

## **A Fair Trial for the Human Rights Act**

**Lecture to the LSE Law Department from Rt Hon Sadiq Khan MP 9/6/11**

### **Check Against Delivery**

Ladies and Gentleman,

It is a pleasure to be here this evening and I want to thank you all for coming and the LSE Law Department for hosting tonight's event

I would also like to thank Francesca for doing me the honour of agreeing to chair – as one of the leading authorities on the Human Rights Act tonight's discussion could not be in safer hands

When I first began discussions with the Law department about hosting this event, many months ago, the idea was for it to be an exposition of Labour's past and current position on human rights and, as the title suggests, an assessment of whether the Human Rights Act receives a fair hearing in the press, or indeed parliament

Since then, a lot has happened

From super-injunctions and rows over the deportation of foreign offenders, to compensation for prisoners and appeals to the sex offender's register - exceptional cases have been deliberately conflated and confused sometimes in an attempt to undermine human rights legislation

This doesn't mean to say that we shouldn't take conflicts and tensions over the Human Rights Act seriously – some concerns *are* legitimate and I will try to tackle them head on

But, recent events have made clear that now, perhaps more than ever, people who believe in strong codified human rights legislation need to provide a robust and convincing defence of it and be positive advocates for it – and that is where I intend to start this evening

First by going back first principles – being explicit about what human rights are, honest about how they relate to our civic responsibilities and clear about the benefits of enshrining them in law and why Labour remains proud to have done so

I will then unpack some of the cases that have been held up as the morally counterintuitive implications of enforcing the HRA - and provide counter examples to the critics who say no good, common sense decisions emerge from it

Finally, I will assess the coalition's approach to human rights and the complete political fudge that is the Commission on a British Bill of Rights

As the distinguished Board Member of this university's Centre for Human Rights, Lord Frank Judd, has said, human rights are **not** an "optional extra for a civilised society" but rather they are the cornerstone of it

Inalienable, indivisible and ours simply by virtue of our humanity – these rights are inherent to all human beings

And they are not abstract concepts or things that don't affect ordinary people's everyday lives

They are fundamental rights and freedoms that underpin our society and democracy:

such as the right to life, liberty, to be free from torture or inhumane treatment, the right to a fair trial, free and fair elections, the right to receive an education, to marry, to practise your religion and express yourself freely

In the furore of the sex lives of footballers, it is easy to lose sight of these essential rights and how they came to be regarded as the cornerstone of a civilized society

Our own human rights legislation has its roots in the atrocities witnessed during the Second World War.

This led to the allied nations of Europe – inspired by the Universal Declaration of Human Rights and encouraged by Winston Churchill– to devise an international treaty to prevent the most serious violations of human rights from happening again

Sir David Maxwell-Fyfe, Conservative Home Secretary in Churchill's government, was charged with overseeing the drafting of the European Convention on Human Rights, and Britain was the first of the European countries to ratify it in 1950

It wasn't until the Wilson government that the UK, in 1966, agreed that British citizens could seek redress for perceived violations of their human rights by the government at the European Court of Human Rights, as outlined in the Convention

But to do this, British people had to go through the time and expense of taking their cases to Strasbourg

Despite several calls for the UK to have its own human rights legislation to protect the rights and liberties of British people in *domestic* law, it wasn't until after the 1997 Labour victory that citizens gained the statutory right to enforce their human rights in the UK

This followed a long debate, not dissimilar to now, about whether the UK should introduce a Bill of Rights

It was notable Conservative ministers and leading Liberal Democrats who were initially the strongest advocates of a Bill of Rights based on the rights in the ECHR which UK governments (but not courts or other public authorities) were already bound to respect

Well known Conservative supporters of such a measure at various times included former Conservative Home Secretary Leon Britain and Former Conservative Minister Norman St-John Stevas, former Conservative Attorney General, Sir Michael Havers and former Tory Lord Chancellor Quinton Hogg (subsequently Lord Hailsham).

The Labour government, true to its manifesto pledge, drafted the Human Rights Act in 1998 and by 2000, when the legislation was enacted, for the first time *British* citizens could bring their human rights cases to *British* courts in front of *British* judges

The Act enshrined in domestic law most of the rights contained in the ECHR. It also included two additional clauses to underline the importance of freedom of conscience and religion and a free press.

But the Act was deliberately crafted to ensure that British courts weren't merely an echo-chamber of the European Court of Human Rights in Strasbourg

It took the rights of the Convention and allowed our judges to interpret them *as they saw fit*.

Meaning that while UK courts have to 'take account' of Strasbourg case law on cases relating to a Convention right, they don't have to incorporate it and can depart from it when appropriate

This was made explicit by the then Labour Lord Chancellor, Lord Irvine, when he said domestic courts must be allowed "*flexibility and discretion*" in developing human rights law, which is precisely what the Human Rights Act gives

It recognises that not all rights carry the same weight, but rather they fall into three categories:

- 1) Absolute rights - those that can never be infringed, such as the right to protection from torture

- 2) Limited rights – such as the right to liberty which may be withdrawn under particular circumstances prescribed by law –the obvious example being following conviction for a crime

And

- 3) Qualified rights – such as freedom of expression – where a balance is struck between the rights of the individual asserting free speech and the needs of the wider community to freedom from hate or harassment or to protect their privacy.

But most crucially, it explicitly maintains parliamentary sovereignty and the supremacy of parliament as the only law-making authority

If a British court finds our legislation does not comply with the Human Rights Act - it cannot use the Human Rights Act to force parliament to change the law

Instead, it can issue what is known as a “*declaration of incompatibility*” and it is up to parliament – and parliament alone – to decide the best way to respond and may in fact choose to not respond at all [And I know Francesca helped devise this approach as a Research Fellow at the Human Rights Incorporation Project at King’s College law school in the mid 1990s].

It is this that distinguishes our Human Rights Act from other examples of rights legislation – such as the US Bill of Rights – which does have supremacy over the US government and Congress

The fact this essential feature of the Human Rights Act is little known has, it would seem rather cynically, been exploited by the Tory-led government, many of whom are explicit that they want to see the Act repealed

Let me give you just one recent example is this:

In February, at the height of the media maelstrom surrounding the government’s announcement it was to give prisoners the vote, The Home Secretary gave a statement to the House of Commons declaring that, as a result of a Supreme Court decision 10 months earlier - in April 2010 - the government were *going to have to allow* sex offenders the opportunity to appeal their inclusion on the sex offenders register which they are on for life.

She said that the government were ‘disappointed and appalled’ by the decision and that there was no possibility for further appeal and so the government would change the law accordingly. In other words, she was being forced by the courts to make the policy announcement she was making.

Now, either the Home Secretary didn't know the law, or she is being disingenuous about its application. The Supreme Court declared that the current law as applied to the sex offenders register was incompatible with the government's obligations under the Human Rights Act.

Once it had made that ruling it was up to parliament to decide how to proceed and the Court could not, and did not, prescribe or dictate a course of action. One option the Home Secretary had was to ignore the ruling and not change the legislation. She was not even under an obligation to refer to it at all. Another was to review the current situation and see how it could best be adapted to be compliant with the law, but put public protection first. But she did not choose either of those options.

The Home Secretary has no excuse – she should know the law as it applies to her brief and has a responsibility to relay it accurately to parliament

Now, the fact that there is a lack of general knowledge and understanding of the Human Rights Act and how it works and that this *can* be exploited by politicians, is, I suspect, in part because there was no real attempt at its inception to communicate its benefits to our citizens

A huge amount of time was spent getting Judges and lawyers ready for the Act but nowhere near the same effort to better inform the public

Nevertheless it was Labour that made the bold decision to enshrine the Convention rights that protect people's freedoms into British law

And we did so not because of pressure from the tabloids (quite the contrary), not because the focus groups and opinion polls said so, not because we wanted to invent a raft of new rights - but because we wanted to deliver for British citizens the access to redress IN BRITAIN for violations of rights already protected by the ECHR as virtually every country in Europe - East and West- had already done. Labour recognised that governments and public authorities should be kept in check and individuals should have their rights protected against encroachment from the state.

Now, I am not saying that the legislation is perfect and its just the way it was articulated by ministers that was wrong - there may indeed be good ways to build on and improve the Human Rights Act and we should discuss openly what that might entail. There is no legislation – no bill of rights –that can't be improved.

But when the Act was developed I accept more could have been done to educate and inform the public, to try to cultivate a feeling of public ownership over fundamental legislation that affects the decisions of all public bodies – and we should have been clearer about what human rights are and how they relate to our everyday lives

The Labour government of the time introduced the Act but didn't try to explain the good reasons why, or who and what it was designed to protect. It made it sound like a technical measure at times.

And let's be honest, sometimes some ministers sounded very frustrated with it when decisions they made were highlighted as breaches of human rights. But then, of course, that's what human rights charters and bills of rights are for and politicians get frustrated by them the world over.

That is very different from repealing them which, as our last manifesto made clear; Labour had no intention of doing to the HRA.

"No rights without responsibilities" was a mantra often deployed to pre-empt attacks on the Human Rights Act from those who argue that 'the irresponsible' have, by their own actions, somehow forfeited the right to such protection - or conversely that the HRA only served to protect the rights of an 'unpopular minority'

It doesn't. The Human Rights Act protects everyone – anyone who could be falsely accused, discriminated against; suffer at the hands of unfair decisions by public bodies

Now, it might be unpopular to say this – but that includes the unpopular minority

For example, we can deplore the criminal actions of offenders, but however heinous their crimes we also want to live in a society where they have the right to a fair and open trial – and if found guilty face the full weight of the law

For although our absolute rights are not contingent on any responsibilities, we *should* lose some rights – to liberty, family life, assembly, expression and more – proportionately to the extent that is necessary to respect the rights of others or protect public safety and well being

But it has been very easy for critics to peddle mis-information, conflate rulings made under the Human Rights Act with those passed down by the European Court of Human Rights and selectively highlight examples that play into the argument that it is a 'criminal's charter'

Scratch a little below the surface and these can be repudiated, but its not difficult for inaccurate - or sometimes plainly false - cases of the perceived misuse of the Human Rights Act to stick in the public's conscience.

The press have reported as fact that a serial killer received hardcore porn in prison due to the Human Rights Act

But this is total fiction

The prisoner in question, Dennis Nilson brought his case to the court when he was denied access to porn by the prison governor. The court ruled that there had been NO breach of his human rights and that the judicial review should not even go ahead– the governor’s decision stood

We have heard stories that a suspect in a car robbery was given his choice of a take-away meal by the police because of his human rights

Also total fiction. There is no human right to McDonalds - or any other fast food outlet. The police decided to comply with his demands as part of their negotiating strategy, not because of the Human Rights Act

More recently, the former Shadow Justice Secretary, Dominic Grieve QC, in 2009 claimed that the Derbyshire police force had refused to release pictures of two fugitive murderers because it could have impinged on their human rights.

Again, this was totally untrue – the HRA imposes an obligation on the State to protect people from serious and foreseeable criminal attack and properly interpreted would not prohibit the use of ‘wanted posters’ with photographs of criminals to this end. In fact, the Derbyshire Constabulary put out an official statement correcting the Shadow Justice Secretary – saying it has “never refused to release photographs on the grounds of the human rights of the offenders.”

There are other examples reported in the media of apparent misuses of the Human Rights Act that are either plainly untrue, or, if brought before a judge, thrown out of court

But we often don’t hear the final ruling – only the fact that an application has been made

But it is an entitlement of all citizens to be able to bring cases to the courts if they feel their rights have been breached - this is why bills of rights like the HRA are in most countries seen as an essential part of democracy so that *every* individual can hold the state to account, and not just once every four or five years at the ballot box.

But there is no entitlement to have a case upheld. If there clearly has not been a breach of a person’s rights, as protected by the HRA, we should expect the case to be thrown out at the earliest opportunity and no more time to be wasted – and by in large, that is what happens.

That is why CCTV still operates to protect public safety and why our courts have refused to overturn the ASBO regime.

However, there have been cases where a decision under the Human Rights Act has compounded a genuine grievance with the legal and justice system and these need to be explained properly and lessons from them must be learned

Take the recent tragic case that has received much coverage of failed Iraqi asylum seeker Aso Mohammed Ibrahim

In 2003, Ibrahim, who already had a caution for criminal damage, ran over a young girl – Amy Houston - and left her fatally injured under the wheels of his car as he fled the scene. A more tragic incident is hard to imagine.

Ibrahim later gave himself up to the police and was convicted – but was charged not of causing death by dangerous driving. Not of manslaughter or murder as one might have expected – but of the relatively minor offences of fleeing the scene of a crime and driving without a license.

For his actions he received an incredibly lenient sentence of only four months. Four months for killing a child.

Amy's father, understandably outraged by the injustice of this situation, has campaigned for years for his daughter's killer to be deported, but *for years* the authorities did nothing – they did not move to deport him or respond to Amy's father's demands

The decision to charge him for a lesser crime than the one he actually committed, the decision to give him the lenient sentence he received and the inaction by the authorities who should have deported him when his asylum application failed were all, in my mind, completely unjust – but none of this was the result of the Human Rights Act

The delay in taking steps to remove him spanning several years gave Aso Mohammed Ibrahim time to begin a relationship with a British woman and have two children with her

It was this that kept him in the country

Article 8 of the Human Rights Act protects the right to a family life and the impact of his deportation on his small children, born and raised here, is what allowed Aso Mohammed Ibrahim to stay. Some people may disagree with this decision but others will accept that the sins of the fathers should not be visited on their children who would have been deprived of their father as a result.



I can understand why Amy's family feel justice has not been served – they were failed by the Home Office who did not take the necessary steps to deport Aso Mohammed Ibrahim when they could and by the criminal justice process when he did not serve a prison sentence that was befitting of the crime he committed

A crime of that sort should carry a long prison sentence – measured in years, not months. It should also have a deportation order attached to it so upon conclusion of a prison sentence a convicted criminal without immigration rights can be deported

Examples like this – where there has been a systemic failure to deliver justice for victims and their families due to inefficiency or too lenient a sentence – are used to damage the credibility of the Human Rights Act, which *does* allow for limitations of rights – including those protected by article 8 – in the interest of public safety or to stop crime

They detract from real benefits the Act has delivered for ordinary people who, without it, would not have been able to stand up to the government and other public bodies when their rights are infringed

The Human Rights Act has delivered some landmark rulings that have changed the power relationship between the individual and the state

It is because of the Human Rights Act that Dianne Blood was able to successfully challenge the decision preventing her from naming her deceased husband on their child's birth certificate

It is because of the Human Rights Act that Verna Bryant was able to secure an inquest into her daughter, Naomi's, murder – who was unlawfully killed following a catalogue of public authority failings that allowed the release of a dangerous man to offend again

And it is because of the Human Rights Act that a local authority had to reconsider its insensitive decision to separate an elderly, disabled couple who had been together for 65 years by initially failing to admit them into the same care homes.

It's true that these common sense decisions made on the basis of the Human Rights Act receive less coverage than the more sensational distortions of its rulings or unrealistic bids for compensation by people whose rights have not been breached

But the real success of the Human Rights Act is something that receives no coverage at all

It has, by institutionalising human rights, changed the culture and procedures of public bodies in a way that makes them duty bound to respect our human rights in their decision making process

Each bill, before it is presented to Parliament, needs a certificate to show it is compliant with the Human Rights Act and if not, ministers need to explain why. This means Secretaries of State and the department's they run have to bear our human rights in mind when they are drafting legislation

By changing the culture and discourse on human rights, it was the previous Labour government that has set the scene for the discussions we are having today about the role of human rights in our constitution

The two parties in the coalition entered into it with diametrically opposed positions on the Human Rights Act

The Lib Dems said, in their manifesto, that they would ensure that *"everyone has the same protections under the law by protecting the Human Rights Act"*

While the Tories said in theirs that they would abolish the Act and replace it with a Bill of Rights

So what we got was a commission to consider the options

But not the cross party commission one might expect for something of this constitutional magnitude. Not one comprising of a cross section of stakeholders in the human rights field, or even MPs. Instead we got a commission made up overwhelmingly of lawyers.

Of the people, for the people and by the people it is not!

Distinguished as the commissioners may be, they will do nothing to address one of the principle criticisms of the process for adopting human rights legislation – that it is designed by and for lawyers and doesn't sufficiently engage with the ordinary citizens whose rights it protects.

More surprisingly though, it can't actually deliver what David Cameron promised his party

The terms of reference of the Commission clearly states that its objective is to *'investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extends our liberties'*

And, as I made clear at the time of the announcement, Labour does not oppose consulting on the introduction of an additional Bill of Rights

In fact, when we were in government we began the process of looking at an additional Bill of Rights to the HRA.

But our Bill of Rights would have built on the Human Rights Act – not replaced it.

If the Human Rights Act is repealed, this won't mean that Britain is no longer subject to the European Convention of Human Rights – it would just mean that the only course of redress that British people have would be via the European Court of Human Rights in Strasbourg

Unpopular decisions passed down by the European Court of Human Rights, like the one to lift the blanket ban on prisoner voting, would still stand if the Human Rights Act was repealed

On this issue Labour's position is clear – the right to vote is not absolute and a person should lose it if they fail to respect the rights of others to such a serious degree as to warrant a custodial sentence

However, we do believe in the rule of law and we do have obligations under the ECtHR whose jurisdiction we accept – so this government needs to outline how it intends, at least by the smallest margin possible, to abide by the Court's ruling

But that being said, this doesn't mean we shouldn't take whatever opportunities there are to reform the ECtHR – which suffers from a debilitating back log of cases and can be criticised for the variable quality of the judges.

But the government shouldn't underestimate the impact to our international standing and to the domino effect on other Council of Europe members - in particular in the relatively new democracies of Eastern Europe and Russia - of not living up to our obligations to the court. Nor should they be disingenuous about the implications of withdrawal from the ECHR, or underestimate the interrelated nature of the convention, the court, the Council of Europe and, ultimately, membership of the Europe Union

The ECHR and the European Court of Human Rights have been a useful political football for the Eurosceptic Tory right, which they have enjoyed kicking – but this manufactured angst is ultimately self-defeating in the long term, as we have to believe that this Tory led coalition government will have no truck with the rumblings about withdrawing from the Council of Europe or indeed the EU, and have expressed no intention of coming anywhere close to this position – so we will remain under the jurisdiction of European human rights institutions under any decent British government of any political hue in the future.

We don't even expect the commission to report back until 2013 and when they do, it is more likely that their findings will feed into the coalition parties' next election manifestos rather than inform this government's policies.

When announcing the imminent establishment of the Commission in February, David Cameron said its purpose was “to look at a British bill of rights because it is about time we ensured that decisions are made in this Parliament rather than in the courts.” Besides the fact that he announced his proposed outcome for this *Independent* Commission at the same time as declaring that it would be set up, as every good law student in this room will know, the whole purpose of bills of rights is to hold the executive and legislature to account in the courts, not to *reduce* their accountability.

In the meantime the Government needs to start showing some leadership on the tricky issues which are thrown up when rights collide – as has been the case recently with super-injunctions

The important issue of balancing the right to a private life – as protected by Article 8 of the Human Rights Act – and freedom of expression – as protected in Article 10 of the Act – has increasingly pitched the judiciary against the press and the lack of any intervention or answers by this government has led to parliamentarians flouting, rather than debating or amending the law

Everyone has the right, subject to lawful restrictions, to a private life – and it is something we expect and hope will be respected – for example when we give confidential information to a doctor or other public body

But we also live in a society where we hold freedom of speech and expression as a pillar of democracy

The right the media has to report what is in the public interest is crucial to this and it is acknowledged in the Human Rights Act – which requires judges to pay “particular regard” to the rights upheld in Article 10 through the additional clause the Labour Government introduced that I mentioned earlier - section 12.

And the media have gained a lot as a result – there has been increased protection for journalistic sources, greater access to court proceedings and a reduction in libel payments – though there is still a long way to go in that area

*Surprisingly, the press have been shy to report these areas of benefit*

But there does seem to be a problem with the way the law has been interpreted and some legitimate concern that issues which are genuinely in the public interest, rather than just interesting to the public, are being unduly protected by injunctions

The fact that these are regularly being broken by users on twitter just further highlights the need to add clarity to the guidance for judges and ensure that our legislation can keep up with the changing technological context. But this should not be a pretext for throwing more mud at our human rights laws.

Now, I have no problem with there being tensions between the judiciary, legislature and executive – Which one of us would want to live in a country where any one of these fully controlled the other? But we do need a system that works.

I welcome the fact that the government has followed our calls and finally established a joint Justice and Culture Media and Sport Select committee of both Houses to consider how to improve the current system and strike the right balance between an individual's right to privacy and the democratic right to freedom of speech and expression

It won't be an easy task. Dealing with fundamental rights on which there is little consensus, but plenty of media pressure, and a myriad of complexity - seldom is!

But that doesn't mean we should ignore it or shirk our responsibility to deal with it

As I said at the beginning of this lecture, those of us who believe in the Human Rights Act and the freedoms it protects have a duty to defend it, be positive advocates for it **and** take heed of legitimate criticisms levelled at it

It was never supposed to sit stagnant on the statute books, but rather be a living document responding to the pressures a modern society faces when balancing rights and freedoms with the new security challenges we face

sometimes when in government we got that balance wrong

We took too casual an approach to the hard won freedoms people in Britain should enjoy

Policies on detention without charge and control orders without checks and transparency may have diminished Labour's position on civil liberties, but the Human Rights Act still stands tall as one of our many proud achievements

We should champion that and the benefits it has brought – to all people that live under its jurisdiction – the law abiding majority that are entitled to have their rights protected by the public authorities that govern them and the minorities that often have no other recourse to the law, before which we are all equal.

But we must go further than just enhancing the understanding of the Act, within parliament and to the public at large

As I have tried to demonstrate in this lecture, the Human Rights Act is not a fringe measure that only lawyers care about and offenders use.

It should – and could - be a measure of national pride and international leverage – as, with our human rights enshrined in law, we can speak with some authority about abuses by other regimes

The best way to foster this may be to create an *additional* Bill of Rights and The Labour Party is willing to engage in debates about how this could be developed

But on the basis that it will incorporate and go beyond the Human Rights Act, not in any way retreat from it.

I want to thank the LSE for allowing me to make this lecture. And I look forward to working with some of you here today to advance some of the arguments I have made to our fellow citizens.

Thank you.