

PROTECTING RIGHTS: HOW DO WE STOP RIGHTS AND FREEDOMS BEING A POLITICAL FOOTBALL?

Sometimes it feels like the current climate is more like a wrestling, than a football match!

As all academics tend to do, I will try to deconstruct this question and address it in two parts

First, how do we stop rights and freedoms being political?
If this were the whole question, it would be a misguided one.

Rights and freedoms come from political struggle, of course.

- Human rights values may endure, but you will never end debate about the appropriate balance between liberty and security; privacy and free expression; or freedom of association and protection from discrimination and incitement – nor should you!
- The issue that confronts us is not how to take rights out of politics but how to enable all to participate equally in politics – and society as a whole – by ensuring that everyone can fulfil their potential through the guarantee of certain fundamental rights; some of which inevitably tread on other people's freedoms, by the way.
- This is the whole point of bills of rights, of course; in particular, to protect individuals and minorities whose views and aspirations are not necessarily represented by a system based on majority rule.
- Any bills of rights worthy of the name, whilst protecting everyone's liberties, gives most succour to the marginalised and unpopular – or controversial causes and questions – precisely because these are the people and issues with least protection from other legislation and policy. When this happens, you will never eradicate negative headlines – they can still dog the Canadian Charter of Rights, more than 25 years after it was enacted.

What bills of rights cannot do – of course – is create Nirvana, or Shangri-La.

Think of the Patriot Act, Homeland Security Act, Real ID Act 2005, Detainee Treatment Act and the removal of habeas corpus from detainees the President designated as unlawful enemy combatants (**see appendix one**).

The American Bill of Rights stopped none of these being passed and nor can any bill of rights, if politics does not come into play to ensure that the rights it upholds are respected and protected by governments and courts alike.

As the famous US Justice Learned Hand memorably said, “liberty lies in the hearts of men and women; when it dies there no constitution, no law, no court can save it.”

But politics is only one side of the equation we are asked to consider. The second part of this question, *football*, is altogether another issue.

- This is a game I am well acquainted with having grown up with 7 male brothers and cousins who were capable of watching two matches at the same time by placing a portable television on top of the main one!
- It is a game which ignites passion, without doubt. A game in which scoring points is the whole point, and backing your side against the other team is the whole pleasure.
- Point scoring in the current debate about a bill of rights and the Human Rights Act (HRA) is evident, although sometimes the race seems to be to the bottom rather than the top [of the division].
- The irony is that whilst giving an appearance of being two opposing teams, the two main political parties have at times been strikingly close on this issue.
- Both have resented the sometimes significant incursions on state power brought about by the HRA.
- Both have stated their support for a bill of rights which underlines the responsibilities of the individual.

The leader of the Opposition, David Cameron, has gone further and called for the repeal of the HRA and the introduction of a specifically British Bill of Rights, in part to *increase* the power of the executive (to deport people and fight terrorism and crime) and *reduce* the power of the judges. These are perfectly legitimate reasons to dislike the HRA, of course, but they are also legitimate reasons to *oppose any* bill of rights worth its sorts – *not* to *support* one!

Rights and freedoms are not a game, of course. Least of all one whose rules should change to suit political leaders – across the political spectrum – or respond to newspaper headlines.

People who call for a new bill of rights have got to make up their mind exactly what vision they are conjuring! If they are seeking enduring values which are constitutionalised, they will have to accept that although we might be the lucky ones to have a say in what these fundamental rights and freedoms should be, we will deprive future generations of this pleasure. It will inevitably fall to unelected judges, not ‘the people,’ to interpret their application, and flesh out their meaning, as the years go by.

The post-war human rights framework – which emerged through the ashes of World War II and the Holocaust, building on the Magna Carta, the 1689 English Bill of Rights and the US Bill of Rights – has been adopted by every country in the world; specifically through the values and standards in the Universal Declaration of Human Rights and the Geneva, Torture and Genocide Conventions.

When other countries argue that these treaties do not, or should not, apply to them – be it the U.S.A after 9/11; Zimbabwe after a sham election or Israel following rocket attacks – we call this exceptionalism, a breach of common values and disregard for basic decency. When democracies try and find loopholes to avoid these established standards, or court judgments which uphold them, we see the path to extraordinary rendition and Guantanamo Bay.

If we want to stop rights and freedoms being a political football I would respectfully suggest that the post war human rights framework – kicked off by Winston Churchill and F.D. Roosevelt – is a pretty good starting point.

Every country in Europe has not just signed and ratified Churchill's charter – the European Convention on Human Rights – but has, through one means or another, incorporated into their law. This is what we did 10 years ago through the HRA. Other countries have bills of rights that stand alongside the ECHR or build on it, as we could, of course. But all modern bills of rights are based on the post-war human rights framework. No-one, besides us, is contemplating de-incorporating the ECHR from their law. Why? Because it is there precisely to stop governments from turning rights and freedoms into a weather vane or political football; depending on who is in power or in favour.

If we turn our back on these common values and say we want to start again, make them up, reflect what the majority want rather than what minorities need, then don't be surprised if these enduring rights and freedoms are up for grabs again when the next generation wants to consult on them. Don't be surprised if the goal posts in this game of football forever change.

Don't be shocked if 20 years from now some of you are here listening to young people spit outrage at the travesties of the next government and your failure to prevent them. Just as some of us did twenty years ago when this book – *Decade of Decline* – was produced by Liberty to trace the trashing of civil liberties under the Thatcher government.

Only then, there was no Human Rights Act or equivalent bill of rights to provide any protections against a system based entirely on the sovereignty of government [let's not kid ourselves it's the sovereignty of parliament].

Decisions by public officials could only be overturned if they were so irrational the official should probably have been locked up anyway. Banning Sinn Fein politicians from the airwaves or gays and lesbians from the army were deemed perfectly reasonable. And Acts of Parliament were protected from judicial review altogether.

I have a little list here of some of the differences the HRA has made (**see appendix two**). Just imagine if these had been the headlines in the Daily Mail in the last 10 years instead of “human rights for scoundrels and villains!”

Football ignites passion and is fun. Defending common values from those who would destabilise them in order to score points and win games – or elections – is much less exciting; but all the more essential.

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28 February 2009.

APPENDIX 1

Erosion of human rights in USA

- **USA PATRIOT Act 2001** (Uniting and Strengthening America by Providing Appropriate Tools for Intercepting and Obstructing Terrorism Act)
Increased powers to search e-mail communications, telephone, medical, financial and other records; gave more discretion to detain and deport suspected terrorists.
- **Homeland Security Act 2002**
Created the United States Department of Homeland Security
- **Real ID Act 2005**
Requires states to issue federally approved driver's licenses, creating a uniform 'identity card.' Residents of states that fail or refuse to comply will be unable to use their driver's licenses for any activity that requires federally accepted identification, such as boarding airplanes or entering federal buildings. Also requires states to store the information on databases, which will be linked together.
- **Detainee Treatment Act 2005**
Strips federal courts of jurisdiction to consider habeas corpus petitions or other actions filed by prisoners in Guantanamo Bay against the US government. Only the Court of Appeals for the District of Columbia Circuit has limited jurisdiction to hear appeals from decisions of the Combatant Status Review Tribunals and the Military Commissions.
- **Military Commissions Act 2006**
Removes right of habeas corpus for persons the president designates as "unlawful enemy combatants"; gives President the power to define what is, and what is not, torture and abuse.
In 2008, the Supreme Court ruled that the Act unconstitutionally limited detainee's access to judicial review and that detainees have the right to challenge their detention in conventional civilian courts¹

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¹ Boumediene v. Bush

APPENDIX 2

The protection of freedom under the Human Rights Act: some illustrations²

Freedom of association

- **Preventing demonstrators reaching a protest is unjustified intrusion into right to freedom of assembly**

The decision by the police to stop coaches of demonstrators reaching a demonstration was challenged under the Human Rights Act (HRA). The police decided to send the coaches home with a police escort to prevent a breach of the peace occurring at the demonstration when the passengers arrived. The court said that the police must take no more intrusive action than appeared necessary to prevent a breach of the peace. The police had failed to establish that the actions they took were proportionate and constituted the least restriction necessary to the rights of freedom of speech and freedom of peaceful assembly under the HRA. It was wholly disproportionate to restrict a person's exercise of these rights because she was in the company of others, some of whom might, at some time in the future, breach the peace. The House of Lords referred to the "constitutional shift" brought about by the HRA, so that it is no longer necessary to debate whether we have a right to freedom of assembly.³

Private and family life

- **Retention of DNA and fingerprint evidence of innocent people is a breach of right to private life**

The blanket and indiscriminate retention of fingerprints, cellular samples and DNA profiles of people suspected but not convicted of offences failed to strike a fair balance between the competing public and private interests. It was a disproportionate interference with the right to respect for private life and could not be regarded as necessary in a democratic society.⁴

- **Damages awarded for unjustified intrusion into private life**

Where an invasion of private life is a matter of legitimate public interest because a public figure had previously lied about the matter, there will be a strong argument in favour of freedom of expression under Article 10 that will often defeat a claim of privacy under Article 8. The publication of the fact that a public figure had taken drugs and was seeking treatment was necessary to set the record straight given her previous statements to the contrary, but the additional information published in the stories, including a photograph, was an unjustified intrusion into private life. In the latter case, balancing the competing interests, the

² Some European Court of Human Rights decisions have also been included as illustrations of the development of human rights law which, as a result of the HRA (s2), the domestic courts are bound to "take into account". Prior to the HRA, European Court of Human Rights decisions were not part of the domestic legal framework.

³ *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55

⁴ *Marper v UK* ECtHR Grand Chamber, 4.12.08

right to privacy under Article 8 outweighed the newspaper's freedom of expression under Article 10 and damages were awarded for the breach.⁵

Freedom of expression and the media

- **Responsibly written articles on matters of public interest are protected**

The common law defence of qualified privilege in libel cases can protect media articles which are of public importance.⁶ The court referred to the need for the common law to be developed and applied in a manner consistent with Article 10 (freedom of expression). The qualified privilege defence has recently been strengthened⁷ and as a result, the media have much more freedom when reporting matters of public interest, where it may not be possible to subsequently prove the truth of the allegations, provided that they act responsibly and in the public interest. Geoffrey Robertson QC said the decision was "an important step in moving freedom of speech closer to that enjoyed by the US media under the First Amendment".⁸

Terrorism

- **Detention of suspected international terrorists without trial is breach of HRA**

A group of foreign nationals who had been certified by the Secretary of State as suspected international terrorists under the Anti-terrorism, Crime and Security Act 2001, and detained without charge or trial, challenged their detention. The House of Lords formally declared that s23 of the 2001 Act was incompatible with the HRA as the detention provisions were disproportionate and discriminated on the ground of nationality or immigration status. The measures did not rationally address the threat to the security of the UK presented by Al Qaeda terrorists because they did not address the threat presented by terrorists who were UK nationals. The detention of some suspects and not others, defined by nationality or immigration status, violated article 14 (prohibition of discrimination) and could not be justified.⁹ The provisions were repealed by the Prevention of Terrorism Act 2005, which put in place a new regime of control orders. The claimants received (modest) damages for the violation of their right to liberty at the European Court of Human Rights.¹⁰

- **Control order restrictions violate right to liberty**

The non-derogating control orders imposed on a group of Iraqi and Iranian asylum seekers under the Prevention of Terrorism Act 2005, which, among other things, imposed an 18-hour curfew and prohibited social contact with anybody who was not authorised by the Home Office, amounted to a deprivation of liberty

⁵ *Campbell v Mirror Group Newspapers* [2004] UKHL 22. See also *Douglas v Hello! Ltd* (2005) EWCA Civ 595; *HRH Prince of Wales v Associated Newspapers* [2006] EWCA Civ 1776; *Mosley v News Group Newspapers* [2008] EWHC 1777

⁶ *Reynolds v Times Newspaper* [1999] UKHL 45

⁷ *Jameel v Wall Street Journal Europe* [2006] UKHL 44

⁸ Quoted in the *Times*, 'Landmark ruling heralds US-style libel laws in Britain', 11 October 2006.

⁹ *A and others v Secretary of State for the Home Department* [2004] UKHL 56

¹⁰ *A and others v UK*, ECtHR Grand Chamber, 19.02.09

contrary to Article 5. The government responded by issuing new orders, subjecting the men to less restrictive conditions.¹¹

Torture

- **Evidence procured by torture must not be admitted in court**

The Special Immigration Appeals Commission (Procedure) Rules 2003 ruled that the Commission could receive evidence that would not be admissible in a court of law. The court determined that this did not extend to statements procured by torture. The Commission could not receive evidence that had, or might have, been procured by torture inflicted by officials of a foreign state, even without the complicity of the British authorities. This conclusion was based on the common law rule excluding evidence procured by torture and gave effect to the absolute prohibition of torture in Article 3. The Commission should refuse to admit evidence if it concluded on a balance of probabilities that the evidence had been obtained by torture. If the Commission was left in doubt as to whether the evidence had been obtained by torture, then it should admit it, but it had to bear its doubt in mind when evaluating the evidence.¹²

- **Deportation where there is a real risk of torture would violate the absolute prohibition on torture**

Deporting an individual to a country where there was a real risk that they would be subjected to torture, inhuman or degrading treatment would be a breach of Article 3 (prohibition on torture, inhuman and degrading treatment). It is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3. The prospect that the person might pose a serious threat to a community, if not returned to his country of origin, did not reduce in any way the degree of risk of ill treatment that the person may be subject to if deported.¹³

Jurisdiction in Iraq

- **Public authorities in 'effective control' of areas outside the UK are subject to the HRA**

The duty on public authorities under the HRA to comply with the Convention rights applies not only when a public authority acts within the UK, but also when it acts outside the territory of the UK but within the jurisdiction of the UK. This will apply when the authority has "effective control" over the area outside the UK. A man who had died as a result of injuries sustained in a detention unit in a British military base in Iraq was "within the jurisdiction" of the UK and covered by the HRA. Iraqi civilians who, it was claimed, had been unlawfully killed by members of British armed forces in southern Iraq in 2003, had not been within the jurisdiction of the UK when they were killed because the British troops did not have "effective control" over the area where the killings occurred.¹⁴

¹¹ *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45

¹² *A and others v Secretary of State for the Home Department* [2005] UKHL 71

¹³ *Saadi v Italy* ECtHR Grand Chamber, 28.02.08

¹⁴ *R (Al-Skeini) v Secretary of State for the Defence* [2007] UKHL 26

Protecting right to life

- **Right to life can include positive obligation to protect life**

The right to life under Article 2 not only prevents the State from intentionally taking life, it also requires States to take appropriate steps to safeguard life. The State's duty includes putting in place effective criminal law provisions to deter the commission of offences and law-enforcement machinery. Article 2 may also go beyond that to imply in certain well-defined circumstances a positive obligation on authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual. This duty will be breached where it can be shown that the authorities failed to do all that could reasonably be expected of them to avoid a "real and immediate" risk to the life of an identified individual about which they knew, or ought to have known.¹⁵

- **Soldiers in Iraq fall under the jurisdiction of the HRA**

A British soldier serving in Iraq who died from hyperthermia after complaining that he couldn't cope with the heat, was subject to the jurisdiction of the HRA. The court said that the protection of Article 2 (the right to life) was capable of extending to a member of the armed forces wherever they were. There is a positive obligation on states under Article 2 to protect life. If there is a known risk to life which the state can take steps to avoid or minimise, such steps should be taken. Article 2 recognises that the lives of members of the armed forces when sent to fight or keep order abroad cannot receive absolute protection. But soldiers do not lose all protection simply because they are in hostile territory carrying out dangerous operations. For example, to send a soldier out on patrol or into battle with defective equipment could constitute a breach of Article 2. The circumstances of the soldier's death in this case gave rise to concerns that there might have been a failure by the army to provide an adequate system to protect his life. An inquest was necessary to establish by what means, and in what circumstances, he met his death.¹⁶

Investigations into deaths

- **Duty to investigate death in custody**

Where a death has occurred in custody the state is under a duty to publicly investigate before an independent judicial tribunal, with an opportunity for relatives of the deceased to participate.¹⁷

¹⁵ *Osman v UK* ECtHR, 28.10.98

¹⁶ *R (Smith) v Oxfordshire Assistant Deputy Coroner and Secretary of State for Defence* [2008] EWHC 694 (Admin)

¹⁷ *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51. See also *R (Middleton) v HM Coroner for Western Somerset* [2004] UKHL 10; *R (Takoushis) v HM Coroner for Inner North London et al* [2005] EWCA Civ 1440 and *D v Secretary of State for the Home Department* [2006] EWCA Civ 143.

Marriage

- **Scheme to prevent sham marriages disproportionately interferes with right to marry**

The scheme under the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, which required certain people subject to immigration control to obtain a certificate of approval from the Secretary of State before they were allowed to marry, other than in an Anglican ceremony, was challenged under the HRA. The court said while states have the right to regulate marriage and to seek to prevent marriages of convenience, the conditions imposed by the scheme were relevant to immigration status but had no relevance to the genuineness of the proposed marriage. The scheme imposed a blanket prohibition on the exercise of the right to marry by all in the specified categories, irrespective of whether their proposed marriages were marriages of convenience or not (although there was a discretionary exception for compassionate circumstances). That was a disproportionate interference with the exercise of the right to marry under Article 12. The court used their powers under the HRA to read the legislation compatibly with Article 12. The court also made a formal declaration that the legislation was incompatible with Article 14 as it discriminated between civil and Anglican marriages.¹⁸ The government stated that legislation would be passed to remove the discrimination.

Asylum seekers

- **Duty under HRA to avoid asylum seekers living in conditions amounting to inhuman or degrading treatment**

A group of asylum seekers were excluded from support for accommodation and essential living needs under asylum legislation¹⁹ because the Secretary of State had decided that they had not made their claims for asylum as soon as reasonably practicable after their arrival in the UK. They challenged this under the HRA. The court ruled that as soon as an asylum seeker makes it clear that there is an imminent prospect of his treatment reaching inhuman and degrading levels (such as sleeping in the street, being seriously hungry and being unable to satisfy basic hygiene requirements), the Secretary of State has a power under asylum legislation and a *duty* under the HRA to avoid it.²⁰ Following the court's decision, the Immigration and Nationality Directorate adopted a new approach to comply with the judgment: "no claimant who does not have alternative sources of support, including adequate food and basic amenities, such as washing facilities and night shelter, is refused support."²¹

¹⁸ *R (Baiai) v Secretary of State for the Home Department* [2008] UKHL 53

¹⁹ They were excluded from support granted under the Immigration and Asylum Act 1999 Part VI by the Nationality, Immigration and Asylum Act 2002 s.55(1).

²⁰ *R (Limbuela and others) v Secretary of State for the Home Department* [2005] UKHL 66

²¹ Home Office, 'Asylum Statistics: 4th quarter 2005 UK', 2005.

Disability

- **Duty to take positive action to secure physical integrity and dignity of disabled tenant in local authority housing**

Where a local authority knew that a disabled tenant's housing was inappropriate but did not move her to suitably adapted accommodation, they failed in their duty to take positive steps to enable her and her family to lead as normal a family life as possible and secure her physical integrity and dignity. Damages were due for this failure.²²

- **Policies on lifting must consider competing rights**

Health and Safety Executive guidance on manual lifting was updated in 2002, highlighting the need to comply with the HRA and the Disability Discrimination Act. It was aimed at a balance between health and safety policy and the needs and rights of disabled people.²³

A lifting policy should balance the competing rights of the disabled person's right to dignity and participation in community life and the care workers' right to physical and psychological integrity and dignity. Following a challenge under the HRA, East Sussex local authority amended its Safety Code of Practice on Manual Handling to include consideration of the dignity and rights of those being lifted. This was circulated to other local authorities, NHS trusts and care providers to encourage them to review their policies.²⁴

Mental health

- **Onus of proof in mental health cases reversed to protect patients**

The Mental Health Act 1983 was successfully challenged under the HRA, leading to an amendment to put the burden of proving that continued detention for treatment for mental illness is justified under Article 5 (the right to liberty) on the detaining authority, and not the patient. The court made a 'Declaration of Incompatibility' under the HRA (s4), which was followed by a fast-track remedial order to bring the law into line with Article 5.²⁵

Restraint of young people in secure training centres

- **Unnecessary physical restraint of young people in custody is a breach of HRA**

The Secure Training Centre (Amendment) Rules 2007 allowed officers working in these institutions for young offenders to physically restrain and seclude a young person to ensure 'good order and discipline'. These amendments were passed with very limited consultation and with no race equality impact assessment. The court ruled that any system of restraint that involves physical intervention against another's will and carries the threat of injury or death, engages the Article 3

²² *R (Bernard) v Enfield* [2002] EWHC 2282 Admin

²³ Health and Safety Executive, 'Handling Home care: Achieving safe, efficient and positive outcomes for care workers and clients', 2002.

²⁴ *R (A and B) v East Sussex County Council* [2003] EWHC 167 (Admin)

²⁵ *R (H) v Mental Health Review Tribunal (North and East London Region)* [2002] QBD 1

prohibition on inhuman and degrading treatment. This is particularly so when it applies to a child who is in the custody of the state. The Secretary of State could not establish that the system was necessary for ensuring 'good order and discipline' and the Rules breached Article 3. The Rules were quashed.²⁶

Sexual orientation

- **Same-sex partner given 'nearest relative' status**

The same-sex partner of a detained mental health patient, whom the local council had refused to afford the status of 'nearest relative', challenged this decision under Article 8 (respect for private life) arguing that private life includes issues of sexuality, personal choice and identity. The court accepted that same-sex partners should be covered by the co-habiting rule applied to heterosexual couples who qualify as 'nearest relative' after 6 months co-habitation.²⁷

- **HRA provides protection against discrimination on grounds of sexual orientation**

The courts have used their powers under the HRA to eliminate the discriminatory effect of para 2, Schedule 1 of the Rent Act 1977 which meant that the survivor of a homosexual couple could not become a statutory tenant by succession whilst the survivor of a heterosexual couple could.²⁸

Race

- **Changes made to cell-sharing policies following racist murder of prisoner**

Following the murder of a prisoner by his racist cell-mate and a successful challenge under the HRA for a public inquiry, the Prison Service introduced changes to its policy and procedures relating to cell-sharing risks, allowing information-sharing to identify high risk factors.²⁹

Gender

- **Gender re-assignment requires legal recognition**

A successful challenge was made against the different treatment for post-operative transsexuals in obtaining marriage certificates and a declaration was made that the Matrimonial Causes Act 1973 was incompatible with the right to private and family life (Article 8) and the right to marry (Article 12). The government altered the law and the Gender Recognition Act 2004 now entitles a transsexual person to be treated in their acquired gender for all purposes, including marriage.³⁰

²⁶ *R (C) v Secretary of State for Justice* [2008] EWCA 882

²⁷ *R (SG) v Liverpool City Council* October 2002

²⁸ *Ahmad Raja Ghaidan v Antonio Mendoza* [2004] UKHL 30

²⁹ *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51

³⁰ *Bellinger v Bellinger* [2003] UKHL 21

- **Separation of mother and baby in prison requires flexibility**

Following a challenge to the blanket Prison Services rule, requiring compulsory removal of all babies from imprisoned mothers at 18 months, the Prison Service amended the requirements for the operation of Mother and Baby Units. The removal of the child had to be a proportionate interference with her right to family life. It was necessary to consider the individual circumstances and whether it was in the child's best interest to be removed.³¹

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³¹ *R (P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151