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Editorial

A RIGHT TO FREEDOM OF ACTION?

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Cases: Entick v Carrington (1765) 19 St. Tr. 1030

Adams v Scottish Ministers 2003 S.L.T. 366 (OH)

Legislation: Human Rights Act 1998

European Convention on Human Rights 1950 Art.8, Protocol 1 Art.1

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Abstract: Argues that an explicit right to freedom of action should be added to the human rights framework on the basis that the current protection offered under the Human Rights Act 1998 is inadequate because it is limited to protecting particular rights or freedoms. Considers the example of the ban on hunting with dogs under Scots law and the extent to which the Outer House judgment in Adams v Scottish Ministers demonstrates the difficulties in challenging the legality of the restriction on the ability to take part in the proscribed activities, leading the petitioners to construct their case artificially under the European Convention on Human Rights 1950 Art.8 and Protocol 1 Art.1. Sets out the case for protecting liberty per se and why a right to freedom of action should be added to the 1998 Act. Includes a suggested text and addresses the concerns which this provision might raise over the limitations of such a right, who would be right holders, the potential for trivial claims and judicial control.

***473** This Opinion identifies limits to current human rights protection in the UK in that outside the human rights guaranteed by the Human Rights Act 1998 (HRA), there are no real mechanisms to protect from interferences with freedom of action. The authors therefore propose the addition of a right to freedom of action to the HRA, thereby remedying and strengthening the protection afforded to

liberty itself. The need to protect **liberty** is presented through case examples and the authors examine the proposed heightened significance of justifications given for state interference with this right.

> "Experience should teach us to be most on our guard to protect **liberty** when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their **liberty** by evil-minded rulers. The greatest dangers to **liberty** lurk in insidious encroachment by men of zeal, well-meaning but without understanding." [FN1]
>
> "The sole end for which mankind are warranted, individually or collectively, in interfering with the **liberty** of action of any of their number, is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others." [FN2]

Libertarianism and human rights

The concept of liberty, or freedom of action, was a central inspiration behind the first generation of human rights. The principle that people are born free and that liberty should not be subject to the arbitrary control of the state is foundational in the early rights documents such as the American Bill of Rights and the French Declaration of the Rights and Duties of Man. Yet, whilst historically the human rights movement had a close connection to libertarian ideals, no existing human rights charter or bill protects the foundational principle of freedom itself.

The spirit of John Stuart Mill's famous maxim is certainly not reflected in the law. Until recently, Parliament was free to restrict any of our **liberties** for any reason it saw fit provided that it clearly authorised the restriction by law. The rule in Entick v ***474** Carrington [FN3]--that governmental infringement on the **liberty** of citizens is only permissible in so far as it is shown to be authorised--provided some protection at common law but this protection was inadequate. Our **liberties** were **negative** freedoms existing "in the silence of the law" [FN4] and guaranteed to us unless Parliament decided otherwise. As Sir John Donaldson explained in the Spycatcher litigation: "the starting-point of our domestic law is that every citizen has the right to do what he likes, unless restrained by common law or statute" [FN5]-- unfortunately, the law had little to offer where common law or statute did restrain liberties. Although principles of interpretation favour a "moral reading" of the law to protect liberties and rights, this is only of marginal use. The common law has no tool with which to consider infringements of liberty where clear and unambiguous legislation interferes with it. In such a case we are reliant upon the government to protect our freedoms but it is clear that it cannot always be trusted to do so.

These criticisms of the limitations of "**negative liberties**" were well rehearsed in the literature surrounding the introduction of the Human Rights Bill and there is no need to reconsider them in detail here. It was because of these limitations that **Liberty** chose to move from a purely libertarian stance to support the philosophy of human rights in the early 1990s. [FN6] It was **Liberty's** view that any majority that existed in Parliament, no matter how benign or benevolent, was unlikely to have the capacity or the will to protect the minority from the majority. It seems somewhat unrealistic to expect politicians to risk the wrath of the tabloids and their chances of re-election for the sake of unpopular groups such as suspected terrorists, sex offenders or failed asylum seekers. The philosophy of human rights addresses the weakness of the **negative liberties** view by developing fundamental principles and placing a **positive** duty on the state to protect them. This is strengthened still further through justiciable rights that

enable individuals and groups to hold the state to account at a domestic or international level. It might be thought, then, that the enhanced protection offered by justiciable human rights norms would be the solution to the lack of teeth in the libertarian position: this is not strictly the case.

Limits to human rights protection

Although the Human Rights Act 1998 has considerably strengthened the protection of the individual from state interference with specified rights and interests, the Act does not defend liberty itself. Whilst human rights techniques are a useful tool in protecting particular rights or freedoms, they are of little use in challenging restrictions on liberty which do not engage protected rights. Human rights principles have, to date, had little impact on diverse debates such as voluntary euthanasia, [FN7] the legalisation of the use of cannabis or any ban on hunting with dogs, which restrict the freedom of the individual but do not obviously raise rights protected under the Human Rights Act. In these cases ***475** the complainant will retain the rights available under the common law, [FN8] but as we have seen these rights are of little use in the face of a statute explicitly restricting liberty.

Take, for example, the ban on hunting with dogs currently in place in Scotland [FN9] and proposed for England and Wales. The ban clearly restricts the freedom to take part in the proscribed activities but is it possible to examine the legality of this restriction on liberty through the Human Rights Act? The recent challenge to the Scottish legislation in Adams v Advocate General for Scotland [FN10] suggests that this would be extremely difficult. [FN11]

The reason the petitioners in Adams were challenging the legislation is clear from the judgment: "their complaint is that the legislation has the effect of criminalising their way of life: the risk of being prosecuted and convicted if they continue to engage in it". [FN12] Unfortunately for the petitioners, the Human Rights Act does not protect the freedom to continue in a particular way of life and so they were forced to recast their claims as falling under the Act. The challenge was characterised as falling under Art.8 of the Convention (the right to respect for private life) and Art.1 of Protocol 1 (the right to peaceful use of possessions). [FN13] The challenge failed, essentially because the real concern of the petitioners, the restriction of their liberty, was artificially constructed as one of these secondary rights but failed to fully engage those rights.

Take first the claim that the ban infringed respect for "private life" under Art.8. Although this right goes further than a right to "privacy", it does not go as far as a general right to "freedom of action". To engage the right the petitioners had to argue that hunting is a "private" activity, or at least that hunting and the culture surrounding it was central to their private lives. Unsurprisingly the petitioners failed on this ground. The court found that hunting is something of a spectacle, open to all comers and often taking place in public or on public land making it difficult to argue that it is private in nature. The claim failed on the basis of the public nature of the activity, an issue essential to Art.8 but irrelevant to the question of whether the petitioners' way of life should be criminalised.

The claim under Art.1 of Protocol 1 also turned on an issue irrelevant to the restriction of liberty: the question of whether the use of their property was controlled under the legislation. Whilst petitioners whose horses, land or dogs were used in hunting could bring a claim under Art.1 of Protocol 1, those who did

not own such property could not, unless it was possible to argue that the "right to hunt" itself was a possession, the use of which was being limited. [FN14] The artificiality of this argument meant that in Adams it was only the petitioners with relevant possessions who were ***476** able to proceed to the question of whether the ban was justified as a necessary and proportionate response. Again the ability to raise a challenge under the Human Rights Act depended on proving a fact irrelevant to the central question of whether the restriction on the way of life of the petitioners was reasonable.

This example shows the inadequacy of the Human Rights Act in dealing with questions concerning restrictions on liberty. Whilst we do not make any judgment as to whether the prohibition on hunting was an inappropriate restriction on liberty, we do consider that the court should be able to ask such a question. We would argue that the claim could be addressed more rationally if the interference with liberty was considered as a whole rather than viewed from the artificial perspective of its impact on protected interests. A more useful approach would be to recognise that the ban constitutes a restriction on existing freedoms exercisable by citizens in the United Kingdom. On the presumption that freedoms should not be further eroded without good reason we should then turn straight to the crucial question of whether the interference was justified. In raising this question it is an unnecessary obstacle to have to establish first that the activity was part of the participants' "private life" or that the right to participate was a "possession". If the principle of freedom is accepted, claimants should be able to raise it directly rather than being forced to recharacterise the issue as raising protected interests.

The need to protect liberty

If we are correct and neither the common law nor the Human Rights Act allow challenges to restrictions on liberty per se, does this matter? We would argue that it does. Even a government concerned to protect the liberties of its citizens will find itself in situations where it is expedient to interfere with freedoms. A government under pressure to take decisive and rapid action may well respond with measures that limit or infringe the freedoms of individuals or groups. A brief glance at some recent and proposed legislative measures illustrates this. The draconian legislation that followed September 11, 2001 allowed, amongst other measures, the detention of terrorist suspects for indefinite periods without charge. The call for greater security prompted by the fear of terrorism brings forward proposals for identity cards and greater surveillance and data sharing powers. Outside of the terrorist threat legislative measures to deal with perceived social problems have included imposing curfew orders on children and effectively criminalising otherwise lawful behaviour through anti-social behaviour orders on the grounds that it may cause "distress" to others. [FN15]

The proper limits of state interference with liberty is an issue that has received serious consideration from writers such as H.L.A. Hart [FN16] and Joel Feinberg. [FN17] Clearly there will be circumstances in which restrictions on freedom of action can be justified, for example, where the restriction is closely tailored for the protection of the rights of others or on the protection of a compelling public interest. In order to protect liberty these restrictions must be based on a considered basis. Our concern is that it is clear that the government does not seem to operate on any such coherent view and that the ***477** courts have no tool with which to assess the appropriateness of state interference with liberty outside of the limited rights protected by the Human Rights Act.

A right to freedom of action?

What might give the courts such a tool and bring human rights protection more closely in line with traditional libertarian thinking in this country would be to include a new right in the Human Rights Act. This right would protect liberty, the right to engage in any peaceful activity unless there was a legitimate reason to prevent it. Any interference would need to be properly prescribed by law and its effect would have to be proportionate and necessary in a democratic society. This new right would act as a brake on all those governments (of whatever political colour) whose first response to pressure to do something is to create new restrictions and criminal offences. This new right would give the individual protection outside the existing categories of the Human Rights Act but would use the human rights framework to ensure that the principle could not be ignored by the state when it became inconvenient.

A suggested text for such a right, to be added to the Human Rights Act, would be:

> "Everyone has the right to freedom of action. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

This right would bring the foundational common law principle of freedom of action within the protection of the Human Rights Act. It would also begin the process of going beyond the European Convention on Human Rights and creating a "home-grown" Bill of Rights. [FN18]

In principle, this text could also be added to the European Convention on Human Rights itself. We are aware, however, of the difficulties involved in getting the agreement of more than 40 governments and drafting a new additional protocol. [FN19] It is perhaps more realistic to build on the Human Rights Act and move towards a UK Bill of Rights.

Recent statements from the Home Secretary and the Prime Minister suggest that the current government has little interest in expanding rights. [FN20] Nevertheless, the Conservative Party has taken a much greater interest in freedom since Labour came to ***478** power. This interest has been reflected by the Daily Telegraph in their campaign for "a free country". [FN21]

Although the Conservative Party did not oppose the Human Rights Act when it was debated in Parliament, it has not enthusiastically supported the Act. The Shadow Home Secretary, Oliver Letwin, has recently written setting out his concerns about human rights. [FN22] His thinking is that freedom under the law has been the foundation stone of British **liberty**, and that human rights law is a threat to that very freedom. In his view, much of the new human rights law removes, rather than upholds, **liberties**. The ever more powerful state can encroach on basic freedoms and the paradigm shift from **liberty** to **positive** rights leaves too much discretion to the judges. He argues that the continental tradition of rights-based--often discretionary--law conflicts with the British tradition of **negative** freedoms. Modish trends, which go against the true tradition of **liberty**, have no place in conservative thinking.

His solution is to include a freedom clause in each new law. This "freedom clause" has now been given some structure by another Tory MP, Mark Prisk, who has introduced a 10-minute rule Bill:

> "to require each item of legislation to be subject to a statement as to how

each measure included in it affects the freedom of expression, assembly, conscience and association and why the benefits of the measure outweigh any loss of freedom." [FN23]

Although we would argue that the human rights law could be a powerful tool to protect liberty, we share the concern that the current law does not go far enough to protect liberty. It seems to us that therefore some support for our proposal might be found from within the libertarian camp.

Scope of the right

In our view, the limited protection given to freedom of action in the current law is of sufficient concern that the introduction of a new right warrants serious attention. We are, however, aware that there are a number of issues, and potential difficulties, which need to be addressed. We have identified below some areas which would need particular research and debate before the new right could be included in the Human Rights Act.

Limitations

A particular issue for public debate are the limitations included in the right. The restrictions included in our draft right are intended to mirror the drafting of particular articles in the European Convention on Human Rights to aid in the interpretation of the new right. [FN24] The Convention is now over 50 years old and it may be that new restrictions (such as environmental protection) may be required or that existing ***479** restrictions should be removed. This is particularly the case with the restriction for the "protection of morals", included in a number of Convention rights. In principle, we would argue that the morality of the majority should never justify the interference with the freedom of another. We would also reject any suggestion that society is entitled to protect its common morality in order to protect itself. [FN25] Ideally we would remove this restriction, however we are aware that this may have significant ramifications for areas of public policy such as medical ethics: particularly issues such as embryo experimentation, the ban on cloning of humans and restrictions on late abortions. The policy implications of introducing the right without this restriction would require particular research.

Right holders

A further question is whether the right should only apply to individuals or should be extended to companies or other corporate bodies. We would suggest that the right should be limited to individuals as it is based on the principle that individual dignity requires that a person is able to take control of their life as far as reasonably possible.

Trivial cases

There may also be some concern that the right could unnecessarily restrict public authorities in implementing licensing or regulatory systems. For example, it might be possible to use the right to claim that a speed limit or parking restriction in a particular area is not necessary and is an unjustified restriction on liberty. The use of human rights claims in such trivial cases could unduly hamper public administration and would tend to devalue human rights protection. One way to deal with this objection is to concentrate on what is perhaps the libertarian real concern--the creation of new criminal offences. It this was adop-

ted as a test of whether the right was engaged or not, fewer of these objections would apply.

Judicial control

Finally, there may be concern that the power given to judges by the right is too extensive. On one level any law restricts the freedom of individuals to do as they wish: traffic laws requiring me to drive on the left-hand side of the road restrict my freedom to drive on the right. In this context, such a right would enable virtually any law to be challenged, as even a trivial restriction on liberty arguable infringes the individual's right to "freedom of action". Once before the courts the judiciary would be faced with charges of judicial legislation as they would be required to weigh the reasons given and decide whether the restriction is necessary "in a democratic society". Many people were uncomfortable with the amount of power given to the judiciary through the Human Rights Act and the perceived problems for the separation of powers. There may ***480** be concern that the right would allow an inappropriately wide range of issues to come before the courts.

We would suggest two possible ways to address this difficulty. First, a de minimis level of interference may be required before the right was engaged. More fundamentally, however, we may consider the mechanisms used to protect human rights and where the final say on the content of those rights lies. Under the current regime it is the courts who have that final say, subject to any amendments made by Parliament to the Human Rights Act itself. Under Liberty's proposals for a domestic Bill of Rights [FN26] it would be possible for Parliament to re-enact legislation struck down by the courts subject to enhanced parliamentary scrutiny and voting procedures. Where a proper balance is drawn between judicial and legislative power, the concerns about judicial "legislation" can be minimalised.

Conclusion

We would argue that this country's long-standing commitment to liberty and freedom is not adequately protected in the current system. The principle of liberty, or freedom of action, is foundational to the Anglo-American concept of rights but was insufficiently protected by the common law. Whilst the Human Rights Act gives greater protection to individuals in some circumstances, it may only do so where particular interests are at stake. We propose that this is remedied by an explicit right to freedom of action within the human rights protection system. Although the introduction of such a right may be problematic, we would argue that the need for protection of liberty is great enough to warrant serious consideration of this appeal.

FN1. Olmstead v United States 48 S.Ct. 564.

FN2. J.S. Mill, On Liberty (1859), ch.1.

FN3. (1765) 19 St.Tr. 1030.

FN4. Thomas Hobbes, The Leviathan (1651), Pt 2, ch.16.

FN5. Att-Gen v Guardian Newspapers [1990] 1 A.C. 109 at 178.

FN6. F. Klug, The People's Charter (1991).

FN7. R (on the application of Pretty) v DPP [2001] UKHL 61; [2002] 1 A.C. 800.

FN8. Human Rights Act 1998, s.11.

FN9. Protection of Wild Mammals (Scotland) Act 2002.

FN10. [2002] U.K.H.R.R. 1189.

FN11. The potential arguments that could be used are also considered in detail by Rabinder Singh and David Thomas in "The Human Rights Act implications of a ban on hunting with dogs" [2002] E.H.R.L.R. 28. The conclusion of the authors of that article is that the Bill then before Parliament would comply with the Convention.

FN12. [2002] U.K.H.R.R. 1189 at [71] per Lord Nimmo Smith.

FN13. The petitioners also raised discrimination under Art.14 on the basis that the legislation discriminated between different forms of hunting. This argument also failed.

FN14. The court in Adams found that there was an interference with property (the home and livelihood of one petitioner and the animals of others) but that it was justified in the public interest.

FN15. See the White Paper and draft Bill published on March 12, 2003.

FN16. H.L.A. Hart, Law, Liberty and Morality (1963).

FN17. Particularly Offense to Others (1986), Harm to Self (1986) and Harmless Wrongdoing (1988).

FN18. The incorporation of the European Convention into domestic law was always intended to be a starting point leading to the second stage of a creation of a domestic Bill of Rights. See, e.g. "A new agenda for democracy: Labour's Proposals for Constitutional Reform", NEC Statement (April 1993) and S. Sedley, "A Bill of Rights for Britain" [1997] 5 E.H.R.R. 458 at 459.

FN19. Since the Convention itself was finalised in the early 1950s there have only been seven protocols that have provided new substantial rights to the Convention--Protocols 1, 4, 6, 7, 12 and 13. An average of one every seven years.

FN20. See, e.g. the comments made by the Home Secretary and the Prime Minister concerning asylum: "Blunkett v the Bench: the battle has begun", The Times, March 4, 2003 and "Asylum in Britain: You can't quit treaties, Blair warned: Courts would ban withdrawal from refugee obligations", Guardian, February 6, 2003.

FN21. www.telegraph.co.uk/freecountry.

FN22. Oliver Letwin, John Marenbon and Martin Howe, Conservative Debates: Liberty under the Law (October 2002).

FN23. Hansard, HC col.141 (February 25, 2003).

FN24. See, e.g. Arts 8(2), 9(2), 10(2) and 11(2).

FN25. See the debate between Lord Devlin in The Enforcement of Morals (1959) and H.L.A. Hart in Law, Liberty and Morality (1963).

FN26. The People's Charter, n.6 above.

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