

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

## **THE HUMAN RIGHTS ACT**

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“This Bill will bring human rights home ...Our courts will develop human rights throughout society. A culture of awareness of human rights will develop.”

*Lord Irvine, House of Lords 2nd reading of the Human Rights Bill – 3 November 1997*

Perhaps it was inevitable that the Government would eventually talk of amending the Human Rights Act (HRA). Ever since September 2001 the Act, once the centrepiece of a (comparatively) progressive first Labour term, has seemed fair game for those seeking the cause of society's ills. Not all have used language as provocative as the Sun's Richard Littlejohn who said the HRA was a “charter for perverts, terrorists, malcontents and illegal immigrants”. However, there seemed to be a growing public belief that the Act was only of use to those who seek to harm us, to ‘fat cat’ lawyers and the ‘human rights lobby’.

Perhaps these sentiments are understandable. To many people the HRA has not been something they could use or benefit from. It has been in the domain of courts and of lawyers. Most people don't spend their time in legal proceedings so there was little feeling that the Act was ‘for them’.

It is against this backdrop that the events of recent weeks should be put in context. Following the July bombings the initial response from the Home Office was commendably measured. New offences of acts preparatory to terrorism and indirect incitement would be published but there would be no rush to legislate. Unfortunately, the Prime Minister wanted tougher talk and more action. Saying the 'rules of the game had changed', he set out a raft of proposals deemed necessary to combat terrorism. Top of the list, and the sparking point for attacking the HRA, were plans to allow removal of non nationals who could not be forced to leave the country previously. To do so would put the UK in breach the bar on torture contained Article 3 of the Convention, as the Government accepted that it was likely that if returned they would be killed or tortured. The principle means of achieving this would be to seek assurances from these states that they would not mistreat anyone. However, should the HRA be any legal impediment to this process, then the Prime Minister warned "we will legislate further, including, if necessary, amending the Human Rights Act in respect of the interpretation of the European Convention on Human Rights".

The following week the Lord Chancellor, Lord Falconer, suggested that another course of action might be to pass legislation forcing greater weight be given to national security concerns when considering human rights issues. Another, somewhat blunt, possibility suggested removing article 3 from the HRA so that it could not be relied on until a case went to the European Court of Human Rights.

Whatever approach is taken the HRA is clearly under serious attack. It appears that there support for this assault. According to an ICM/Guardian poll almost three quarters of the public believe it is right to give up civil liberties to improve security against terrorist attacks. It is clear that defenders of the HRA must work hard to dispel myths and preconceptions, to show that it is not an obstacle to national security. We must persuade doubters that proportionality requirements intrinsic to most of the articles already require national security to be a central consideration in human rights issues.

At the heart of the myth is a preconception that the HRA is used by the courts to undermine the will of the public as expressed through an elected Parliament. A view the Government is happy to perpetuate. The Human Rights Act specifically preserves parliamentary sovereignty. It can only overrule secondary legislation which will not have

received full parliamentary scrutiny. It may be that when are decisions of fundamental constitutional importance (such as the House of Lords Appellate Committee ruling in December 2004 by eight votes to one that detention of foreign nationals under part 4 of the Anti Terrorism Crime and Security Act 2001 breached the HRA) the Government feels compelled to act. Its response may well be to introduce further draconian legislation!

Linked to this perception, and again a popular theme of some ministers, is that the courts are somehow undemocratic. Because we don't vote for judges they should be restricted in their ability to determine laws. You do not have to engage in lofty debates about constitutional law and the separation of powers to grasp how frightening the implications of political interference in judicial independence can be. At the heart of the rule of law is consistency and equality of treatment. Even the fiercest critics of the legal system might want to pause and imagine a democracy where the judiciary was subservient and accountable to the Government of the day.

Those who condemn the HRA will often base their criticism on the fact that the Articles it contains are in some way 'foreign', an example of European law being foisted upon an unwilling British people. Leaving aside the fact that many of the architects of the Convention were British, it is worth considering which convention articles embody this alien intrusion.

Many of the rights contained in the HRA are embodiments of English common law traditions stretching back centuries. Our right not to be detained without lawful justification; to receive a fair trial if accused of a criminal offence; to express ourselves freely; and to peacefully protest go to the heart of democratic tradition. We may not have had a right to privacy in UK law prior to the HRA. However, the often declared belief that 'an Englishman's home is his castle', while perhaps being somewhat misogynistic, shows how important the notion of privacy can be. Even the right not to be tortured, at the heart of current argument, is something few people would argue against in principle. The problem seems to be that while we might be repelled at the thought of torture taking place within our borders, we seem less concerned by the prospect of exporting people to other states where they are likely to face death or mistreatment.

Those who proclaim that 'terrorists don't have rights' are unlikely to stand by the full implications of such a statement. Hopefully anyone other than the most committed hardliner would accept that anyone suspected of terrorist crime should be put on trial if possible and not locked up indefinitely without ever being brought before a court. Otherwise they would be advocating the sort of summary justice more associated with the Taliban or found in Saddam Hussein's Iraq. In other words they believe in the rights to a trial and to liberty. Their objections are not to the *existence* of these rights but to a belief that these rights are applied unfairly and can place us in jeopardy.

So how do we address these criticisms? It was a belief in these core rights and protections that lead the Labour party towards incorporation of the Convention. In the last days of opposition, as they prepared for government, there was a genuine belief that the passing of the Human Rights Act was an essential element of the party's vision of society. According to the 1997 election manifesto, passing the HRA would allow, 'citizens...statutory rights to enforce their human rights in the UK courts'. As mentioned above, it seems to be a lack of connection with the HRA that underlies much of the antipathy to it. There is every reason to be confident that the new Equalities and Human Rights Commission, due to start work in 2007, will address this. For the first time there will be a statutory body under a duty to promote and protect human rights and to encourage good practice. Human rights protections will extend beyond the courtroom into wider society. Elderly people in care homes being made to eat dinner on the toilet might not amount to a strict breach of Article 3 but it is certainly inhuman and degrading treatment.

The Commission may have the potential to address concerns over unfairness in the future. The more pressing need that also needs to be addressed is the belief that human rights lay us open to terrorist attack. This presents all advocates of human rights with a challenge. We must be able to argue that human rights *are* compatible with security. There are many measures that the Government can reasonably take which can comply with the HRA. New proposed offences such as 'acts preparatory to terrorism' and 'indirect incitement' should be scrutinised to ensure human rights issues are addressed but it is important that this is done constructively. Pressure must be placed on the government to allow the admissibility of intercept evidence in trials to allow prosecution of those who the government claim are terrorists. Positive suggestions can be made

about protecting the court process, witnesses and jurors without making inroads into the fair trial process. We can argue that the police and security services should have the resources and appropriate proportionate powers to meet the threat of terrorism. If the police want to lock suspects up for three months before charge to allow evidence to be gathered, we should be prepared to seek alternative ways to ensure all appropriate evidence can go before a court

We are under a duty to do all we can to ensure that human rights protections extend to all. Tony Blair has correctly argued that the most effective way of combating terrorism is not to allow divisions to grow between communities. The danger in attacking human rights protections is that they provide the litmus test between reasonable and acceptable measures and those likely to cause anger and resentment. Particularly in Muslim communities, there is a need to feel that the state is acting fairly in combating terrorism.

The Human Rights Act should be a proud legacy of the Labour government. Even a minor amendment will set a precedent allowing progressive chipping away at rights and protections. We must do all we can to preserve it.

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