

# Human rights are majority rights

The Lord Morris of Borth-y-Gest Memorial Lecture

Bangor University

Speech by Lord Chancellor and Secretary of State for Constitutional Affairs

Lord Falconer of Thoroton

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Noswaith dda or good evening.

It is for me a real honour to be here to-night.

My week has been a north Wales week. I do not mean by that that I was topped for speeding.

On Wednesday I gave, in London, the Williams of Mostyn memorial lecture.

Gareth was, as you will all know, born in a taxi travelling between Prestatyn and Rhyl. Or that is what he told me. He never let on whether his mother was leaving the hospital in despair, or did not get there in time.

Gareth was a great lawyer, a great leader of the lords and an immensely brave and effective Attorney General.

Arriving here last night I passed the spot where he was born. How much we have lost by his all too early passing.

I have spent the day in North Wales. I started the building work at the new Carnarfon criminal justice centre. I opened the new witness suite at Llandudno magistrates court . I saw the work going on to increase the size of offices, in Mold combined court.

And I heard how so many more cases than before from Wales are now tried in Wales.

Justice is strong and growing here in Wales.

It is a real pleasure and an appropriate end to my visit to be invited to give the Lord Morris Memorial lecture here tonight in Bangor.

Lord Morris, rightly, is recognised as being one of the breed of Law Lords who fully encapsulated the qualities for which our judiciary are renowned. He was a judge of thirty years standing. He moved rapidly through the ranks and, as a Law Lord, presided over a significant number of cases which were not only influential in the development of our law then, but remain so now. I need only give one example; the Home Office v Dorset Yacht. A case that is familiar to all law students, young and indeed old. His judgment remains influential even today in defining the duty of care for public bodies and officials.

He was a great man, who served his country not only on the bench, but also in defence of its freedom during the First World War. That desire to serve and protect our nation's liberty is a trait which was seen throughout his time on the Bench. He was, it has been written, 'vigilant in protecting the freedom of the individual when threatened by the executive.'

And it is this trait which I think makes the topic of my lecture tonight entirely appropriate. And one, I

believe that both Lord Morris and Lord Mostyn, would have welcomed.

What I want to speak about this evening is human rights. I believe that the Human Rights Act which this government put on to the statute book in 1998 is, and will be seen as, one of the great legal, social and constitutional reforms not just of this government but of all of the post-war governments in the United Kingdom. It will be, I believe, a ratchet reform: one which it will not be possible to turn back - an embedded element of our legal and constitutional framework.

But I accept that there have been at times problems with the way the legislation has been operationally interpreted, and arguments and controversy about what effect it has had on our law. That's why I have been campaigning for it, arguing its merits in speeches and interventions in Parliament, up and down the country, and in visits I have made ranging from Australia to America. I want to continue that argument today.

So what I want to argue tonight is:

- that human rights and our human rights legislation is vitally important to this country now, and that the legislation is important not just for the few, but for the many
- that in looking and continuing to look at the effects and impact of the legislation on our laws and our practices, our conclusion, based on the evidence we have so far, is that the legislation has neither caused a crisis in our courts nor changed the nature of our law
- that, far from that effect, the legislation has in fact had a profound effect on policy and decision making throughout the State
- and that as a result, the Human Rights Act guarantees protection not just for minorities, but for everyone: that human rights are mainstream, not marginal

Firstly, then, the value of human rights. Human Rights are for everyone. They apply to everyone. They can be relied on by everyone. They are secured and guaranteed by the State, for all. Regardless of age, race, sex or religion they are a constant on which we can all rely. They both protect us from an overmighty state. They also require the state to provide proper protection for each one of us from crime, from having our privacy infringed, and for the protection of all of our human rights.

Human Rights are a necessary and vital part of our democracy, and they are for us all.

They have been guaranteed by the state, for each one of us, since the Human Rights Act came into force in 2000. It was a significant day for us as citizens and for us as a nation, as the clarion call to 'Bring our rights home' was answered. Our citizens now can enforce their Rights and claim their remedies in British courts in front of British judges, as a direct result of the Act obviating the need for the UK citizen to go to Strasbourg. It has meant rights can be vindicated much more quickly and much more easily.

As I shall explain later the knowledge that infringements can be enforced so much more quickly has had an effect much more profound than the effect on the comparatively small number of litigants who have been saved the air-fare to the European court of human rights in Strasbourg. For the policy makers awareness that maybe in a number of years, if the European Court of Human Rights can get through its backlog, and its complicated procedures it might determine that a provision or a decision offends the convention, is not a real or significant pressure in the making of decisions. The fact you might be breaking English law is a profound pressure on the way policy-makes frame legislation.

Secondly, the impact of human rights. Last year I commissioned a review of the Human Rights Act. To see, six years on, how it was working.

Prior to the introduction of the Act there had been many soothsayers who prophesied the Act would

change our law unrecognisably, and for the worse. They said it would cause a constitutional crisis and grid-lock in the courts. They were wrong.

Firstly: there has been no constitutional crisis.

The Act has made clear that Parliamentary Sovereignty remains. The Act, I believe, purposefully and skilfully maximises the protection of human rights without trespassing on parliamentary sovereignty. Judges have shown considerable restraint in ensuring their role does not become politicised. And power rightly remains in Westminster, with the legislature and the executive.

Secondly: it has not led to gridlock in the courts.

Doomsday predictions of the courts facing gridlock, being swamped and overwhelmed by the constant taking of human rights points, and the legal system grinding to a halt, have as might be expected turned out to be hopelessly wrong. The system has worked well. The courts have not ground to a halt. The judges have been sensible robust and unintimidated by the change in the law.

They have strike the right balance, using the Act when appropriate, not being afraid to disregard it when it is not apposite or necessary. They have been robust, and they have been fair. Many cases which sought to suggest Human Rights arguments have rightly been dismissed as misconceived or irrelevant to the case. The judiciary I believe have used considerable wisdom to ensure that the Human Rights Act is and remains a much valued piece of legislation.

Thirdly: building on this the Act has allowed renewed dialogue with the European Court of Human Rights.

Not only have British citizens been able to enforce their rights in British courts in front of British judges, but British judges have been able to add to, and aid European human rights jurisprudence. One example will suffice. In *Z v UK* in 2001, the ECHR refused to follow one of its earlier judgements, *Osman v UK*, because of the discussion relating to *Osman* that the House of Lords had undertaken in *Barratt v LB Enfield* earlier that year. Through increased dialogue human rights jurisprudence has noticeably improved. It has also allowed the UK to be able to assert itself squarely into the debate internationally about Human Rights. Being able as we now are as a country to point to effective and comprehensive Human Rights legislation enhances our credibility as we seek to promote it internationally.

The impact of the HRA on the courts has been overwhelmingly positive because it has made a tangible difference to individuals who have had their rights violated by the State. It has given them effective and speedy redress. It has given them meaningful protection. It is no good to speak of one's commitment to HR if one does not give those whose rights are infringed, a remedy.

Yet there has been little impact on our law, because I believe many of these rights were already reflected within our law. A culture which the Act has sought to build on. Whilst our current rights have been supported and strengthened by its presence, the Act has in practice had very little discernible effect on existing law. It has been raised in a number of decisions right across a huge range of issues but it has not caused outcomes which are unexpected or which would not have been achieved under existing law. It has enhanced our law by providing remedies and clarity. But as the report found it has not caused the law books to be rewritten. The European Convention on Human Rights was written in large measure by English lawyers who underlined English principles.

Yet, as I indicated earlier, the Act has had a far greater, a far more profound effect on society outside of

the court. The Act has not been just about what goes on in the courtroom, it has been about what goes on outside, in wider society.

Before turning to that reality, it is also true to say that the Act has provided the opportunity for the promotion of a number of myths - myths which, if we do not counter them properly, are damaging - damaging to the legislation, and so damaging to the protection the legislation offers our people. Part of my job is to counter those myths - and to take every opportunity to do so.

The day to day operation of the human rights act is something that rarely, if ever, is covered in the media. Given the nature of the coverage around human rights one would be forgiven for assuming that human rights are purely for minority groups, for defendants, for foreigners, for criminals, for chancers.

It is no surprise that in some parts of our community this view of human rights has taken hold. Just consider a selection of headlines of the past two years; "Traitor wins Human Rights Payout", "Ordinary Britons deserve human rights too", "human rights, social wrongs", "Terrorists' Charter". Such headlines are as damaging as they are misconceived.

In this view human rights are other people's rights - they are rights which I will never need, and therefore they are for other people, who always on this analysis misuse them.

There are a number of issues at play here.

Firstly, media coverage tends to be dominated by a number of myths and misunderstandings, and by grey areas where matters of principle are at stake as much as matters of the law. I do not intend to go into this point in great detail, as I have discussed these at length elsewhere, but I think it important to raise them by way of illustration. Three brief examples.

Take the infamous Kentucky Fried Chicken episode. It is widely believed and widely reported that a man in Gloucestershire, while evading capture by the police holed up on the roof of a house whereupon he demanded drink, cigarettes, and food - Kentucky Fried Chicken, apparently - from the police who were pursuing him.

A spokeswoman on behalf of the police is reported as saying, and I quote "although he's a nuisance, we still have to look after his wellbeing and human rights".

Two points here. Firstly, it is utter nonsense that his human rights entitled him to KFC on the roof. This was a purely operational matter for the police to decide, whether or not providing him with food would bring about a peaceful and swift resolution to the stand-off. Secondly, and significantly, the incident was reported as the man receiving food because of his human rights.

Second example, Dennis Nielsen. In 2001 it was widely reported Nielsen, a multiple murderer, was able to obtain hard-core pornography while in prison by citing the Human Rights Act. This is entirely untrue. He did apply for a judicial review of the Prison Governor's decision to deny him access to hard-core porn - but that was refused at the permission stage, and again when he renewed the application. The Human Rights Act categorically did not lead to his being supplied porn. The second half of this story- perhaps unsurprisingly was not covered by the press.

The third example is more complex, and demonstrates a case which is in a grey area. In 2000, a group of nine Afghan nationals hijacked a plane and forced it to land at Stansted. They claimed that they were escaping a violent, oppressive regime which they feared would shortly assassinate them because of their political affiliations. They were charged in Britain with hijacking, and after a hung jury which could not agree on whether they had a defence of duress, they were convicted on a retrial. After they had spent years in jail throughout this process their conviction was quashed when the Court of Appeal

held the judge had misdirected the jury by failing to leave the issue of duress to them and then because the judge considered a fear of political assassination in the future was insufficiently targeted to constitute the defence of duress. They were released. They sought asylum. They were refused because of the hijacking. But the tribunal which considered their case held that they were at risk of political assassination by the Taliban even though the Taliban were no longer the government, if they were returned to Afghanistan. The consequence was as a result of the Chahal case in the European Court of Human Rights they could not be deported. The Government accepted that they could not deport. They refused to give the hijackers exceptional leave to remain, which would have been the norm. Instead they sought to create a new category of "permission to stay". The difference between leave to remain and permission to stay was that the hijackers could not work in this country. The court held that the state could not invent a new category without primary legislation.

This case caused an uproar - with the media invective directed at the Human Rights Act which they interpreted as a licence for hijackers and terrorists. Why should they be allowed to stay? Why should they be free to potentially pose a threat to the public? Why are they being rewarded for a very serious crime? What will stop others like them? Why should their human rights outweigh mine? All legitimate questions. But none of them have simplistic answers.

Speaking for myself, I believe the question is, do we want to be living in a society where we send people back to certain torture or death when they do not pose a threat in this community? I do not believe that we do. Human rights are the values we live by - and we must be true to them as a society. We must practice what we preach - even when that means taking difficult decisions, unpopular decisions, decisions on the margins.

What these three illustrations show is the nature of the human rights stories that tend to get in the papers - either myths, like the KFC example where human rights never even come into it, or partial reporting, when the outcome is conveniently forgotten, or the grey areas, the issues on the margins - like the Afghan hijackers.

A common denominator though is that whenever human rights hit the headlines they seem to be concerning minority. Regardless of the accuracy or otherwise of the reporting we rarely see human rights in any other light.

We don't hear about human rights operating for the benefit of the mainstream of society, or indeed operating in the mainstream of society; we only hear about it at the margins; when it is misapplied, when the State is challenged in the courts, or in the grey areas where decisions are seen as going against the grain of popular opinion.

But the reality of human rights, and the Human Rights Act is that it protects each of us every day without attracting comment, notice or attention. The Human Rights Act impacts on all our lives in many unseen ways.

The third principal point I want to argue tonight is the effect of the legislation on policy - on areas where decisions about our protections, about our freedoms, about ensuring our dignity are made every day.

It is perhaps shown at its clearest by the example of the elderly couple who despite being married for over 30 years, were separated and moved to different care homes because it was considered too expensive to let them live together. But it was the Human Rights Act that ensured they were brought back together, and cared for in the same home. Without recourse to the Act they would have had no

way of getting the local authority to act. But because of the Act they were able to enforce their rights.

The local authority failed in its duty to consider the human rights of that elderly couple when it made its decision. The Act put upon them a duty to ensure the couple's rights were upheld. In every decision, whether operational or policy. And the Act has ensured that decisions like that one shouldn't happen again. It forces local authorities and public bureaucracies to focus on the interests of the people they serve.

Local authorities up and down the country makes hundreds of decision every day which affect everybody's rights. Not just about the elderly, the vulnerable, the marginalised. But about everybody. They make decisions that impact on our dignity, that ensure we are treated equally and fairly. That ensure that our floor of rights, minimum standards as defined by the Human Rights Act are taken into consideration.

Making decisions, developing policy and delivering legislation can have a huge effect on our day to day lives. The Act recognises that, and that is where the Act's huge benefit for us all can be seen. It is in the day to day that the Act has its greatest effect for all of us.

The Act creates a number of positive obligations, which are responsible for this profoundly welcome effect.

**1- Firstly**, the Government is required to make a statement of compatibility with the Human Rights Act about all legislation going through Parliament

**2- Secondly**, the Act places an obligation on all public bodies to not breach the Act in developing policy

**3- Thirdly**, Human Rights obligations should be met in all decisions made by public bodies.

### **Legislation and s19**

Turning firstly to legislation and declarations of compatibility. Since the Human Rights Act came into force in 2000 all Bills and subordinate legislation coming before Parliament must be "human rights proofed". There are now statutory requirements under Section 19 of the Act for a Minister to make a statement to the effect that either; "the provisions of the Bill are compatible with the Convention rights" or that although the Minister "is unable to make a statement of compatibility the Government wishes the House to proceed with the Bill".

This is an important step. It means that human rights considerations are at the heart now of how laws are made. They are not an afterthought, nor an add on. Human rights proofing is not simply an exercise to be carried out after the legislation has been passed. Questions of proportionality and the identification of issues and options that produce the least interference with human rights are now embedded in the very process of law making.

Since 2000 therefore, human rights have become an integral and statutory consideration of all legislation. Every law passed since then will have been human rights proofed. The effect of this measure has been to force policy makers to consider human rights in the development of that policy.

The Human Rights Act leads to better laws, by ensuring that the needs of all members of the United Kingdom's increasingly diverse population are appropriately considered.

### **Policy making**

This has had a very beneficial affect on policy making. The immediacy of the Human Rights Act, enforceable in British courts, before British judges, not requiring time consuming and expensive

recourse to Strasbourg - has had a positive impact on public authorities. That the Act makes it unlawful for a public authority to behave in a way incompatible with human rights has placed an onus on them to think more broadly about the impact of their policies.

Policy making has also responded to case law which has contained human rights principles. Where existing policies are found to be in breach of Human Right principles in the courts, mechanisms exist by which government can respond and amend policy so that breaches do not continue to occur. This brings benefits not only for the citizen, in the fact that unlawful violations of their rights are stopped. But also for the government because policies that are infringing on citizens rights can be quickly rectified. Ensuring proper protection for society is provided, and minimising the amount of resources being swallowed by being taken to court for breaches.

### **Decision making**

Perhaps the greatest impact, as I suggested briefly above, has been the impact of the Act on the decision making process of public bodies. The positive onus to consider rights before acting is a significant one. It prompts the decision maker to think first, to consider what the effect of the decision might be. On individuals and on society. Just as in the case of the elderly couple who were initially separated. Or the case of the elderly patient who was left on the toilet for long periods of time because staff were too busy to move her or the members of an old peoples home who were fed breakfast whilst they were sitting on a commode. The Human Rights Act should force such decisions to never be countenanced. By promoting dignity, and increasing awareness of fundamental human rights the Act encourages decision makers to protect rights. It promotes protection through pre-emption. Not as an after thought to be enforced later in the courts, or when the damage has been done, but right from the off.

Protection through prevention. Protection that has far greater meaning.

The HRA defines a floor of rights which inform the decision maker. Setting out minimum standards of treatment, of care, of action by which we all expect to be treated. Through more human rights friendly legislation and policy - government and public authorities are daily acting to the benefit of wider society - in the interest of all our rights. Rarely is this seen, rarely is this acknowledged - but it is there providing protection to each and every one of us.

The positive obligations of the Human Rights Act has brought benefits for all of us. Legislation and policies take account of our rights from the very beginning of any thought processes. Ensuring they are compatible, trying to improve protection rather than erode it. And responding quickly to challenges to existing practice and legislation, ensuring violations do not continue to occur. Importantly the positive obligation also enshrines the duty of protection in operational decision making. Promoting consideration of the rights of the individuals and of society before decisions are taken provides far more meaningful protection. And is of enormous benefit. Far better to prevent the violation than merely give redress afterwards. The positive obligations laid out in the Act provide protection that is for everyone.

And my fourth principal point is the legislation's **guarantee** of state protection for all. The Human Rights Act has had a far more a profound effect on our society than perhaps has been realised by society. Its effect has been far more beneficial than the occasional court case. Or the isolated right upheld. It has moved rights into the mainstream. It has changed the focus of rights to be for the mainstream. Not for others. Not just for the terrorist, or criminals or chancers, but for the majority. For

the ordinary decent hard working man and women, young and old. It is not a terrorist's charter, nor is it accurately represented in the media. It is society's charter. It has a defining effect on the state and the relationship between the state and every individual

The Human Rights Act has brought rights home. It has made rights real in our British Courts. It has enshrined meaningful and real protection. For everyone.

And it has done so not just through the courts but through embedding a culture where people's dignity is respected throughout the State, at national and local level.

It is an effective mechanism, which promotes consideration of rights at every step of development of policy, legislation and decision making. It ensures proper consideration is given to the relationship with citizen. And that the wider interests of society are fully considered. Without the Act, it is hard to see how such guarantees could be given.

That I can say so boldly that the Act gives guarantees is because the Act also provides a mechanism by which rights that the State fails to protect can be enforced. Ensuring policy and legislation that are in breach can be re-considered. And decisions which violate the rights of the citizen can be questioned, remedies provided and steps taken to ensure that there is no further violation. All of this protection comes because of the Act, not in spite of it.

As I have sought to set out in my remarks, the guarantee given by the HRA is both hidden and visible - it can be held up, pointed to, and importantly relied upon when the interests of the individual are violated. Yet for all the confidence that its visibility can provide, its invisibility can achieve great effect. Day by day, being used as a tool by public bodies in policy and decision making to inform and frame decisions. To ensure that the rights of each one of us are at the forefront of all decisions

The Human Rights Act brings rights into the mainstream. It is for the majority. Sometimes that produces hard results. The Afghan Hijackers is such a case. But that does not mean we should give up on protection, or turn our back on guaranteeing society's rights. Thomas Paine, the great advocate of the rights of man got it right I think when he said:

'He that would make his own liberty secure must guard even his enemy from repression'

The Human Rights Act brings the protection of rights to the forefront of modern society. And it places the onus squarely on the State to protect them for everyone. There is no guarantee unless they are for everyone.

That is a duty that this Government is proud to bear. And which it is determined to fulfil. The HRA is an effective mechanism by which all of our rights can be protected, and be guaranteed. They are for everyone and we must make sure they continue to be so.

Thank you

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