

JUSTICE Tom Sargant memorial annual lecture 2009

Human Rights and the New British Constitution

Professor Vernon Bogdanor CBE

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Freshfields Bruckhaus Deringer LLP, London



advancing access to justice, human rights and the rule of law

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Part I

One of the dominant intellectual trends of our time is the transformation of political questions into legal questions, the transformation of questions in political thought, political philosophy and the historical questions of political philosophy into jurisprudential questions. A central role in that transformation was played by H.L.A. Hart, the philosopher who re-founded the study of jurisprudence in the 20th century. In 1955 he published a seminal article in *The Philosophical Review* entitled 'Are there any natural rights?' thereby starting what became a trend towards the transformation of questions of political philosophy into questions of jurisprudence. Hart's lead was followed by many leading contemporary political philosophers, John Rawls, Ronald Dworkin, and Robert Nozick to mention just three.

This trend corresponds, I believe, with an alteration in the character of liberalism in modern times. Traditional liberal philosophers, such as John Stuart Mill, were concerned primarily with the balancing of interests, a balancing to be secured through processes of parliamentary debate and discussion. Rights were seen by the utilitarians as devices to protect the powerful. In his *Anarchical Fallacies*, Jeremy Bentham famously called discussion of rights 'nonsense', and imprescriptible rights 'nonsense on stilts'. Mill, and his leading modern disciple, Isaiah Berlin, wrote of an irreducible pluralism of values, and claimed that for liberals there are no final answers. Rights, however, purport to provide final answers, and these answers are to be given not by elected leaders, following a process of democratic debate and discussion, but by judges. When someone says 'I have a right' that really ends the argument. It takes the argument out of politics so that no balancing of interests seems to be needed. It may be that liberals have become more accustomed to the agenda of rights because they feel that they have lost the public debate; they have been unable to persuade politicians or people, and therefore they have to rely on the judges.

¹ Some of the arguments in this lecture are based on themes in my book, *The New British Constitution*, Hart 2009.

Bentham used to argue that rights were the child of law. What he meant by this was that the only meaning one could attach to the notion of a right was of something embedded in a legal system. To speak of a moral right was to speak of something that ought to be embedded in a legal system. In the modern world, however, rights are as much the parent of law as its child. The Human Rights Act, for example, translates into law a certain conception of human rights, a conception that is of course heavily influenced by the European Convention on Human Rights. The Human Rights Act is the corner stone of what I regard as a new British Constitution.² It is transforming our understanding of government and of the relationship between government and the judiciary.

A.V.Dicey, like Mill and Berlin, a great liberal thinker, was proud of the fact that Britain had no bill of rights. He would have been horrified, I think, by the Human Rights Act. Dicey said that there is in the 'English constitution' – by which I think he meant the British Constitution – 'an absence of those declarations or definitions of rights so dear to foreign constitutionalists'. Instead, he argued, the principles defining our civil liberties are like 'all maxims established by judicial legislation, mere generalisations drawn either from the decisions or dicta of judges or from statutes'. With us, he says, 'the law of the Constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source, but the consequence of the rights of individuals, as defined and enforced by the courts'. By contrast, 'most foreign constitution makers have begun with declarations of rights' and then he adds – not ironically I think – 'for this they have often been in no wise to blame'. But the consequence, Dicey argues, was that the relationship between the rights of individuals and the principles of the Constitution is not quite the same in countries like Belgium, where the Constitution is the result of a legislative act, as it is in England, where the constitution is based on legal decisions. The difference in this matter between the Constitution of Belgium and the English Constitution may be described by the statement that 'in Belgium individual rights are deductions drawn from the principles of the Constitution whilst in England the so called principles of the Constitution are inductions or generalisations based upon particular decisions pronounced by the courts as to the rights of given individuals'.³

But following the Human Rights Act, our rights are no longer based on such inductions or generalisations. They are instead derived from certain principles contained within the European Convention on Human Rights. For judges are now charged with interpreting legislation in light of a higher law, the European Convention. Yet Dicey famously declared that there can be no such higher law in the British constitution; there is no law so fundamental that Parliament cannot change it, no fundamental or so called 'constitutional

² Vernon Bogdanor, *The New British Constitution*, Hart, 2009.

³ A.V.Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edition, Macmillan 1959, p. 144.

law', and no political or judicial body which can pronounce void any enactment passed by the British Parliament on the ground of such enactment being opposed to the constitution. Rights, however, have become something for judges rather than Parliament to evaluate.

Formally, it is true, that the Human Rights Act preserves the sovereignty of Parliament since judges are not empowered to strike down acts of Parliament. All they can do if they believe that legislation contravenes the European Convention is to issue a statement, a declaration of incompatibility. But that statement has no legal effect. It is for Parliament to amend or repeal the offending statute (or part of a statute) if it so wishes, but it can do so by means of a special fast-track procedure.

The Human Rights Act, therefore, proposes a compromise between two doctrines; the sovereignty of Parliament and the rule of law. But the compromise, for its effectiveness, depends upon a sense of restraint on the part of both the judges and of Parliament. Were the judges to invade the political sphere and to make the judiciary supreme over Parliament, something which some critics allege is already happening, there would be some resentment on the part of ministers and MPs. Conversely, were Parliament to ignore a declaration of incompatibility, and refuse to repeal or amend an offending statute or part of a statute, the Human Rights Act would be of little value. So the Human Rights Act proposes a compromise between two conflicting principles. I once asked a very senior judge: what happens if these principles do in fact conflict, the sovereignty of Parliament and the rule of law? He smiled and said, 'that is a question that ought not to be asked'.

The Human Rights Act, then, as well as giving greater authority to the judges, seeks to secure a democratic engagement with rights on the part of the representatives of the people in Parliament, though the main burden of protecting human rights has been transferred to the judges whose role is bound to become more influential.

Part II

Many human rights cases concern the rights of very small minorities, minorities too small to be able to use the democratic machinery of electoral politics effectively. Often, the minorities concerned are not only very small, but also very unpopular – suspected terrorists, prisoners, asylum seekers, and the like. Members of these minorities are not always particularly attractive characters: life would be rather simpler if the victims of injustice were always attractive characters or nice people like ourselves. Our legal system, however, is probably rather good at securing justice for nice people. It is perhaps less effective at securing justice for people who may not be quite so nice. But the Human Rights Act seeks to provide rights for all of us, whether we are nice or not: and perhaps there is no particular merit in being just only to the virtuous.

The Human Rights Act is, therefore, based on a compromise, which could well prove shaky. I thought at the time the Act was passed that there was a very real likelihood of conflict between the government and judges. But I thought the conflict would not arise for some time, and that the main effects would be long-term. I was wrong. The conflict has occurred much sooner than I thought. In 2006, just six years after the HRA came into effect, Tony Blair suggested that there should be new legislation limiting the role of the courts in human rights cases, and that meant amending the Act. Blair's comments were supported by David Cameron, the Leader of the Opposition, who renewed Michael Howard's pledge in the Conservative Party's 2005 election manifesto to reform, or failing that, scrap the Human Rights Act.

The speed with which the HRA has led to a conflict between government and the judges is to my mind remarkable. In the US it took 16 years after the drawing up of the Constitution in 1787 for an Act of Congress to be struck down by the Supreme Court in the landmark case of *Marbury v Madison* of 1803. After that, no Act of Congress was struck down until the famous *Dred Scott v Sandford* case in 1857; a case which unleashed the American Civil War. It was not until after the Civil War, after 1865, that the Supreme Court really came into its own as a court that would review federal legislation. In France the 5th Republic established a new body in 1958, the Conseil Constitutionnel, empowered to delimit the respective roles of Parliament and the government. But this body did not really assume an active role until the 1970s.

The impact of the Human Rights Act in Britain has been much more rapid and it has had radical implications. But the impact has not been noticed as much as it might have been, precisely because we do not have a codified constitution. It is because we do not have a constitution that radical constitutional change tends to pass unnoticed. In Walter Bagehot's famous words, 'an ancient and ever-altering Constitution' such as the British 'is like an old man who still wears with attached fondness clothes in the fashion of his youth: what you see of him is the same; what you do not see is wholly altered'.⁴ We have, therefore, not noticed that we have in effect made the European Convention on Human Rights, in practice if not in form, part of the fundamental law of the land. It is the nearest we have to a bill of rights.

The Human Rights Act, then, sought to muffle a conflict between two opposing principles; the sovereignty of Parliament and the rule of law. In doing so it presupposed a basic consensus on human rights between judges, on the one hand, and the government, Parliament, and people on the other. It assumes that breaches of human rights will be inadvertent and unintended, and therefore that there will not be significant disagreement

⁴ Walter Bagehot, 'The English Constitution', in *Collected Works*, The Economist, 1974, vol. V, pp. 203-4.

between government and the judges. But there is clearly no such consensus when it comes to the rights of unpopular minorities. Two issues in particular – concerning the rights of asylum seekers and suspected terrorists – have come to the fore since the Human Rights Act came into force and have led to conflict.

The problem of asylum long predates the Act, but it has grown in significance since the year 2000 and is now a highly emotive issue, capable, so politicians believe, of influencing voters in a general election and so determining the political character of the government. Terrorism has also taken on a different form since the horrific atrocity of September 11, 2001. The form of terrorism to which we were accustomed, that of the IRA, was in a sense an old-fashioned form of terrorism; it had a single, concrete and specific aim, namely the reunification of the island of Ireland. The terrorism of the kind championed by al-Qaeda is quite different; it is a new and more ruthless form of terrorism with wide if not unlimited aims, amongst which is the establishment of a new Islamic empire and the elimination of the state of Israel. Al-Qaeda apparently has terrorist cells in around 60 countries. To deal with this new form of terrorism, so many governments, including that of the United Kingdom, believe, new methods are needed and these new methods may well infringe human rights. But the judges retort that we should not compromise our traditional principles of habeas corpus and the presumption of innocence; principles which, they say, have been tried and tested over many centuries and have served us well.

But some senior judges have gone much further than this. They have suggested that the conflict between the sovereignty of Parliament and the rule of law should be resolved by, in effect, abandoning the principle of the sovereignty of Parliament. Indeed, a natural consequence of the Human Rights Act, according to this view, should be a formal abnegation of the principle of the sovereignty of Parliament. The sovereignty of Parliament, they go on to argue, is but a judicial construct, a creature of the common law; if the judges could create it, they can now, if they so wish, supersede it.

In a case in 2005, *Jackson and Others v Attorney General*, which dealt with the legality of the Hunting Act (2004), Lord Steyn declared that the principle of the sovereignty of Parliament was a construct of the common law, a principle created by judges. 'If that is so, it is not unthinkable that circumstances could arise when the courts might have to qualify a principle established on a different hypothesis of constitutionalism.' Lady Hale of Richmond said that 'the courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial powers'. She is saying, in effect, that courts might take upon themselves the power to strike down legislation. Reiterating this point, Lord Hope said that 'parliamentary sovereignty is no longer, if it ever was, absolute; it is not uncontrolled, it is no longer right to say that its freedom to legislate admits of no qualifications whatever.' He

then adds that the ‘rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.’⁵

Step by step, then, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament is being called in question. It can hardly, despite Lord Hope, be anything other than ‘absolute’. For sovereignty is not a quality like baldness, a matter of degree, but more akin to virginity, a quality that is either present or absent.

The implication of the remarks by the three law lords, then, is that the sovereignty of Parliament is a doctrine created by the judges which can also be superseded by them. They would perhaps like to see this doctrine supplanted by an alternative doctrine: the rule of law. But is it for the judges to decide that for themselves? Or is it not rather the case that the doctrine of the sovereignty of the Parliament is part of our very constitutional history? Dicey, whom I quoted earlier, claimed that the roots of the idea of parliamentary sovereignty ‘lie deep in the history of the English people, and in the peculiar development of the English constitution’.⁶ If Dicey is right, the judges alone cannot supersede the principle of parliamentary sovereignty unless Parliament itself (and perhaps the people as well through referendum) agrees.

H. L. A. Hart argued that the ultimate rule in any legal system was the rule of recognition.⁷ This rule, Hart suggested, is not itself a norm, but a complex sociological and political fact, constituted by the practice of legal officials and judges. But legal officials and judges cannot alter a practice in a sociological or political vacuum. Surely parliamentary and popular approval is also required for any alteration in the fundamental norm by which we are governed. At the present time, politicians clearly would not agree to give judges the power that it appears some seek, to supersede the sovereignty of Parliament.

Do the people themselves have a role in determining the rule of recognition? The Labour government’s White Paper, ‘Bringing Rights Home’, published at the same time as the Human Rights Bill was introduced into Parliament, found no evidence that the public wanted judges to have the power to invalidate legislation. It would be unwise to assume that anything has changed in the intervening period. But, whatever the state of public opinion, it is clear there is a conflict between two constitutional principles, a conflict which the Human Rights Act is designed to muffle. This conflict, if not resolved, could come to generate a constitutional crisis.

⁵ [2005] UKHL 56, para. 102.

⁶ *Law of the Constitution*, p. 69fn.

⁷ *The Concept of Law*, Clarendon Press, 1961.

By a constitutional crisis, I mean not simply that there is a difference of view on constitutional matters. That is to be expected in any healthy democracy. What I mean by a constitutional crisis is that there is a profound difference of view as to the method by which such disagreements should be settled. There is a profound difference of view as to what the rule of recognition is or ought to be.

In any society a balance has to be struck between the rights of the individual and the needs of that society for protection against terrorism, crime, and so on. But who should draw the balance, the judges or the government? Senior judges would say, I suspect, that they have a special role in protecting the rights of unpopular minorities, such as asylum seekers and suspected terrorists. They would say that in doing so they are doing no more than applying the Human Rights Act as Parliament has asked them to. The government, and one suspects most MPs, would disagree: they would say that it is for them as elected representatives to weigh the precise balance between the rights of individuals and the needs of society because they are elected and accountable to the people, while the judges are not. They would say that the Human Rights Act allows judges to review legislation, but this should not be made an excuse for the judges to seek judicial supremacy; they should not seek to expand their role by stealth, as the American Supreme Court did in the 19th Century.

There is thus a profound difference of view as to how issues involving human rights should be resolved. The government believes they should be resolved by Parliament; the judges believe they should be settled by the courts. Because they disagree about this, each side is tempted to believe that the other has broken the constitution. Government and Parliament say that judges are usurping power and seeking to thwart the will of Parliament, whereas judges say that the government is infringing human rights and then attacking the judiciary for doing its job in reviewing legislation and assessing its compatibility with the Human Rights Act. The British Constitution is coming to mean different things to different people. It is coming to mean something different to the judges from what it means to government and Parliament. The argument from parliamentary sovereignty points in one direction, the argument from rule of law in another.

There are two possible outcomes. The first is that Parliament succeeds in defeating the challenge from the judges in preserving parliamentary sovereignty, which might mean that, on some future occasion, a declaration of incompatibility comes to be ignored. The second possible outcome is that the Human Rights Act trumps Parliament and that a declaration of incompatibility by a judge comes to be equivalent in practice to striking down legislation, since Parliament automatically gives effect to such a declaration by amending the law. It is too early to tell which outcome is more likely to prevail, but it seems unlikely that the compromise embodied in the Human Rights Act can survive over the long-term. We are at present in a transitional period and eventually some sort of constitutional settlement will be

achieved. But it will be, I think, a painful process and there will be many squalls and storms on the way.

Part III

There is a paradox in current discussions of the Human Rights Act. The paradox is that those who appear most worried by it wish, nevertheless, to extend it. The Conservative Party, for example, proposes to repeal the Human Rights Act, but to enact in its place a home-grown measure giving the same protection as the European Convention, and also protecting additional rights. The Conservatives propose a British Bill of Rights. So also does the Labour government. So also do the Liberal Democrats. All three parties now favour a British Bill of Rights, though there may be disagreement on precisely what it should contain. There is agreement upon it, if not upon the provisions which such a bill of rights might contain.

In August 2008, the parliamentary Joint Committee on Human Rights published a report, *A Bill of Rights for the UK?* HL165, HC 150, 2007-8. It recommended that Britain adopt a Bill of Rights and Freedoms since this would provide ‘a moment when society can define itself.’ Such a Bill should ‘set out a shared vision of a desirable future society: it should be aspirational in nature as well as protecting those human rights which already exist’.⁸ Such a Bill would, in the Joint Committee’s view, have to build upon the Human rights Act without weakening it in any way, and it would have to supplement the protections in the European Convention.

A British Bill of Rights, then, would increase the number of rights which the courts protect. Indeed, the European Convention of Human Rights was regarded by its signatories in 1950 not as a ceiling, the maximum protection which member states should grant, but as a floor, the very minimum which any state claiming to be governed by the rule of law, should support.

In Northern Ireland, there is already broad agreement that greater protection of rights is needed than is offered by the Human Rights Act. The 1998 Belfast Agreement recognised that there ought to be ‘rights supplementary to those in the European Convention on Human Rights to reflect the particular circumstances of Northern Ireland – these additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem and – taken together with the ECHR – to constitute a Bill of Rights for Northern Ireland’. The Agreement provided for the establishment of a Northern Ireland Human Rights Commission providing for the identity and ethos of both communities in the province to be respected, and also a general right to non-discrimination. It also envisaged that the Human Rights Commission in the Republic would

⁸ *A Bill of Rights for the UK?* p.5

join with that of Northern Ireland to produce a charter endorsing agreed measures to protect the fundamental rights of all those living in the island of Ireland. As yet, however, no Bill of Rights for Northern Ireland has been enacted.

It is not difficult to suggest rights additional to those in the ECHR which ought to be recognized in the United Kingdom as a whole – a general right to equality, for example, in addition to the right of non-discrimination guaranteed by the Convention; a right to privacy; a right to a healthy environment, something guaranteed in the 1996 post-apartheid South African constitution; a right to freedom of information; a specific right to anti-discrimination on grounds of sexual orientation; recognition of the rights of children, as recognised in the United Nations Charter on the Rights of the Child – these are all examples of rights which, so it has been argued, ought to be protected in addition to those protected by the Convention. There is also the large but contentious area of social and economic rights. The Convention recognises a right to education but not a right to health care. Many of these rights are recognised in international treaties which the British government has signed. Nevertheless, additional rights would have to be formulated very carefully were they to be embodied in a British Bill of Rights. It would be difficult to make economic and social rights, for example, justiciable; and the law cannot become a mechanism for resolving complex social or economic problems. In a case in 1995, Lord Bingham commented that:

It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like; they cannot provide all the treatments they would like; they cannot purchase all the extremely expensive medical equipment they would like, they cannot carry out all the research they would like; they cannot build all the hospitals and specialist units they would like. Difficult and agonizing judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. This is not a judgment which the court can make.⁹

The courts must remain a last resort, not a path taken by those who cannot secure the reforms they wish to enact through the ballot box and Parliament.

In its report, *A Bill of Rights for the UK*, however, the Joint Committee on Human Rights proposed five types of rights for inclusion.

1. Civil and political rights and freedoms, such as the right to life, freedom from torture, the right to family life and freedom of expression and association. It also proposed a new right to equality.

⁹ *R v Cambridgeshire Health Authority, ex parte B* [1995] 1 WLR 898.

2. Fair process rights such as the right to a fair trial and the right of access to a court. The Committee also proposed a right to fair and just administrative action.
3. Economic and social rights, including the right to a healthy and sustainable environment. The Joint Committee accepted that such rights could not easily be made justiciable, and declared that they would impose a duty on the part of government and other public bodies, of 'progressive realisation', the principle adopted in the South African constitution. This principle would require the government to take reasonable measures within available resources to achieve these rights and report annually to Parliament on progress. But individuals would not be able to enforce them against the government or any other public body.
4. Democratic rights, such as the right to free and fair elections, the right to participate in public life and the right to citizenship.
5. The rights of particular groups such as children, minorities, people with disabilities and victims of crime.¹⁰

One argument for adding such rights to those already recognised in the Convention is that it would make it easier for the British people to feel that they, as it were, 'owned' the bill of rights, that the bill of rights was indigenous. At present, many feel that the Human Rights Act is an elite project, designed only to protect highly unpopular minorities, such as suspected terrorists and asylum seekers. The Act, therefore, is not grounded in strong popular support. Rights that might be generally used by all would give human rights legislation greater popular salience, and might thus, paradoxically, make it easier to protect the rights of unpopular minorities.

But there is a fundamental difficulty with the idea of a British Bill of Rights which has not yet been faced. For some at least of the rights which might be embodied in a British Bill of Rights would seem to encroach upon the powers of the devolved bodies – the Scottish Parliament, the National Assembly of Wales and the Northern Ireland Assembly. Thus the extension of one aspect of the new British constitution – the protection of rights – might easily come into conflict with another – the devolution settlement. From a strictly legal point of view, of course, the protection of rights is a reserved matter, since Parliament, at least in theory, remains sovereign. Nevertheless, the devolved bodies have responsibility for such matters as health care, and would undoubtedly see a British Bill of Rights providing for the right to health as a form of creeping centralisation, depriving them surreptitiously of powers which had been transferred to them by the devolution legislation. The devolved bodies might well wish to decide for themselves whether or not to provide for additional

¹⁰ HL165, HC 150, 2007-8

rights to those in the European Convention. There is some tension, then, between the principle of devolution and that of the entrenchment of rights UK-wide; and, insofar as a British Bill of Rights was based on the idea of rights that were fundamental to British citizenship, it could serve to unpick the delicate settlement reached in the Belfast Agreement which served to reconcile the unionists of Northern Ireland, who wished to remain British citizens, and the nationalists, who did not, and who do not see themselves as British at all. It would be necessary, then, to secure the consent of the devolved bodies, as well as MPs at Westminster, to a British Bill of Rights. That would not be easy since neither the SNP nor Sinn Fein, would want to agree to something that they saw as 'British'. They would prefer rights for Scotland and Northern Ireland that were, as it were, self-generated. But, if the devolved bodies were not involved in the negotiations, they might not accept a British Bill of Rights as legitimate. In 1980, when Pierre Trudeau sought to patriate the Canadian constitution, he did not consult the Canadian provinces until required to do so by the Supreme Court of Canada. Quebec, which already had its own provincial bill of rights, refused to accept the patriated constitution, since this would deprive it of autonomy in relation to French language and education rights.¹¹ The issue remained as a running sore, poisoning relations between Canada and Quebec for many years. A British Bill of Rights, therefore, could prove a highly divisive issue both in Scotland and in Northern Ireland.

If the British government preferred not to involve itself in difficult disputes with the devolved bodies, the alternative would be to propose a bill of rights applying only to England. There would then be an English rather than a British Bill of Rights, and the devolved bodies could be left to adopt whatever arrangements they wished if they sought to add to the rights already recognised in the Human Rights Act. An English bill of rights, however, could hardly be expected to strengthen the sense of Britishness. It could, on the contrary, weaken it.

Even apart from this problem, a British Bill of Rights might prove of very limited value in strengthening the sense of citizenship. It could delineate only the very minimum requirements of citizenship. Some ministers are currently sympathetic to the idea of a British Bill of Rights and Duties. The suggestion is that such a document could encourage good citizenship. Yet, many, if not most of the duties of good citizenship – e.g the duty to be a good neighbour, the duty to contribute to one's community – are not such as can be ensured by law. They are problems for society, not for the legal system. It is a mistake to overburden the legal system by giving judges the duty to resolve complex social problems, problems that they are ill-equipped by training to resolve. Nor could the rights of the citizen become dependent upon the extent to which she performed her social duties. The right to freedom of speech and to the other rights enshrined in the Human Rights Act, are not dependent upon the satisfactory performance of social duties. They are granted to everyone

¹¹ See Geoffrey Marshall, 'Canada's New Constitution (1982): Some Lessons in Constitutional Engineering', in Vernon Bogdanor, ed, *Constitutions in Democratic Politics*, Gower 1988,

living in Britain, regardless of whether or not they are good citizens. Some of the most contentious issues relating to rights concern the rights of prisoners, people who, by definition, have shown that they are not good citizens.

Part IV

In addition to adding to the rights listed in the Convention, the Human Rights Act could be strengthened in another way, by providing stronger protection for existing rights than is provided in the Act. There are two ways in which this can be done, by legislative entrenchment and by judicial entrenchment.

When calling for a home-grown British Bill of Rights in 2006, David Cameron suggested that it might be made exempt from the Parliament Act, which allows the Commons in the last resort to override the Lords. At present the only legislative provision that is exempt from the Parliament Act is that requiring a general election to be held at least once every five years. The reason for this, of course, is to ensure that an unscrupulous government with a majority in the Commons cannot postpone the date of a general election beyond five years to keep itself in power. Similarly, the effect of exempting a British Bill of Rights from the Parliament Act would be to ensure that a government could not alter its provisions without securing the agreement of the Lords.

An alternative might be to provide that the Act could be amended only by a special majority in the House of Commons, for example, two-thirds of those voting. Such provisions are common in relation to Bills of Rights. The American Bill of Rights can only be amended by a special majority of Congress and a special majority of the states; the same is true of the protection of rights in the South African constitution. The Canadian Charter of Rights and Freedoms can be amended only by two-thirds majorities in both houses. New Zealand and Israel, which, like Britain lack a codified constitution, both give special legislative protection to certain rights. The 1993 Electoral Act in New Zealand contains an entrenched provision which can be amended only by 75% of the MPs in the single-chamber Parliament or by referendum. Israel has a set of Basic Laws protecting rights which can be amended only by an absolute majority in the single-chamber Parliament, the Knesset.

The second way of strengthening the protection offered by the Human Rights Act is by giving judges power to do more than simply issue a declaration of incompatibility when, in their view, legislation infringes the European Convention. In most countries with a bill of rights, such as the United States, South Africa and Germany, judges can invalidate legislation which conflicts with the Act. In Canada, the government can over-ride the judges by introducing legislation, accepting explicitly that it is not accordance with the Charter of Fundamental Freedoms of 1982, but declaring that 'notwithstanding', this, they ought to be enacted. All legislation of this 'notwithstanding' type needs to be renewed every five

years; but the political stigma attached to introducing legislation with such a clause is so great that the Federal government has never employed it – although it has been employed at provincial level by provincial governments. The Canadian government and Parliament can thus, like the British government and Parliament, decide to ignore the decision of a judge in a human rights case. It is, however, more difficult to take this course in Canada than it is in Britain, since if Parliament in Britain disagrees with a declaration of incompatibility, it merely does nothing but maintain the status quo; whereas, the Canadian Parliament has to act positively to override the Charter.

Judicial entrenchment in Britain would entail explicit recognition that the Human Rights Act was fundamental constitutional legislation. It already has a certain status as fundamental law precisely because it is not subject to the doctrine of implied repeal. But to allow judges to invalidate legislation would be formally to undermine the doctrine of parliamentary sovereignty. It might be argued, however, that if we can modify this doctrine by subscribing to a superior legal order, the European Union, and providing for judges to ‘disapply’ legislation which is contrary to European legislation, then we can also modify it by giving judges the power to ‘disapply’ human rights legislation. In gradually coming to distinguish between ‘fundamental’ and ‘non-fundamental’ statutes, we are moving in a tortuous and crab-like way towards establishing real constitutional principles, towards becoming a constitutional state.

Part V

The Human Rights Act, it has been argued, is of greatest value in cases concerning small and unpopular minorities; minorities that are unable to use electoral and political processes effectively. Larger minorities are generally able to use these processes and perhaps for them, the Act may be less helpful. Nor can the Human Rights Act be expected to resolve wider social issues. It cannot be expected to deal with the wider problems that face us in a multicultural society. It cannot resolve our culture wars.

Trevor Phillips, the Chair of the Equality and Human Rights Commission, has drawn attention to the range and nature of these conflicts in such areas as the implementation of affirmative action policies; the recognition and use in the British legal system of Sharia law and Sharia courts, where the testimony of a woman may be worth less than the testimony of a man. To what extent, if at all, should the civil courts recognise the jurisdiction of Sharia courts; the legitimacy of arranged marriages and concerns over their potential for coercion; the role of faith schools in our society; where, for example, parents wish send their child to a Jewish school, but the mother is a convert, should the school be able to decide whether to admit the child or should it be a matter for the courts; and the balance between the freedom of choice of parents in choosing schools and the goal of securing racial and social integration. This last issue is perhaps of particularly importance in building a stable

multicultural society. With free choice of schools, many schools remain 100% white, others remain 50-60% peopled by members of ethnic minorities. There is, some would suggest, insufficient of a cultural mix. Survey evidence has shown that very few English people have close friends from other cultures. The question originally asked was to ask people to list their 20 closest friends, but this question was abandoned since most English people do not have 20 close friends! Is it consistent with public policy that ethnic groups remain so separate?

None of these issues can be settled simply by invoking rights. All of them involve a clash of rights and a clash of interests. For this reason, they are not questions which judges can easily resolve or finally settle. The great danger, particularly with the idea of extending rights into the social and economic sphere, which the Joint Select Committee on Human Rights in Parliament recently proposed, is of bringing judges into areas that lie beyond their competence. There is a danger, in addition, that we seek to enlist the support of judges to transform our current liberal prejudices into unshakable verities and eternal truths. For these reasons, I believe that the legal paradigm, inaugurated by the work of H.L.A.Hart, may have gone too far. It is worth remembering what American Supreme Court Justice Robert Jackson said of judges in the 1930s when the United States Supreme Court was using its power of judicial review to cripple President Roosevelt's economic and social programmes. 'We are not final', he said, 'because we are infallible, but we are infallible only because we are final'.¹² Justice Stone reminded his colleagues that 'While an unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check on our own exercise of power is our own sense of self-restraint'.¹³ It was a salutary reminder.

It is dangerous for a society to believe that it can leave its liberties in the hands of judges. The Human Rights Act, like the Bill of Rights in the United States, shows what is in the shop window; the question of whether one can actually buy the goods is quite separate. It must be remembered that the American Bill of Rights, which is today so greatly lauded, did not prevent segregation or 'lynch law' existing in many states in the South for very many years. The equal protection clause of the 14th Amendment was a mockery in practice for anyone belonging to the Afro-Asian minority until the Voting Rights Act was passed in 1965.

I conclude, therefore, that the philosophy of rights, while it may be necessary, is not sufficient to meet the challenges of the 21st Century. We need to return to an older form of liberalism, that championed by Mill, a liberalism which seeks to balance interests and competing claims. The philosophy of rights is most needed in cases dealing with vulnerable and unpopular minorities whose interests will not be recognised by the ballot box. But even

¹² *Brown v Allen* 344 U.S.(1953) 540.

¹³ *United States v Butler* 297 U.S. (1936) 79.

in this very limited area, we must be aware of over-estimating what can be achieved by judges. Judges, constitutions and political institutions are necessary to protect human rights, but they can never be sufficient. The condition of society matters also. Mill famously criticised Bentham for believing that a constitution is a mere set of rules or laws, rather than a living organism representative of an evolving political morality. Dicey also believed that the quality of a legal system depended on the quality of the society which it served. He once said that ‘the “rule of law” or the predominance of the legal spirit may be described as a special attribute of English institutions’.¹⁴ That may seem, at first sight, an arrogant statement. But what he meant was that our laws rest essentially on a public opinion that supports the protection of human rights; that the protection of human rights depended not only on laws and institutions, but on a spirit favourable to human rights.

Edmund Burke is supposed to have said that ‘all that is necessary for evil to triumph is for good men to do nothing’. No one has been able to find the source for this quotation, but whether he said it or not, there are very eloquent testimonies to its truth. We are mistaken if we believe that human rights legislation is sufficient to preserve our freedom.

In a book published long ago, in 1925, called *The Usages of the American Constitution*, the author tells the story of a church in Guildford, the Holy Trinity Church. On the site of this church was an earlier building which was destroyed in 1740 when the steeple fell and carried the roof with it. One of the first to be informed of the disaster was the verger. ‘It is impossible’, he said, ‘for I have the key in my pocket’.¹⁵ The Human Rights Act is the key, but it will not of itself prevent the fall of the steeple. Only a vigilant public opinion can do that.

¹⁴ *Law of the Constitution*, p. 195.

¹⁵ H.W.Horwill, *The Usages of the American Constitution*, Oxford University Press, 1925, p. 243.



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