of the many civil liberties and freedoms that have been eroded over the last 20 years. I see the two as being connected in one vital way. Rights are fundamental to how we live our lives – to enabling us to live our lives freely. The Freedom Bill aims to remove the

obstacles to the free enjoyment of these rights that have been erected by successive Conservative and then Labour Governments.

Bill of Rights and Responsibilities

So I begin with the Bill of Rights and Responsibilities. The Government Green paper points out that “what rights and freedoms we should enjoy in relation to one another and against the state and how they should be balanced by the responsibilities we owe each other” is one of the most “fundamental questions in politics”. To me, it is a fundamental question with a very easy answer. Human rights may be balanced against each other, when they come into conflict in any particular case and judgement. But they should not be balanced against the particular behaviour of the person making the claim. Human rights should never be contingent on responsibilities. Human rights, such as the right to life, a fair trial and freedom of expression and association, are not and can never be conditional. They are the minimum that we afford fellow human beings as part of a civilised society. As such, they are an expression of our values, not a bargaining chip that we put on the table in demanding something else.

In short, both the Government and the Conservatives are mixing up human rights with citizens’ rights. Responsibilities go hand in hand with citizenship, but human rights exist on their own as absolutes. Citizens’ rights may be more extensive than human rights. They may indeed be conditional or even reciprocal. But that is an entirely different debate and should not get mixed up with human rights.

As a result of this central confusion, this Green Paper is a political own goal at best, and a disaster at worst. It came about as a response to the Conservative policy summarised by my opposite number as ‘fewer rights, more wrongs’ – a misguided sound-bite if ever there was one, since I cannot imagine why we would want more wrongs - and a promise that they will repeal the Human Rights Act. We believe that this is a fundamentally misguided conclusion. There is a danger of great mischief if this debate puts the human rights act

itself into contention. Both Conservative and Labour front benches seem to be responding to the frankly hysterical anti-Human rights campaign in the media and by Europhobes.

The Conservatives have yet to provide an answer to what they would do instead beyond a 'British Bill of Rights' that 'balances rights and responsibilities in a framework which will command public support'. This so far sounds very similar to the Government's Green Paper. We know that they like some parts of the Human Rights Act – the right to privacy and freedom of speech for example. Would they just cherry-pick the 'best' bits from the Human Rights Act and insert them into their own Bill of Rights and Responsibilities, getting rid of any rights they see as unnecessarily burdensome for the state such as those extended to foreigners?

This would frankly be an outrage. There is a reason why we have human rights rather than citizens' rights or British rights. The Universal Declaration of Human Rights, adopted in 1948 and championed by Eleanor Roosevelt amongst others, was a direct reaction to the horrors of the holocaust in Nazi Germany. It was the first real expression by the world of the rights to which all human beings are inherently entitled. It was a turning point in the history of civilised society – a signal that the atrocities of the Second World War would never be repeated. We have just celebrated its fiftieth anniversary.

This is the real danger of the confusion between citizens' and human rights. In Nazi Germany, it was decided that Jews were no longer citizens, and therefore no longer entitled to the rights of a citizens. They became an underclass, beyond the pale, and were excluded from the protections of the normal rule of law. It became acceptable in Germany to treat them as outcasts, and that led to ghettos, concentration camps, and ultimately to the holocaust. It could happen again. Any minority group could in turn be selected and cast out. Jehovah's witnesses, blacks, evangelical Christians, Moslems. When rights become contingent, they become weaker. They can be withdrawn.

Human rights were conceived of so that all humans, regardless of race, religion, nationality, gender or sexuality, could be equal and entitled to some rights by virtue of being human. It is not just Nazi Germany where we have seen the relevance of this. The history of slavery in the United States might have been rather different had the constitution been committed to human and not citizens' rights. Guantanamo might not have existed. Citizens' rights are always contingent, and can be withdrawn. Only a firm commitment to human rights can establish a firm bulwark against the pressures of populism.

I should also add that this is the worst possible time to be contemplating any dilution in rights, just as there is a threat of extremists being elected in greater numbers to the European Parliament. No-one knows how fragile are the buttresses that support civilised society, but we know that economic hardship weakens them. In Germany between the wars, the German Jewish population was among the most assimilated in Europe. They had fought for, and been decorated by, the imperial reich in the first world war. They were integral to the artistic, intellectual and cultural elite of the country, yet within a decade they were cast out from citizenship and were in the extermination camps. Bosnia is another reminder that barbarism lurks perilously close to the surface. Mark Mazower's "Dark Continent" is not a history of Africa but of Europe.

It would also be extraordinary for the Conservatives to repeal the Human Rights Act for another reason, as it would make us the only signatory of the European Convention on Human Rights not to allow its rights to be applied by our own courts. For a country that was a parent of that convention, precisely because we wanted a bulwark against barbarism, this is a remarkable fit of amnesia about our own history and interests. True, the Conservatives see one benefit of such a move as having the effect of constraining the influence of Strasbourg case law on British jurisprudence. In fact, the real direction of influence is that UK case law is now influential in Strasbourg, a benefit that would obviously be lost if the Human Rights Act were abolished.

Nick Herbert, for the Conservatives, objected in a speech last November and I quote:

‘The Act has transferred significant power out of the hands of elected politicians and into the hands of unelected judges. This was known, predicted, and indeed intended.’

And quite right too. Parliamentary sovereignty should not be exercised in such an arbitrary and slapdash way that it tramples human rights, whether inadvertently or intentionally. One of the great problems of our parliament is the shovelling through of vast numbers of clauses of bills – particularly in the criminal justice area – without even a debate in the House of Commons, and sometimes even in committee. Parliamentary sovereignty is too often merely the rhetorical disguise for executive domination. We need, as my colleague Lord Lester has pointed out, to grow a culture of human rights which would engender more popular support and understanding.

There are many such public examples of politicians failing to respect human rights rulings, and indeed of being openly critical. In 2006, in a reaction to a ruling by Mr Justice Sullivan that there had been a serious abuse of power at the highest level of Government in seeking to flout a judicial decision on the right to asylum of the Afghan plane hijackers¹, Tony Blair disparaged the High Court’s judgement as ‘an abuse of common sense’.

The Government have also consistently complained that the Act has been an impediment to the deportation of foreign nationals. This applies largely to attempts to deport terrorist suspects to countries where they would be likely to be tortured. The example of torture is an excellent illustration of the difference in opinion on the Human Rights Act. The right not to be tortured is one of the most fundamental human rights, whereas the Government has on occasion taken the view that securing national security by disregarding these rights where convenient is the best way to fight terrorism.

¹ R (S and others) v Secretary of State for the Home Department [2006] EWCH 1111 (Admin).

We cannot beat the enemies of the open society by becoming them. We must beat them by bettering them. Crossing a line on torture – implicitly condoning it even in a foreign country against a suspected terrorist – makes everyone of us more vulnerable, not safer. It establishes a rotten precedent that could be turned against us in future. Yet the failure of ministers to defend that line publicly has led to criticism of the Human Rights Act and of the British judges who have applied it. Ministers did not seem to realise that such a young part of our constitutional apparatus needs supportive nurturing, not ill-informed criticism.

It is for this precise reason that the Human Rights Act, and not a Bill of Rights and Responsibilities, is so important. It provides us with rights that apply to everyone and so that no-one can violate – no our own Government, not another Government, not a terrorist, and not each other.

Obviously, we as a party accept that the Human Rights Act is not perfect. It should be enshrined in a written constitution, providing proper checks and balances and making it a special kind of law more difficult to change and amend than ordinary law. Failing that desirable development, the HRA is by far the best vehicle we have for enshrining human rights into domestic law, but it is legitimate to debate whether there are other rights that could be included and which are currently absent.

For example, we would like to see a discussion around a right to equality before the law and equal protection of the law. Article 14 of the Human Rights Act provides that all rights must be secured without discrimination of any kind. However, it stops short of guaranteeing non-discrimination generally, and instead forbids discrimination in respect of the substantive rights guaranteed by the European Convention on Human Rights. This would bring us in line with many other countries – the USA, Ireland and Canada, for example. Equality before the law has long been a core value of our constitutional culture and our law, and it is right that it should be a fundamental right for all humans.

A second possible improvement to the Human Rights Act could be the addition of a right to good governance and administrative justice. Administrative law contains the legal principles governing the exercise of power by public authorities. It is an essential component of the rule of law, and protects the citizen against maladministration and the abuse of power by public authorities. Such a right enshrined in law would enhance transparency and accountability in Government, and increase public confidence in the maintenance of the highest standards of public administration in accordance with the rule of law, something which in the present climate of MP's expenses, alleged excessive use of force by the police, and smear campaigns in Downing Street, is desperately needed.

The role of the Freedom Bill

And so now I wish to move on to the second section of my speech, which discusses our recently launched Freedom Bill. The bill is our response to a political problem, which is that on each occasion that we face some security scare, ministers have brought forward some new measure with a simple argument: "We are only asking you to give up a small part of your traditional liberties in exchange for the greater good of security." That argument, repeatedly deployed, has led to a substantial cumulative destruction of hard-won freedoms. Our Freedom bill, now in draft, is designed to put them all in one place to dramatise that cumulative loss and build political support for their repeal.

There are already 20 sections in the draft Bill, each of which deals with a specific area of concern. For example, extradition, ID cards, CCTV, protection for whistleblowers, and the Freedom of Information Act. However, there are a number of areas that I feel they are particularly relevant to the European Convention and to the Human Rights Act, and I want to discuss just two of them in more detail here.

The first of these is the National DNA Database. The UK has the largest DNA database in the world, with over 4 million records. A million of those people

have no criminal record on the Police National Computer. A million were added as children. Babies have been added. Nearly one in two of all black men are on the database. Yet Article 8 of the Human Rights Act provides for the right to privacy. It specifically states:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

As I am sure we are all aware, the European Court of Human Rights ruled unanimously last year that it violated section 8 of the ECHR (and therefore the Human Rights Act) for innocent people to have their DNA retained on a database for life. In particular, it remarked on the 'blanket and indiscriminate nature' of the power of retention.

This is an example of a measure that we would completely roll back. Yes, we would retain a DNA database for people convicted of crimes, or for a certain time for those tried for serious violent or sexual crimes. The Scottish solution has a lot of merit, and was proposed by Liberal Democrats. We are committed to restoring the right to a private life in England and Wales. The Government's reaction to the ruling on the other hand has been lacklustre. They are 'consulting'. The latest leaks in the newspapers suggest a sensible Scottish-style solution, but I have one warning. An attempt to deal with the judgement should be by primary legislation that can be amended and debated by parliament, not by secondary legislation which involves ministerial fiat.

The second set of changes that we propose in the Freedom Bill that is particularly relevant to the European Convention concerns terrorist legislation

– in particular pre-charge detention and control orders. Britain has the longest period of detention without charge of any English-speaking developed country with common law. Australia is the longest after us with 12 days, but has only reached that extended period because it introduces cooling off periods between interrogations.

Control Orders were in fact the Government's response to a ruling by the Law Lords that imprisoning people without charging them – the so-called 'Belmarsh Provisions' – was illegal. Control Orders allow the Home Secretary to impose an unlimited range of restrictions on any person they suspect of involvement in terrorism. The restrictions imposed by some control orders amount to house arrest and they can include controls on who a person can meet or speak to; when they can leave their house and where they can go.

Both of these provisions come close to violating Article 6 of the Human Rights Act – the right to a fair trial. I will not recite the entire Article here, but it includes the presumption of innocence, and the right to know what you are being charged with, neither of which is the case in the two examples I cited above.

We would scale back pre-charge detention to 14 days. The information we have suggests that in most successful prosecutions, the crucial evidence was obtained within 14 days of detention, and that the Crown Prosecution Service has a higher conviction rate for terrorist offences than for other serious crime. 28 days are not needed. This is too long, and we would reduce it to 14.

We voted against the continuation of control orders in 2007, 2008 and earlier this year. The regime is flawed, unsustainable, and in some cases dangerous. We have pledged in the Freedom Bill to repeal Control Orders, and instead to use more effective and just measures either to bring charges, or to drop them. We should use intercept evidence in court, and we favour greater use of post charge questioning.

These are just two of the 20 measures currently in the draft Bill. I would like to add the repeal of section 76 of the Counter-Terrorism Act 2008, which makes it an offence to photograph police and members of the armed forces. We also have plans to introduce measures to address the problem of aggravated trespass, and others which affect the right to protest. This is particularly salient in light of recent events at the G20, and the tragic death of Ian Tomlinson.

As I have said, the Bill is a draft. It is a consultative document designed in part to stimulate debate on these issues, and to highlight the cumulative erosion of each seemingly small move. We want and need more feedback. It is people like you, who are passionate about these issues, who can tell us what you want to see. Tell us things we haven't thought of yet, or things we haven't discovered – of which there are doubtless many. We would like your help so that we can present a bill at the next election which will help to set the agenda for debate.

In conclusion, let me repeat my most important message. Don't mess with the Human Rights Act. Don't confuse human rights and citizens' rights. The Human Rights Act is a key part of our defences against tyranny and we must not let it die in the British way, as we acquired our empire, in a fit of absentmindedness. It has been foresworn even by its Labour parents, who think it strong enough to fend for itself. But it is not yet the robust part of our constitution that it should be. It needs friends, but let no-one be in any doubt where the Liberal Democrats stand. For human rights, and for the Human Rights Act. Thank you.