

Lunchtime Lecture given by Michael Wills MP to British Institute of Human Rights

Perspectives on a Bill of Rights and Responsibilities

20.4.09

Thank you. I'm grateful for your introduction. But more than that, I'm grateful for all the excellent work the British Institute of Human Rights have been doing to bring 'rights to life'. Human rights are not just something for textbooks or far away places. They are - and they must be - part of our lives, here, today. And the British Institute of Human Rights does invaluable work in ensuring that they are. One of the most memorable experiences I've had as the Human Rights Minister was sitting in on a Key Stage 3 class using the 'Right here right now' toolkit produced by the British Institute of Human Rights and seeing how these concepts were brought alive for those young women.

And I welcome these lunchtime lectures which come at a particularly opportune moment. This is an important time to be discussing human rights in this country. Nearly a decade on from the introduction of the Human Rights Act, the Conservative Party are committed to scrapping it and replacing it with new legislation, yet to be defined in detail. And the government has just launched a Green Paper on a Bill of Rights and Responsibilities, precisely because we want to generate a debate about these profoundly important issues.

As the Green Paper points out, how individuals should live together, what rights and freedoms we should enjoy in relation to each other and against the state and how they should be balanced by the responsibilities we owe each other are among the most fundamental questions in politics. They are not abstractions, removed from the practical politics of jobs and housing and healthcare and education. Because these constitutional arrangements determine how power is distributed in our country, they determine how every other question in our public life will be answered.

And at the heart of the Green Paper is a central question: are there rights and responsibilities, over and above those entrenched in the Human Rights Act, which are so fundamental to our society and to our sense of ourselves, that they should be entrenched in a way that renders them part of our constitutional fabric and not easily vulnerable to the vagaries of party politics and elections.

This is an important debate - and especially now when an unprecedented global recession has meant that so much of what we took for granted in recent years we can no longer take for granted. I do not intend today to rehearse at length the government's views on the debate as we set those out in the Green Paper and those of you who have not yet read it, I commend it to you. Instead today, I want to discuss how the debate has started off and what this reveals about the politics of rights and responsibilities in this country and what can be done about it.

Expressions of rights and responsibilities, whether the declaration of Magna Carta in 1215 and the Declaration of Arbroath in 1320, or the later Bill of Rights and Scottish Claim of Right in 1689, or the great Reform Acts of the 19th and early 20th centuries, or the foundation of the National Health Service as part of the welfare state, are all seen as landmarks in the history of our country. Rights and responsibilities always merit serious and sustained discussion.

And yet so far the debate launched by the Green Paper has borne little resemblance to the great constitutional debates of previous centuries. Instead it's rather resembled the discourse at Old Trafford between United and City supporters at a Manchester derby.

For the Conservative Party, the Green Paper was a 'charade', because it ruled out any legislation before the election. But how it could do any thing else ? A Green Paper is precisely that - Green. It sets out options for discussion - which is precisely what this Green Paper did. And could anyone seriously argue that legislation on something as important as a new Bill of Rights should be driven through the second

half of a Parliament before the country had had any time to engage and then deliberate on all the complex issues involved ?

Of course, it's easy to understand why the Conservatives resort to what I believe lawyers call vulgar abuse, as their own position on the Human Rights Act is so muddled. In search of a headline after a third election defeat in a row, they pledged to scrap it without thinking through what that would mean. When they finally realised that resiling from the ECHR on which the Human Rights Act is based would call into question their continued membership of the European Union, they then had to commit to the ECHR and any new Bill of Rights being based on it.

They have claimed their Bill would return greater freedom and flexibility to British courts, emancipating them from Strasbourg jurisprudence. But in fact, unless they resile from the ECHR which they have said they will not do, any new Bill would be likely to restrict the so-called 'margin of appreciation' rather than extend it. As Jack Straw said in a lecture last year: 'Far from failing to benefit from any margin of appreciation, the UK enjoys considerable flexibility on account of the Human Rights Act because our courts apply the same criteria, in the same way, and on the same issues as the Strasbourg court. Indeed, in the debates which preceded the introduction of the Bill, one of the many arguments in favour of it was that we would benefit from the margin of appreciation.'

What then might a Conservative Bill of Rights do that the Human Rights Act does not do ? Well, that's a mystery. In a recent interview, the Shadow Justice Secretary said their Bill would 'deliver something slightly different from the HRA' but 'must cover the rights protected under the convention' and 'where rights aren't absolute

there would be some cases where, if you behaved irresponsibly, your ability to demand certain rights will be affected' What does this mean ? 'Slightly' different ? How 'slight' ? If it is 'slight', why do it at all ? Would it amount to no more than a restatement of status quo ? Or is it something new ? If so what ?

And then he said 'we could probably do much more than the ECHR in terms of freedom of expression' But is he aware that the Human Rights Act already does that ? To underline the Government's belief that freedom of expression is a cornerstone of democracy, Section 12 of the Act was drafted to require courts to have particular regard to the importance of the Convention right to freedom of expression, particularly to enhance freedom of the press. Does he want to go still further than the Human Rights Act in this area ? Unclear. 'We could also look at privacy law' he said ' which in many ways is developing piecemeal and which demands attention particularly in respect of the balance between privacy and the right to impart or exchange information.' He doesn't say why. Indeed he concludes by saying 'I can't elaborate further on this now.' Quite. They have dug themselves a hole and they haven't yet found a way to clamber out of it.

So, when Lord Hoffmann criticised the European Court of Human Rights in a lecture last month, the Shadow Justice Secretary leapt on board what he saw as a lifeboat. 'Lord Hoffmann's critique' he wrote in an article on the influential Conservativehome website, 'supports the reasoned criticisms' the Conservatives have been making of 'both the Strasbourg Court and the Human Rights Act'. That's an interesting conflation of the two. Because actually Lord Hoffmann's critique did nothing of the sort in relation to the Human Rights Act.

This is what he actually said: 'I do not make any criticism of the drafting of the [European] Convention [on Human Rights]. It seems to me a perfectly serviceable abstract statement of the rights which individuals in a civilised society should enjoy. At the national level, the precise wording of the document is not important, because the values which it expresses have deep roots in our national history and culture. What matters is how these familiar rights are interpreted in relation to other rights and the business of government. It therefore seems to me perfectly acceptable to adopt the text of the Convention as a United Kingdom constitutional instrument. That is what we did in the Human Rights Act 1998.' He goes on to say 'I have no difficulty about the text of the European Convention or its adoption as part of United Kingdom law in the Human Rights Act 1998 There is nothing to be gained by fiddling with the language.'

But, at least the Conservative Party have got the excuse that, as politicians do from time to time, they have got themselves into a muddle over policy. The same can't be said for the response to the Green Paper from those who believe in the importance of human rights. You might have thought they would welcome the opportunity given them by the Green Paper to debate the position of rights and responsibilities in our society. If you'd thought that, you were soon proved wrong.

Their response was, for the most part, a sour stew of cynicism and suspicion, seasoned with an aristocratic belief that issues such as these were too precious to be risked in discussion with the British people. I take as my main texts the leaders in 'The Guardian' and 'The Independent', newspapers which, to their credit, have stood out against the caricatures of the Human Rights Act elsewhere in the media and have in the past tried to conduct a civilised debate about it.

This was what 'The Guardian' said about the Green Paper: 'the duties add nothing meaningful to the current law while falsely implying that rights are somehow contingent on good behaviour. When the small print concedes this will not be the case, spinning anything else provides cover for the HRA's enemies. As such it is a grossly irresponsible thing to do.'

Let's look at that text with the care it deserves. First it suggests that the government is falsely implying that rights are somehow contingent on good behaviour. Then it admits that is not what the government actually said as it states 'the small print concedes this will not be the case' So what was this small print and what does it 'concede' ? Actually, the text 'conceded' nothing. It made a clear and explicit statement, not a 'concession'. This is what it said. 'The Government is clear that fundamental rights cannot be legally contingent on the exercise of responsibilities.' And for the avoidance of doubt, the Green Paper stated this twice. Small Print? I don't know how this could have been made more explicit.

This leader then went on to use an implied conditional tense 'spinning anything else provides cover for the HRA's enemies' before sliding into a statement of apparent fact 'As such it is a grossly irresponsible thing to do.' I repeat 'It is a grossly irresponsible thing to do'. Never mind that the government is not spinning this nor is there any evidence produced that it is. Never mind that the Green Paper states explicitly - twice - that human rights are not contingent on the discharge of responsibilities, the leader, uses a sleight of grammatical hand to criticise the Green paper for doing something it quite explicitly is not doing.

The 'Independent' leader does not follow the 'Guardian' into this tendentiousness - I think that's the word - but it does make one revealing assumption. It states that 'our freedoms stated or unwritten should not be used as party political weapons'

But that is precisely what the struggle for our freedoms in this country have always been - and always will be. That is because our freedoms are not canonical inscriptions handed down the mountain but reflect a continuing battle for power between sections of society and those who claim to represent them. As the Green Paper spells out, in our view, this debate is fundamentally about power and where it is located in our society and where it should be located. It is about politics.

So suspicious have some become of politicians that our views on the Human Rights Act are lumped together indiscriminately - and inaccurately. Just yesterday, that doughty campaigner for liberty, Shami Chakrabarti, was quoted in the 'Independent' as saying: 'They both [Labour and the Conservatives] now want to bring in a Bill of Rights to replace the Act.'

Half-right. The Conservatives do want to scrap the Human Rights Act. This Government does not nor have we ever said anything to suggest that we do. As we said in the Green Paper: 'The Government is proud to have introduced the Human Rights Act and it will not resile from it.' In discussing the possibility of building on it, the Green Paper said 'Any new Bill of Rights and Responsibilities might subsume the Human Rights Act, or might preserve it as a separate Act.' That really is not the same as replacing it. This government is fundamentally opposed to the Conservative policy of scrapping the Human Rights Act. And we have said so, in terms, over and over again. To conflate politicians in this way is wrong.

We have to assume the leader writers of great national newspapers and human rights campaigners have actually read the Green Paper, and not relied on second-hand prejudice that anything the government does is malign, so what is going on here? Why is it proving so hard to have a rational debate about something so important in our national life? I think it can be summed up in one word: fear. Both left and right are frightened to have an open discussion about these issues. Why?

Most immediately, in my view, it's because of the new environment created by the events of 9/11 and subsequent global terrorism. There are, always have been, and always will be, inherent tensions that exist between those two fundamental imperatives of liberty and security. How best to keep them in balance is a constant struggle for any Government; any people. That struggle was thrown into sharp relief by 9/11 and has been kept there by subsequent atrocities and continuing terrorist plots.

But this is symptomatic of historic issues. Rights and freedoms always carry with them the cost of conflict and raise agonisingly difficult questions precisely because they are about power. What are the limits of the rights of the individual against

others ? How far can the state arrogate to itself the power to act on behalf of individuals (and the state is not always the enemy of the individual - the history of this country shows how the state can be the guarantor of the rights of the most vulnerable individuals - the NHS and our wider welfare system are part of the state) ? In a democracy, what are the proper limits on the power of the majority?

There are no simple, easy answers to such fundamental questions and those we find can shift over time and according to circumstance.

So why have both Left and Right become so frightened of talking openly and honestly about these issues ? Who would have thought when Parliament passed the Human Rights Act just over ten years ago, welcomed on all sides, that it would become such a third-rail issue. The Conservative Party are clearly frightened that their initial welcome for the Act could now be construed as somehow being soft on crime and terrorism, an approach epitomised by the new Shadow Home Secretary when he said recently that in his view there are too many rights and not enough wrongs.

In another part of the political garden, some of those who believe in human rights as a hallmark of modern civilisation are busy burying their heads in the flower beds, hoping politicians will not say anything if they can't simply support the Human Rights Act in the way they did ten years, and several political lifetimes, ago. They appear to fear that talking about it in any other way will just lead to trouble, fanning antagonism to the Act. That presumably is what 'The Guardian' meant by when they called the Green Paper 'irresponsible'.

I think this is short-sighted. Surveys suggest that, as is always their prerogative and often their custom, the public live in a state of cognitive dissonance on these issues. Around three quarters of those polled in a recent Ministry of Justice poll said the Human Rights Act should be retained. But an ipsos Mori poll at the end of 2007 found that 31% were dissatisfied or very dissatisfied with the way the Human Rights Act worked in practice compared with 24% who were satisfied or very satisfied. Only 2% were very satisfied compared with 10% who were dissatisfied. 81% of those in an Equality and Human Rights Commission survey a year ago agreed that 'there are some problems with human rights in Britain.'

In these circumstances, these issues cry out for leadership. Their muddled and incoherent position suggests the Conservatives are not minded to provide any version of it.

What should constitute such leadership? I do not believe that simply proclaiming the virtues of the Human Rights Act is sufficient. Of course, it's necessary and the Government does so proclaim them. We are proud of bringing in the Act and we do not resile from it or the principles that underpin it. The pursuit of human rights has been a noble endeavour and has demonstrated the capacity of the human spirit to overcome evil all over the world. We believe the Human Rights Act has demonstrated its value to the British people, whether to grand newspaper magnates or to campaigning organisations such as the Countryside Alliance or to pensioners who wanted to spend their last years together. Work carried out in government and by the BIHR demonstrates how human rights values of dignity and respect can transform the delivery of public services.

But all this does not mean we should then constrain the discussion or ignore the real concerns that people have about the Act or fear open and frank discussions of rights and responsibilities. . Rightly or wrongly the perception has grown, as Jack Straw, has said, in remarks widely misinterpreted, that it is 'a villains' charter'. It is not, but it is a fact that many see it in this way.

Do we ignore them? Always perilous in a democracy. Or do we, as I think we should, try to understand the roots of these concerns and address them? In my view, that is what democratic politicians should do. Aristocratic systems of governance are predicated on the belief that only an elite are qualified and entitled to govern. We have moved on from that.

In that spirit of democratic engagement, I want to argue, as the Green Paper does, that there are three key areas where the debate now needs to move.

The first is in the area of responsibilities. Every time a minister mentions this, there is a sharp intake of breath - and worse - among those who believe in the importance

of human rights. It's seen as code for abandoning the key principles that underpin human rights. It is nothing of the sort.

It is a fact that many people, decent, tolerant people, whose lives are being made wretched by crime and anti-social behaviour are concerned that human rights legislation somehow means those making their lives a misery are immune from the consequences. All too often, whenever I hold a meeting on anti-social behaviour in the most marginalised wards in my constituency, and sadly there is a regular need for such meetings, someone raises this claim. And such perceptions are given currency by reporting in sections of the media which is both irresponsible and inaccurate.

These perceptions are not true. But that's no reason for complacency. We would be rash to hope that such misperceptions will not take root. They can and they do. So we need to work constantly to expose these myths. And we do.

Effective action against criminals, whether terrorists or perpetrators of anti-social behaviour is obviously crucial in winning this argument and the government is doing everything it can. And there is no evidence that it has been fettered in this task by this country's human rights legislation. The Review of the Human Rights Act carried out by the Department of Constitutional Affairs in 2006 concluded that:

'Decisions of the UK courts under the Human Rights Act have had no significant impact on criminal law, or on the Government's ability to fight crime ... The key and overriding question is whether the Human Rights Act has impeded the achievement of the Government's objectives on crime and terrorism and led to the public being exposed to additional and unnecessary risk... [T]he public policy issues which arise here derive not from the effect of the Human Rights Act in UK law, but from the UK's obligations under the European Convention on Human Rights itself – to which the Government and all the major political parties remain committed... The 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 Human Rights Act, but from decisions of the Strasbourg Court in cases such as Chahal.'

But we do need to explain and explain better the intellectual framework of the legislation and how the concepts of proportionality and balance are inherent in the Act and in human rights generally. Human rights legislation does not protect wrongdoers from the law. It gives them a right to a fair trial. It does not stop them going to jail.

And we need to make the case that rights are accompanied by responsibilities, not contingent on them, but accompanied and balanced by them. As the Green Paper sets out, and, again, I commend it to those of you have not yet read it, the concept of the responsibilities we owe each other has a long intellectual history and is inherent in all instruments of human rights. As the Green Paper says:

'The idea of the link between rights and responsibilities is not new, either in theory or in practice. In our daily lives we owe responsibilities to the state and to each other. Some of these are moral, and are rightly not a matter of legal duty or sanction; many others already exist in our legal system, in statute, in common law and through convention.

The challenge is how better to remind people of the importance of individual responsibility and give them greater prominence. Individual rights must be promoted and protected without losing sight of the essential contribution of responsibilities to collective harmony and prosperity.

Solutions range from the ethical to the political to the legal, and may or may not include prescriptions about the relationship between rights and responsibilities.'

Those wise men and women who were responsible for drafting the great human rights instruments had no such fear about discussing the role of responsibilities and wove it through their drafting.

This is not this government reinventing human rights theory or 'spinning it' as 'The Guardian' would have it. To avoid discussing these issues now is not simply an act of timidity, it is dangerous to the cause of human rights. To confine debate to postal codes which contain a Waitrose is to allow concerns to fester. And leaves space for

those who do not believe in human rights at all, in the Conservative party and elsewhere, to make a recidivist case.

The second area for debate is whether the Human Rights Act is sufficient or whether we need to go further. Should we be complacent about our rights? Since the last great reforms of the suffrage and the development of the welfare state in the twentieth century and the formulation of human rights in the wake of the atrocities of totalitarian regimes there has been little demand for new rights. Rather the debate has been how to entrench the rights and freedoms we have and render them more accessible. The Human Rights Act was, after all, not about creating new rights but about bringing them home, so they could be enforceable in UK courts and not Strasbourg.

Do we need now to act further to entrench the rights we have? Surely this is a subject that merits discussion? Nothing is immutable - and our rights and freedoms are the fruit of specific historical circumstances. And we are living through times of unprecedented change and upheaval. Even a year ago, who could have imagined our banking system would be, to all intents and purposes, nationalised?

Politically, the Conservative Party have stumbled into an unsustainable position on the Human Rights Act, against wise advice from some in their own ranks. If they are ever in a position to legislate on this, who knows if they may not lurch inadvertently into doing profound damage to the principles underpinning this Act, with civilised voices drowned out as it becomes seen as a vehicle for creating more wrongs.

It is highly instructive to read the many, many comments posted on that influential Conservativehome website in response to the article by the Shadow Justice Secretary I quoted earlier. He's pretty much out there on his own.

'Sadly Mr Grieve does not know what he is talking about - he does not understand the legal position' says one of the more articulate 'Repealing the Human Rights Act (and replacing it with a "British Bill of Rights" - actually we already have one, as I would have once hoped a lawyer like Mr Grieve would know) will not solve the problem - as the United Kingdom will still be bound by the Convention ... So there is the choice. Either withdraw from the European Convention on Human Rights, or

stop talking about ending this or that absurd consequences of being part of it.' The respondents on this website don't want the delicate balance the Shadow Justice Secretary is trying unsuccessfully to strike. They want out of the Human Rights Act and out of the European Convention on Human Rights.

Now, of course, those who post responses on websites are not necessarily typical of the general public. But this website is a well-proven powerful forum of grassroots opinion in the Conservative party and who's to say that if the Conservatives were to be elected, the grassroots would not win out. The Shadow Home Secretary certainly thinks they want less rights, more wrongs.

So, is there a case for entrenching further rights that we have taken for granted? If so, which ones? And how? Surely these are issues that should at least be discussed - as the Green Paper proposes?

And finally, we need to discuss how any new constitutional expression of our rights and responsibilities should be given effect. There are serious arguments for and against making them directly justiciable - giving people a direct cause of action in the courts. But it is politically illiterate to argue, as so many commentators did in relation to the Green Paper, that unless all the provisions of any new Bill are directly justiciable it is worthless.

This ignorance of the power of words to move and mould behaviour is particularly surprising when the new American President, who has captured the imagination of the world, has been propelled so powerfully on his extraordinary journey to the White House by his mastery of language. Words matter. Who would argue that the Gettysburg Address might as well not have been written, and put in the bin along with the American Declaration of Independence ? And that no-one needed have bothered coining 'liberte, egalite, fraternite'.

Words are not always connected to meaning and language can obfuscate and deceive but it can also crystallise understanding and inspire us. The courts are not the only source of action and progress in our society. How impoverished is our politics becoming that discourse can be thought to possess no meaning unless it ends in law?

We believe the Green Paper sets out fundamentally important areas for discussion. In the months ahead we'll be going out to the British people to discuss these issues with them. I hope all of you here will join in.