

'This Way, That Way, The Other Way? Directions for Human Rights in the UK'

Event Report

Date: 19 October 2015, 18:00-19:30

Venue: Bindmans, 236 Gray's Inn Road, London WC1X 8HB

Speakers:

- Helena Kennedy QC (Baroness Kennedy of the Shaws)
- Martin Howe QC (8 New Square)
- Anthony Speaight QC (4 Pump Court)
- Professor George Williams AO (University of New South Wales, Australia and IAS Fellow, Durham University from October - December 2015)

Chair:

- Saimo Chahal QC (Hon) (Partner and Joint Head of Public Law and Human Rights team, Bindmans)

On 19 October 2015, the Bingham Centre and BIICL held an event '*This Way, That Way, The Other Way? Directions for Human Rights in the UK*'. The event provided an opportunity to hear leading voices reflect on the future of human rights protection in the UK, and assess arguments for and against repeal of the Human Rights Act (HRA) and possible withdrawal from the European Convention on Human Rights (ECHR). The government is expected to announce a consultation on a British Bill of Rights by the end of the year.

The event was chaired by Saimo Chahal QC (Hon) (Partner and Joint Head of Public Law and Human Rights team, Bindmans) and speakers included Helena Kennedy QC (Baroness Kennedy of the Shaws), Martin Howe QC (8 New Square), Anthony Speaight QC (4 Pump Court), and Professor George Williams AO (University of New South Wales, Australia and currently IAS Fellow, Durham University).

The Bingham Centre is very grateful to Bindmans for hosting this event.

Helena Kennedy QC placed today's human rights debate in the context of the history of the HRA. Describing her chairmanship of pressure group Charter 88, Baroness Kennedy explained that activists in the 1980s and 90s saw such a Bill as part of a wider constitutional reform that would also encompass House of Lords reform, judicial appointments and freedom of information. Yet, although support from the Labour party was eventually forthcoming, there was a marked lack of support for any such reform amongst Conservatives. Consequently, the solution of incorporating the ECHR into UK law was hit upon - a politically expedient way of avoiding the political wrangling that was expected with any attempt to elaborate a Bill of Rights.

Despite a troubled start, Baroness Kennedy believes that the resulting HRA was an excellent rights-protection instrument. The HRA had found an elegant solution to the need to safeguard human rights without surrendering the sovereignty of Parliament. She emphasised the crucial role that the HRA has played in securing rights for women, and for terror suspects in Northern Ireland, and argued that negative perceptions of the HRA owe much to irresponsible and inaccurate media coverage – for example, in relation to prisoners' voting rights or the deportation of criminals. She also pointed out that retention of the HRA is strongly supported in the devolved regions of the UK.

However, Baroness Kennedy stated that she is not, and has never been, ideologically opposed to the introduction of a British Bill of Rights. In fact, as part of Charter 88, she had championed such an approach. However, she argued that the issue of rights protection in the UK had become a highly politicised debate. Drawing on her experience as a member for the Commission on a Bill of Rights, Baroness Kennedy argued that, for some of her fellow members, the HRA had become a 'political football', the merits of which were tied up with the question of whether the UK should participate in the 'grand European project'. As such, Baroness Kennedy ended on a note of caution, emphasising that today is a 'desperately dangerous' moment to start picking apart the HRA.

Martin Howe QC emphasised that Conservative plans to repeal the HRA are not about "attacking and destroying fundamental rights". Rather, they aim to redress what Mr Howe identified as the two key problems with the current system of rights protection in Europe.

Firstly, reform of human rights protection in the UK would seek to curb the expansionist tendencies of the European Court of Human Rights (ECtHR). Mr Howe pointed to the extension of the Convention's territorial application to areas under the temporary control of British forces in Iraq as an example of the unacceptable levels of judicial activism currently being displayed by the Court. Similarly, the Court's recent judgments on prisoners' voting rights could simply not be justified on the basis of the Convention – especially given the UK's explicit rejection of such a right during the drafting process. For Mr Howe, the Court's activism not only raises serious questions concerning the legitimacy of its decisions, but also risks devaluing the concept of human rights by inviting a backlash against its unjustifiable judgments.

Secondly, the corollary of curbing the ECtHR's activism would be the restoration of Parliament's power to make such decisions for itself. Through its willingness to pronounce itself on politically sensitive human rights issues, the Court has deprived Parliament of the right to decide how the balance between competing rights – such as the right to privacy and the right to freedom of expression - should be struck. The de-judicialisation of the political and policy decisions that are at the core of human rights protection is essential if Parliament is to perform its role, as envisaged by AV Dicey, as the ultimate guarantor of human rights in the UK.

Anthony Speaight QC also argued that the ECtHR has strayed too far from the principles of respect for democracy and the rule of law outlined in the Convention's preamble. Drawing support from the dissenting judgments of Judges Costa and Wildhaber in *Hirst v UK*, Mr Speaight emphasised the need for the ECtHR to remember that it is not a legislator, and that it must be careful not to assume legislative functions. Whilst acknowledging the moral force which rights enthusiasts see in their convictions, Mr Speaight argued that the inherent and equality dignity of every human being is a superior moral force which must prevail – stating that it is “quite wrong for decisions to be taken away from Parliament and given to an élite”.

However, Mr Speaight did not advocate withdrawal from the ECHR, believing it was better to seek to achieve reform of the model from within rather than abandon it completely. Moreover, he noted that a withdrawal would likely only have a limited effect, with both the Luxembourg and domestic courts proving themselves willing to engage in rights-based jurisprudence independently of the ECHR. For example, Mr Speaight referenced the majority of the Supreme Court in *Evans*, echoing Lord Wilson's dissent that their approach to s3 Freedom of Information Act 2000 was more akin to re-writing, rather than interpreting, the statute. In addition, Mr Speaight called for the UK to implement the Court's decisions on prisoners' voting rights, arguing that it was essential for the UK to comply with its existing obligations under international law.

Yet improvements could still be made. Mr Speaight suggested that a home-grown constitutional charter could enjoy greater public support than the ECHR-mimicking HRA. In a UK Bill of Rights, the European element would be replaced by an emphasis on whether the individual's constitutional rights have been infringed. Whilst Strasbourg jurisprudence would be a highly persuasive authority, it would be removed from the uniquely privileged position conferred by s2 HRA. Any such Bill of Rights could be incorporated into a more extensive constitutional statute setting out the UK's devolution settlement in a single document – such as the Bingham Centre's suggested Charter of Union – which would also contain a declaration of the principles of parliamentary sovereignty in a representative democracy.

Professor George Williams AO provided an Australian perspective on the UK HRA debate. For Professor Williams, the HRA represents more than a domestic rights-protection instrument. Instead, it has achieved iconic status in other common law jurisdictions as a model of how rights can be safeguarded without constitutional entrenchment or conferring supremacy on the judiciary. By providing an alternative to the judicially-focused United States Bill of Rights, the HRA was the catalyst for the first push towards legislative protection of human rights in Australia. As a result, the Australian Capital Territory and Victoria have now both enacted rights-protecting instruments which draw heavily on the UK model, and discussion is under way in relation to a similar instrument for Queensland.

However, Professor Williams also noted that the evolution of Australian human rights norms was inspired not only by the positive example set by the HRA, but also by recognition of its weaknesses. The Australian models therefore made key adaptations to the HRA model. These include an increased emphasis on consultation and education, as well as the centrality of Parliament in the rights protection process. In addition, the Australian instruments were grounded in Australian, rather than international, conceptions of human rights, and have been the subject of regular review and amendment.

Yet despite the HRA's perceived deficiencies, Professor Williams explained that the campaign to repeal it makes little sense from an Australian perspective. As a country without national human rights protection, Australia's poor track record on protecting Aboriginal rights and enacting Draconian counter-terror legislation makes the dangers of weakening the HRA all too obvious. Finally, Professor Williams pointed to the 'ripple effects' of an HRA repeal, emphasising that opponents of a human rights act for Queensland are easily able to misrepresent the current UK debate as a cautionary tale of why such legislation is a bad idea.

The event was followed by a Q&A with the audience.

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