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'Rights without responsibilities – a decade of the Human Rights Act'

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1. Introduction

It is a great pleasure to be here today.

I would like to thank the British Institute of Human Rights for sponsoring this public lecture, and for the British Library for hosting us.

In two weeks' time we will celebrate the sixtieth anniversary of the Universal Declaration of Human Rights. In 1948 the world had just emerged from the first truly global war which claimed the lives of more than 50 million people. Nation states had been responsible for the most shocking abuses of human rights. In the shadow of this catastrophe, there emerged a genuine mood among governments and people in all countries that a new world order based on shared values was needed.

The creation of the United Nations became the vehicle for this ambition, and the Declaration of Human Rights its clearest expression. Great rights were proclaimed: the right to life, liberty and security of person; the presumption of innocence; freedom of thought, conscience and religion; of movement; of association and peaceful assembly; the prohibition of slavery and torture.

Sixty years on, the Declaration retains a deep symbolic value. Barack Obama recently described its principles as 'both beacons to guide us and the foundations for building a more just and stable world.'[1] From the Declaration sprang other statements and treaties on rights, including, three years later, the European Convention on Human Rights.

[1] *Statement on International Human Rights Day*, 10 December 2007.

The Convention was drafted by British lawyers and designed to reflect British traditions. Indeed, British involvement in the framing of the Convention reminds us that in some respects none of these rights were new to us. It was a Convention grounded in political freedoms which had been fought for and won in this country. And we should never down-play this fact. The Chairman of the Commission which drafted the United Nations Declaration of Human Rights, Eleanor Roosevelt, described it as 'the international Magna Carta for all men everywhere.'[2]

The history of rights and liberties in our country is core to our national identity. The British Library's excellent *Taking Liberties* exhibition faithfully charts the story of the rights in England, and later in the United Kingdom, as one of rights being claimed – or as the exhibition says 'taken' – against the Sovereign and a ruling elite.

2. Evaluating the Human Rights Act

The United Nations Declaration drew heavily on the US Declaration of Independence and the French Declaration of the Rights of Man and Citizen some 175 years earlier. But our own Bill of Rights, which preceded these texts, differed in an important respect: it referred to the 'true, ancient and indubitable rights and liberties' established by English law, but it did not make a declaration of equality or the natural rights of man.

The concept of natural rights had, of course, been powerfully opposed by Edmund Burke and Jeremy Bentham. 'Right is the child of law … from real laws come real rights', Bentham said.[3] Neither these thinkers nor the English law recognised the idea of 'positive rights' which existed in the absence of legal provision. And until the Human Rights Act was passed a decade ago, that constitutional principle held sway.

Some have viewed the Act as merely the logical development of the declarations that the United Kingdom signed up to after the War – 'bringing rights home', to use the Government's phrase. But in seeking to give domestic legal effect to rights which until how had been essentially declaratory, the Act has had a far more profound effect than that. Helena Kennedy has described 'a different *Zeitgeist*, a shift in the legal tectonic

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[2] *U.N. Address on the Universal Declaration of Human Rights*, 9 December 1948.
[3] *Anarchical Fantasies*, 1816.

plates.'[4] Professor Wade has said that the Act is a 'quantum leap into a new legal culture'.[5] Today, I want to challenge the assertion that this constitutional change has been a success, and to warn against the way in which a human rights culture is conceived by some of its proponents.

In doing so, I reject the crude accusation that to criticise the Human Rights Act is to denigrate the concept of human rights. It is precisely because we should all care deeply about rights that we have to give a faithful assessment of the Act and what it has delivered. Over the course of the last decade the Conservative Party has been resolute in the defence of civil liberties, notably in resisting the further extension of detention without charge in terrorism cases and in defending jury trial in fraud cases. It is significant that it was Parliamentary opposition led by the Conservative Party which saw off those measures, not the Human Rights Act. As David Cameron has said, 'we will never be casual about our freedoms.'

2.1 Parliamentary sovereignty undermined

Unlike most statutes – a notable exception being the 1972 European Communities Act – the effect of the Human Rights Act on Parliament itself has been profound. One of the greatest impacts of the Act has been the undermining of Parliamentary sovereignty – the feature of our Constitution that the great Victorian jurist, Dicey saw as vital.

In theory, Parliamentary sovereignty is not affected by the Act. Parliament made the Act, and Parliament can revoke it. Parliament can legislate in contravention of the Act, and if judges find a law incompatible with the it, Parliament can ignore that declaration of incompatibility. But in practice, as we all know, this has never happened. The Act has transferred significant power out of the hands of elected politicians and into the hands of unelected judges. This was known, predicted, and indeed intended. Roger Smith, now director of Justice, spoke of the 'landmines' that the Human Rights Act had deployed, and the 'disguised' – a startling admission perhaps from a supporter of the

[4] Quoted by Costigan & Thomas, *The Human Rights Act: A View from Below*, Journal of Law & Society,2005; reproduced in *Human Rights Act, A Success Story?* Ed. Clements & Thomas, 2005, p. 51.
[5] Ibid.

Act – 'disguised, but real, shift of power to the judiciary … and the accompanying tremor to the doctrine of parliamentary sovereignty'.[6]

Even before the passage of the Act, senior judges like Lord Justice Laws and Lord Justice Sedley were beginning to challenge the notion of parliamentary sovereignty – not yet in their judgments, but in comments and articles. The Act shifted the balance more fundamentally. Notwithstanding the very deliberate way in which Parliament expressly limited the courts' powers over primary legislation, so that it was Parliament which would decide how to address an incompatibility between statute law and the Convention, they have argued that the Act does something more fundamental.

Lord Steyn, for instance, claims that the Human Rights Act created a new legal order. The supremacy of Parliament, he argues, has been downgraded from the central principle of our constitution, to a general principle – created by judges and implicitly one which judges could set aside under some unspecified constitutional principle.[7] Lord Justice Sedley has argued that the Act enables the courts 'to *reconfigure* legislation wherever possible to give effect to Convention rights'.[8] Lord Hope has said that 'the courts have a part to play in defining the limits of Parliament's legislative sovereignty'.[9]

To allow an unelected judiciary to change laws passed by the elected Parliament is a dangerous precedent. Parliament may have many flaws, but as Lord Bingham has noted 'the democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament'.[10] And democracy, not legalism, represents our best protection for liberty.

The development of civil and political rights in England, and later in the United Kingdom, was a story of rights being claimed against an overbearing centre. But it was also a struggle for a greater say – individually and collectively – in the governance of the country. From the 17th Century onwards, representative government was seen as

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[6] *Human Rights Act: A Success Story* (ed Clements & Thomas), 2005, p.187.
[7] R (Countryside Alliance) v Attorney General [2007] HL 52.
[8] *Human Rights Act: A Success Story* (ed Clements & Thomas), 2005, p.17.
[9] R (Countryside Alliance) v Attorney General [2007] HL 52.
[10] (Bingham in R (Countryside Alliance) v Attorney General [2007] HL 52).

the best defence against tyranny. Prominently displayed in the *Taking Liberties* exhibition is the declaration by Richard Overton, the leader of the Leveller movement in 1646 that 'The parliament, and the whole kingdom whom it represents, is truly and properly the highest supreme power of all others – yea, above the King himself.'

Whether it was Magna Carta in 1215, the Bill of Rights in 1689, the Great Reform Act of 1832 or the Representation of the People Acts in the 19th and 20th Century, it is Parliament which has by popular will secured liberty and equality. It was Parliament which defended the right to trial by jury. It was Parliament which abolished the slave trade and the death penalty. It was Parliament which gave equal voting rights to women, and legalised homosexuality. In more recent times it was Parliament which blocked the Government's plans for 90- and then 42-days pre-charge detention. I do not profess that Parliament has been on the right side of every argument, or that legislators always get it right – far from it. But when Parliament falls short, it is accountable to the people whose rights and responsibilities are affected, in a way that the courts are not.

To tolerate – let alone celebrate – the erosion of Parliamentary sovereignty is to ignore the fact that Parliament has been a staunch defender of rights in this country. And it poses a challenge for all democrats: by losing faith in democracy like this, are we not also losing faith in the people whose rights we claim to defend?

2.2 The separation of powers eroded

Related to the undermining of Parliament's position has been the effect of the Human Rights Act on the judiciary. The Act has propelled judges into the political arena, and in so doing, has eroded the principle of the separation of powers.

It is ironic, given the changes in the Constitutional Reform Act 2005 that were designed to create a more impermeable separation between the judiciary on the one hand and Parliament and the executive on the other, that one of the effects of the Human Rights Act has been to blur the roles of these branches – in particular by turning judges into decision-takers and law-makers. Essentially political questions that should be decided by Parliament are now being decided by judges.

Consider the way in which a privacy law is steadily being created from the law on confidence, as the courts – public bodies under the Human Rights Act – are compelled to shape the Common Law to take account of the Strasbourg jurisprudence.
This is an issue on which Parliament has been highly reluctant to legislate, and understandably so. The issue of where the balance should lie between the right of free expression and the right of privacy is both challenging and controversial. Creating a privacy law would amount to a substantial redistribution of rights, imposing new restrictions on the media.

In recent weeks we have seen a highly personal attack on Mr Justice Eady by leaders of the press relating to his judgement in the Mosley case. Yet the judge was doing no more than Parliament had demanded of him. It was Parliament that instead of passing a privacy law had simply pointed the judge in the direction of two conflicting rights and asked him to decide where the balance should lie. That is not a task that should have been asked of him. The reason why we charge Ministers with making administrative decisions is that their responsibility to the people equips them to judge where the public interest lies. It is because the job of judges is far more restrained – to interpret and apply the law impartially – that we ensure their independence from the political system. But when judges enter the business of creating new rights and new responsibilities, people start to question to whom they are accountable. We must guard against what the United States Supreme Court Justice Scalia has called a 'judicial aristocracy'.[11]

It is integral to the principle of judicial independence that judges remain apart from – some would say above – political debates and controversies. But it was not the press who put Mr Justice Eady in the political firing line; it was the Human Rights Act. It is for States – not necessarily the courts – to strike the appropriate balance between Convention rights, and the main way of doing that is through the formulation of clear laws that balance rights and responsibilities. If we leave it to the judiciary to create law in this way then we drag them into the political fray, whether they want to be there or not.

[11] St. Louis Post-Dispatch, *Scalia warns of judicial aristocracy*, 3 May 2006.

Over the past twenty years, constitutional reformers have complained about the inadequacy of parliamentary scrutiny of legislation. I strongly agree with them. But the answer cannot be to duck the issue completely, draft vague, uncertain law and then let the judiciary take responsibility. Balancing privacy and freedom of expression is a tough issue, but on this and other matters, there is a responsibility on politicians to grasp it. In this respect, the Human Rights Act has not just eroded sovereignty; it has encouraged Parliamentary irresponsibility. If Parliament no longer feels that it is the custodian of liberties, it will become more cavalier about protecting them.

The emerging privacy law is by no means the only example where the Human Rights Act has involved judges in making decisions which are in essence political. Earlier this year, the High Court ruled that to send a soldier out on patrol or into battle with defective equipment could constitute a breach of Article 2 (Right to Life) under the European Convention. The Ministry of Defence, which is appealing against the judgement, argued that it was 'impossible to afford to soldiers who were on active service outside their bases the benefits of the Human Rights Act.'[12] Whatever we may feel about the Government's failure to equip our armed forces properly, it is highly undesirable that judges, rather than politicians, should be deciding such matters. And in my view the intrusion of the Human Rights Act into the field of conflict in this matter will be highly problematic.

2.3 The evolution of rights

The UN Declaration has lasting value as a declaratory document, a statement of principle that enters and frames our discourse. The European Convention makes the rights a binding international obligation. But entrenching them into our domestic legal system fixes these laws in time. As society evolves so must the law, and even great texts whose overarching principles stand the test of time need to be adapted. We cannot divorce rights from the historical context in which they were declared.

The Magna Carta states that no one should be arrested or imprisoned on the appeal of a woman for the death of any person, except her husband, and that where anyone who

[12] *The Times, Families can sue MoD over failings that led to deaths of troops,* 12 April 2008.

dies owing money, his heir shall pay no interest on that debt while he is under age, if the creditor is a Jew. The Bill of Rights states that Protestants may carry arms for their defence, but not Catholics. These are some of our greatest constitutional texts, but they have been amended to suit changing sensibilities.

The European Convention, too, was a product of its time, designed as a response to the greatest violations of human rights, genocide and the Holocaust. But in seeking to protect all human rights it could not anticipate future developments in science and technology that may pose a threat to those rights. It did not anticipate the potential for the accumulation, storage and processing of enormous amounts of data; or the extent to which the State could monitor its citizens; or that information on millions of people – their medical records, bank account details – could be digitised and transferred across the world in seconds to be accessed by anonymous administrators in another country. Nor did it anticipate a world in which powerful non-State actors, who are not party to treaties or conventions, could threaten the rights and security of millions of people with weapons of mass destruction previously only available to governments.

Parliament's historic role has been to respond to changing times and legislate accordingly. And its record, as I have noted, has generally been the provision of new rights. Such flexibility is now denied. While Parliament may wish to legislate for new rights to private information, or to make new arrangements to protect its citizens from terrorism, its decisions can – and indeed have – been declared incompatible by our own courts applying Convention rights which were framed over half a Century ago. For an unwritten, evolving and flexible Constitution, we have substituted a framework which was set in the 1940s.

2.4 The place of politics

When we hear the justifications for establishing a canon of law that somehow sits above politics, it's not hard to identify a strong undercurrent of distrust in the political process and in particular a lack of faith in Parliament. In this view, our democracy has become an ochlocracy, or mobocracy, where the people need saving from themselves, and elected governments cannot be relied upon to respect minorities. At its worst, this distrust of democracy can become the sneer of the metropolitan elite, consciously

divorced from the mores of the people. But even at its best, the idea that the people's rights cannot be protected by the people's representatives is surely misconceived.

Shami Chakrabarti, the Director of Liberty, has said that 'to some extent human rights laws exists to protect society when politics lets it down.'[13] There is no doubt that our Parliamentary processes need strengthening. But ultimately, without the agreement of the people, human rights will be no more than nonsense upon stilts. Human rights are by definition universal. They cannot exist without popular consent. They cannot be an elitist ideal, imposed upon an unwilling public. Jefferson might have believed that men's rights were 'endowed by their Creator', but he also believed 'That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed'.[14] For the truths of rights to be self-evident, they must be evident to all. They cannot merely be a canon for the enlightened few.

The strengthening of Parliament is an important cause for all democrats, but for those who champion liberty it should be a particular ideal. Human rights cannot be located outside politics, because they cannot be divorced from the will of the people. Those who seek to promote human rights by circumventing Parliament, or challenging the validity of popular opinion, will soon find that their cause is powerless. The great gains in liberty over the centuries were made by popular demand. As one study of the United States Supreme Court argued, 'A society that relies upon courts and judges to make the important political and moral decisions is a society that has lost touch with what self-government is about. It is a society in which citizenship has little or no meaning.'[15]

2.5 The rights culture

Proponents of the Human Rights Act explicitly intended it to have a wider impact on society. Lord Irvine, the former Lord Chancellor, said: 'Our courts will develop human rights throughout society. A culture of awareness of human rights will develop.'[16] And since the Act was introduced, we have seen the steady development of what can be

[13] *Human Rights Act: A Success Story* (ed Clements & Thomas), 2005, p.146.
[14] *Preamble to the United States Declaration of Independence*, 1776.
[15] Hickok and McDowell: Justice vs. Law – Courts and Politics in American Society (1993).
[16] *House of Lords 2nd reading of the Human Rights Bill*, 3 November 1997.

described – I think accurately – as a rights culture. I do not mean by this a culture of respect for rights, or even a culture of awareness, but rather a trend that has seen rights devalued and misapplied.

This culture has distorted priorities in public bodies and undermined public safety. Consider the case of Naomi Bryant, who in 2005 was murdered by Anthony Rice – a convicted rapist – who was released by the Parole Board following a recommendation by probation officers. The Chief Inspector of Probation, Andrew Bridges, said that prison and other officials were side-tracked by considering Rice's human rights above their duties to the public.

The Rice case is not an 'urban myth'. Cases like this have happened because of the corrosive effect that the Human Rights Act has had on administrative decision-making. Andrew Bridges warned that 'Prisoners are now legally represented at Parole Board hearings, often by counsel, who also have recourse to judicial review. It is a challenging task for people who are charged with managing offenders effectively to ensure that public protection considerations are not undermined by the human rights considerations.'[17] This is not a passing comment. It is repeated six times in the Chief Inspector's report, and it goes to a deeper problem with the Act, and the way it requires public officials to make human rights judgements in individual cases. Such an exercise in 'balancing' rights by officials is bound to be problematic.

In this respect the Human Rights Act has not led to a universal regard for the rights of all, but a skewed regard for the rights of those who shout the loudest. As Andrew Dismore MP, Chairman of Parliament's Joint Committee on Human Rights concedes: 'Victims have human rights, too. It's a challenging question for the human rights lobby, as to how the rights of criminals and victims should be assessed.'[18]

Only this month, the Serious Organised Crime Agency was advised – by its own lawyers – that issuing 'wanted posters' for criminals would amount to a breach of Article 8 of the Convention. This is a clear hindrance to the work of the authorities that

[17] *HM Inspectorate of Probation (2006b) An Independent Review of a Serious Further Offence Case: Damien Hanson & Elliot White*, Home Office, Paragraph 1.3.5.
[18] Andrew Dismore: *An easy target for populist politicians*, *The Independent*, 23 August 2007.

jeopardises public safety. And if the issuing of wanted posters is a myth, then why are lawyers at SOCA instructing their officials otherwise? Either this advice is legally sound, in which case it makes a mockery of the Act and confirms the public reaction, or it is a myth, in which case the myth has transfixed the lawyers as much as the readers of tabloid newspapers. Either way, the effect is the same – the wanted posters are not produced, the names of serious criminals on the run from the authorities are not publicised, and people are less safe as a result.

In contrast, the list of social achievements claimed for the Act over ten years is, if I'm being frank, a relatively modest one. A frequently cited case relates to an elderly married couple in need of long-term care who successfully claimed their rights under the Act in order to be kept together, an outcome which everyone will applaud. But it shouldn't take judicial intervention to make local authorities behave properly, and we cannot rely on human rights laws in every case to do so, however entrenched they become. What was missing in those cases was not respect for human rights, but common sense and compassion. It is the responsibility of councils and the public servants who work for them to behave decently and to follow good public policy. When they don't, they should be held accountable.

Taking public bodies to court to enforce such rights is not only a negative and expensive means of achieving changes in practice; it is bound to be largely ineffective. Real advances in healthcare, social services provision and education will only be secured through the positive action of making those services effective and accountable to their users. The blunt instrument of human rights laws is no way to drive better performance in public services.

2.6 The myth of British influence

After decades where British governments faced judgements handed down from the European Court of Human Rights in Strasbourg, but were denied the capacity to influence those judgements through the developing jurisprudence, it is claimed that the Human Rights Act has enabled British judges to play a role in shaping the jurisprudence of the European Court. But this is unconvincing. In the case of *Hirst v UK* in 2005, the Court held that Britain's laws banning convicted – but only convicted – prisoners from

voting in elections was contrary to the requirement in Protocol 1, Article 3, of the Convention to hold free and fair elections. Before this, the British courts had held that the restriction was a proportionate interference. The European Court ruled that it was not.

As the Government says, the matter had been considered fully by our national courts yet Strasbourg paid little attention to this fact and instead concentrated on the views of a court in another country – indeed another continent – decided by a narrow majority of 5 to 4, concerning a law different in text and structure, interpreted by domestic courts to which the margin of appreciation did not apply. On this matter, the enactment of the Human Rights Act, and the successive verdicts of British courts, had no effect whatsoever on the decisions of Strasbourg judges. They reached their own conclusion, and the ruling still stands.

2.7 Rights devalued

I have highlighted a number of detrimental effects of the Human Rights Act, including constitutional changes that have eroded the separation of powers and undermined Parliament and the development of a rights culture. But arguably the worst effect of the Act has been to devalue the language, and so the very concept, of human rights.

Terrible human rights abuses in the world are taking place as we sit here today – in Zimbabwe, in Iran, in Sudan, in Burma. They amount to serious violations and they cause harm on a tragic scale. The Secretary General of the UN, Ban Ki-moon, has said that 'torture persists, devastating millions of victims and their families.'[19] In Eritrea 2,000 Christians are detained without trial. Given Eritrea's population this is the equivalent of more than a quarter of a million EU citizens being detained indefinitely. They are all held pending denial of their faith, or are released if they are so debilitated by torture or mistreatment that they are a burden to their captors. More than a quarter of a million people have been displaced during the past three months of fighting in the Democratic Republic of Congo. Since the conflict began in Darfur in 2003, at least

[19] *Message on the International Day in Support of Victims of Torture*, 26 June 2008.

300,000 Sudanese civilians have been killed, and thousands raped. Millions have been forcibly displaced.

Of course, the multiple infringements of human rights abroad is no justification for tolerating a single breach at home. But international abuses of human rights are on a different scale of seriousness. These abuses are devalued when the same language, indeed the same legal rights, are invoked in relatively trivial complaints in our own country, whether or not they are successful, such as the prisoner who brought a case on Article 3 grounds of inhuman or degrading treatment because the toilet in his cell was blocked.

The British Institute for Human Rights' dossier 'Changing Lives', to which the Chairman referred, cites the case of a man with learning disabilities who was provided with a single room to be used as bedroom, bathroom, toilet and living space. A case brought under the Human Rights Act citing Article 8 right to a private life and Article 3 to not be treated in a degrading manner, ensured he was placed in more suitable accommodation that respected his dignity. Now of course, this is a good outcome for the man concerned, but Article 3 of the Convention was intended to prevent torture. Yes, he should have been better served, but the policy should not have to be changed by recourse to the Human Rights Act, and to do so, is an abuse of Article 3, and devalues the fundamental right which it encapsulates.

The very concept of human rights as understood in public discourse is now in danger. The Government admits that the Human Rights Act has never carried the public with it. The big mistake now would be to see this as a public relations problem, the result of the public's poor understanding, and the propagation of myths by the tabloid press. Hostility to the Act is not just a communications problem. The new Equalities and Human Rights Commission wants to educate the public, but the problem won't be solved by awareness campaigns and a few good news stories, and any good will soon be undone if the Commission – as it has promised – challenges laws passed by Parliament. A more fundamental change is needed if rights are to be respected again.

4. Reclaiming rights

The great rights of the United Nations Declaration were generally individual rights, but as the Declaration made clear, in society we have responsibilities to one another. It explicitly states that 'Everyone has duties to the community in which alone the free and full development of his personality is possible.'[20] But in a more atomised and increasingly consumerist society, there is a danger that rights become not tools for protecting the individual within society, but advantaging the individual against society. The Czech author Milan Kundera has warned of prolific human rights in free countries 'becoming a kind of universal stance of everyone against everything, a kind of energy that turns all human desires into rights. The world has become man's right and everything in it has become a right'.[21]

The answer to the age of increasing individualism must surely be the strengthening of society and its bonds, and the promotion of responsibility. Yet the modern civil religion of rights is not only silent about responsibilities; it pushes in the opposite direction. In the 'commoditisation of rights', they become goods to be claimed, where people exercise their rights to the detriment of the rights of others. Those are not my words; they are the words of the architect of the Human Rights Act, my opposite number, Jack Straw.[22] Unfortunately, Straw's answer to this problem appears to be yet another layer – or two – of rights to be claimed. It also is reported that Ministers favour an expanded sphere for socio-economic and environmental rights. It seems highly unlikely that such rights could be justiciable, even if they should be. 'What is the use of discussing a man's abstract right to food or medicine?' thundered Burke. 'The question is upon the method of procuring and administering them. In that deliberation I shall always advise to call in the aid of the farmer and the physician, rather than the professor of metaphysics.'[23]

Such an extension of rights would, I suggest, be a serious mistake. If commoditised rights start being used by one individual to make a claim directly against another, as the Government is apparently contemplating, then rights will become not defensive instruments but attacking ones. We have seen the damage that the vertical claiming of rights – that is, against public bodies – has done to the language of rights. To give them

[20] *The Universal Declaration of Human Rights*, Article 29 (1).
[21] *Immortality*, pp. 150-4.
[22] *Towards a Bill of Rights and Responsibility*, 21 January 2008.
[23] *Reflections on the Revolution in France*, 1790.

horizontal effect – that is, against individuals, as has already happened in the sphere of privacy – could extinguish any residual public support for human rights.

The Government's plans in this area, for a Bill of Rights to add to the Human Rights Act, will take us down the wrong path. Piling rights upon rights, with a new rights Bill, and then the EU's Charter of Fundamental Rights, would further undermine both Parliament and the judiciary, and it would distance the concept of rights from ordinary people.

Instead we should be focusing more on how we can seek to better balance rights with responsibilities. This requires us to look fundamentally at the place of rights in Britain today. We need to reclaim rights and restore them in the eyes of the public; to go back and look fundamentally at what rights mean to ordinary people, and how best they can be protected in the 21st Century. As Solzhenitsyn urged, 'It is time in the West to defend not so much human rights as human obligations.'[24]

5. A British Bill of Rights

One of the key opening questions posed by the *Taking Liberties* exhibition is, 'In gaining so many rights, have we lost our responsibility?' And I think this is the crucial question.

Two years ago, David Cameron set out the limitations of the Human Rights Act and proposed that it should be replaced with a modern British Bill of Rights and Responsibilities, grounded in our laws and traditions. Since then, we have convened a panel of lawyers and constitutional experts to meet and discuss how this might be achieved, and their work is ongoing. I believe that there should be a number of key objectives for such a Bill of Rights and Responsibilities.

First, we want to make clear where the balance between competing rights lies in areas of law where nation states enjoy a margin of appreciation. We want a greater stress on

[24] *Speech to Harvard University*, 1978.

responsibilities than the Human Rights Act or the European Convention – to which we would continue to remain a party – currently afford.

Second, we want a British Bill of Rights and Responsibilities to help us restore the place of Parliament and repair the separation of powers. Parliament should be deciding the great issues of the day. We should not be asking the judiciary to define our rights: in a democracy it must be for the people, and their representatives, to create a framework of rights. In the words of Edward I, when he summoned the Archbishop of Canterbury to the Parliament of 1295, 'What touches all, should be agreed by all'.

Next year we will have a Supreme Court and from 2010 it will be hearing cases. But how supreme will it be? With a British Bill of Rights and Responsibilities, we aim for a settlement that restrains the influence of Strasbourg case law, and truly allows the development of a distinctive British jurisprudence on human rights.

Third, we want a British Bill of Rights and Responsibilities to bring greater clarity, to aid Parliament in drawing up laws and issuing guidance, preventing judge-made law and helping those public servants on the frontline who have to take difficult decisions. We want greater clarity to limit the spread of bad practice and address the rights culture by introducing common sense into decisions by public authorities.

In the drawing up of such a Bill of Rights and Responsibilities, we would be able to have a public debate about what further rights might be added and whether any limitations within the Convention might be lifted. Additional rights could be made available, such as a right to trial by jury – which is not guaranteed by the Convention, but is fundamental to our conception of rights – and rights to government information and protection of personal data. During this process, we would need to ask ourselves important questions. Which rights need greater protection than the Convention currently affords? How do we ensure that the State can protect the rights of its citizens against the new threats in the modern world?

To seek answers to these questions is not to undermine human rights, but to protect them. I began by quoting the soon to-be 44th President of the United States, whose commitment to human rights is about to be demonstrated by the closure of Guantanamo

Bay . But I hope that we will still hear the echo of words spoken by the 35th President, who famously called for active citizenship and for the nations of the world to join together to fight what he called the 'common enemies of man'. Speaking six months before his assassination, John F Kennedy said:

> '… this Nation was not founded solely on the principle of citizens' rights. Equally important, though too often not discussed, is the citizen's responsibility. For our privileges can be no greater than our obligations. The protection of our rights can endure no longer than the performance of our responsibilities. Each can be neglected only at the peril of the other.'[25]

6. Lifting our sights

I end with an appeal to all human rights advocates. Around the world today, rights are being horrifically abused by governments and individuals acting in medieval ways. This afternoon, the Law Society and Peace Brigades International are convening a meeting which will hear from human rights lawyers in Latin America and Asia who face intimidation, threats and even a risk to life through their work, violations which, as the organisers say, 'undermine the fabric of society as a whole'. It is sobering indeed to reflect on the risk which such campaigners are facing.

The European Convention gives some rights greater weight than others, for instance by allowing no derogation in some. Rights are not of equal value, and some violations are worse than others. In many areas the courts apply the tests of proportionality, and so should we. Rights matter everywhere, but let's be clear: appalling violations in parts of the world where human rights are currently unknown and disrespected matter most.

The right not to be stoned to death for adultery. The right to practice your religion free from persecution by the authorities. The right not to have your property seized and livelihood destroyed by Party henchmen. The right of women to have an equal say in the choice of their leaders. The right to love who you choose without being condemned

[25] *Remarks in Nashville at the 90th Anniversary Convocation of Vanderbilt University*, 18 May 18 1963.

to death for it by religious leaders. The right not to be killed because of your race, your religion, your tribe, or your sexuality.

We must lift our sights and focus our minds on how we can ensure that the worst human rights abuses never go unanswered. If human rights are truly to represent the advance of civilisation, and not to become the preserve of lawyers and litigants and so permanently discredited in the eyes of the public, then our efforts must be on defending the concept of rights abroad, and guarding against their devaluation at home. Only then, will we be able to reach a settlement in Britain that the public can support.