CONSERVATIVE DEBATES

Oliver Letwin
John Marenbon
Martin Howe

Liberty under the Law

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e-mail: info@politeia.co.uk
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Foreword

We live in an age of censorship. We are not allowed to do or say things that the ruling elites consider illiberal. Much of what is not allowed is self-censored as those tempted to express opinions considered by the elites to be beyond the pale have learned to fear obloquy and social ostracism. However, to reinforce the prevailing orthodoxy, our masters have underpinned the moral guidance they have kindly provided, with an increasingly intrusive body of law. That law is in the French tradition. It merely expresses the principles to be followed and leaves the interpretation of those principles to judges: highly intelligent, well meaning officials appointed by a group of *haut fonctionnaires* who now run our lives. These judges are not elected and have the right to overrule the decisions of our elected representatives. They tell us what our rights are in principle and interpret those principles themselves. We have no appeal against their judgement of what is just and what is good for us. In other words they are happy to be arbitrary in order to force us to be good.

This situation flies in the face of the liberal settlement which has hitherto assumed that individuals should be masters of their own lives ultimately limited only by laws made by an elected Parliament. For the first time since the Stuarts, Parliament has been defeated and we have acquiesced in it. We may agree with the judges as to what is acceptable and what is not but that is not the point. They have in short reversed the victory of Parliament over Sir Edward Coke in the reign of James I.

Are we happy with this development? Do we prefer to be ruled by fallible people like us who at least we can sack once every 5 years or by unsackable Platonic guardians?

In the present climate publishing this pamphlet verges on an act of courage. Writing it is certainly courageous. The pamphlet's success will not be measured by the reasoned argument it elicits in response but by the hoots of derision the establishment now uses to overwhelm its most acute critics.

Robert Cranborne

THE AUTHORS

Oliver Letwin has been the Conservative Member of Parliament for Dorset West since 1997 and is currently the shadow home secretary. Dr Letwin was a visiting research fellow at Princeton University 1980-81 and a research fellow at Darwin College, Cambridge. He also served as a member of the Prime Minister's Policy Unit from 1983-86. His publications include *Privatising the World* (1987), *Drift to Union* (1990) and, for Politeia, *Civilised Conservatism* (1999).

John Marenbon is a fellow of Trinity College, Cambridge. Dr Marenbon's interests include political thought and the history of philosophy. His publications include *The Philosophy of Peter Abelard* and, for Politeia, *A Moral Maze: Government values in education* and *Little Platoons or a Free Society,* a response to Oliver Letwin's *Civilised Conservatism.*

Martin Howe QC specialises in European law and intellectual property law. He conducts cases in the English courts, the European Court of Justice and other European tribunals. Previous publications include *Europe and the Constitution after Maastricht, From Maastricht to Amsterdam,* and numerous articles on European legal and constitutional issues. For Politeia he wrote *Tackling Terrorism: The European Human Rights Convention and The Enemy Within* (2001).

I

Rights and Liberties: Invisible Changes
Oliver Letwin

The fundamental principle of our democracy is: freedom under the rule of law.

Simple words, complicated concept.

At first appearance, the concept looks easy to grasp - "freedom under the rule of law" means that British citizens are free to do anything that the law does not prohibit; the law is made by Parliament; and the law is interpreted by judges. So far, so good. But the frequent experience of British citizens does not correspond with this clear and comforting appearance. In practice, our laws do much more than merely to prohibit certain forms of private activity. They also provide the agents of the state with a wide range of powers.

The first of these is the power to tax and spend; but from the taxation and spending arise great numbers of administrations and administrators who, armed with other powers given to them by the law, exercise control over the citizen in innumerable ways.

The doctors who compel people to undergo psychiatric treatment, the social workers who remove a child from his or her parents, the officials who inspect small businesses are just three examples which stand for hundreds of others. Since the powers allocated by law to these agents of the state are frequently very widely defined, the citizen frequently has the impression of dealing with an all-powerful bureaucracy which, so far from allowing people to do anything not prohibited by law, regards with suspicion any action that it has not specifically sanctioned.

The mechanism which has led to this progressive increase in the size and power of the state is clear. Somebody, somewhere does, or fails to do, something that someone else thinks they ought not to have done or ought to have done, respectively. Those who are critical of the action or the lapse make a fuss in public. The hue and cry is taken up by a newspaper or broadcaster who is after a 'good story'. The government of the day responds with legislation to establish a new bureaucracy or to enlarge the powers of the existing bureaucracy - so that something can be shown to have 'been done' about the problem. And, before you can say 'Jack Robinson', the power of the state is once again enlarged at the expense of the freedom of the citizen.

Checks and balances

There is, at present, little in the way of a parliamentary check on this ratchet. Because our Parliamentary system is based on Dicey's celebrated 'fusion' of the executive with the legislature, the government, under normal circumstances, controls Parliament. No surprise, then, that when the government decides to legislate to 'do something' about a problem by giving itself more power, Parliament grants that power.

I have elsewhere argued (*Daily Telegraph*, 2 July 2002) that a modest improvement could be introduced - in the form of a requirement that each piece of legislation giving new powers to the state should be subject to a 'freedom test', forcing the Minister introducing the legislation to specify the impact that the legislation is likely to have upon the freedom of the citizen. Such a device - especially if accompanied by appropriate administrative changes within Whitehall - might serve to make Parliament more likely to debate the consequences for freedom of specific enlargements of the power of the state. It might also make Ministers and their officials more likely to consider the question of freedom when framing new legislation in response to some public concern.

The possibility - perhaps, now, the likelihood - of a House of Lords more endowed with democratic legitimacy, but more independent of the executive than is the House of Commons, also gives grounds for optimism that increased checks and balances may soon be built into our parliamentary system. Over time, an evolution towards a more powerful and independent second chamber might do much to right the balance and to check the momentum of increasing state power over the citizen.

But, in the meanwhile, we have neither the freedom test nor a sufficiently powerful second chamber. The role of protecting the citizen from the state has accordingly been taken on by the judiciary. The mechanism of judicial review has been used to curtail the power of the agents of the state. Where statutory definitions of the limits of that power have been vague, the judges have been willing to step beyond pure interpretation and to decide, instead, whether the powers of an agent of the state - be he the most junior official or the most senior minister - have been exercised 'reasonably'. The jurisprudence of the 'reasonable' has become one of the bulwarks of British liberty.

Recently, the judges have been armed by Parliament with an array of other weapons with which to take on the power of the executive. The Freedom of Information Act 2000 (which comes into effect in 2005), the Data Protection Acts (1998, amending that of 1984) and, above all, the Human Rights Act of 1998 are good examples. We are only gradually beginning to understand how far judicial activism will deploy these new weapons in advancing the freedom of the citizen against the agencies of the state.

A paradigm shift

We have, here, a striking paradigm shift. No longer 'freedom under the rule of law' - the citizen able to do anything not prohibited by law as interpreted by judges. In its place, a vast

array of ill-defined powers for the state and its agencies, and a judiciary armed with weapons of great but uncertain power to defend the citizen against the intrusions and arbitrariness of those agents of the state.

What are the results of this paradigm shift? First, it has given great and uncharted responsibility to the judges. At present, this responsibility is being exercised with great care. But how will the next generation of judges, or the generation after that, use its power and fulfil its responsibilities? What mechanism have we established for assuring ourselves that the degree of protection for the freedom of the citizen afforded by the judiciary will go on being appropriate to the level and scope of the powers of the state in future? The answer is, I fear, that we have not only done little or nothing to assure ourselves on this point - but have, to all intents and purposes, failed even to debate the subject with any seriousness.

From the freedom of citizens to universal human rights

The second implication of the paradigm shift is a profound - though largely unrecognised - alteration in the relationship between the citizen and the foreigner. Nothing could better have illustrated this point than the recent judgement in the case of those detained under the Anti-Terrorism, Crime & Security Act. In this case, the lawyers for the defendants successfully argued at the Special Immigration Appeals Commission (in effect, a part of the High Court) that they could not be detained under the provisions of the Act, because the Act itself was incompatible with Article 14 of the European Convention on Human Rights, incorporated into English law by the Human Rights Act. Article 14 states that: 'the enjoyment of the rights and freedoms set forth in this Convention shall be secure without discrimination on any ground such as ... national or social origin.' The judges found that, since the provisions of the Anti-Terrorism Act apply only to foreign nationals, detention under the Act constitutes 'discrimination' on the ground of 'national ... origin'.

In days gone by, there was a fairly robust consensus in Britain that the freedom of the citizen was just that: freedom attaching to those who were by birth, or had become, British citizens. In the spirit of that consensus and before the paradigm shift, there were frequent examples of compassion, pity and kindness towards foreign nationals - but there was little or no sense that English law was designed to protect the interests of foreign nationals. The effect of the paradigm shift has been - almost unconsciously - to move away from the concept of the liberties of the citizen and towards a concept of universal human rights.

The state, the judges and the citizen

A third, and unnoticed, effect of the paradigm shift has been the (almost equally unnoticed) shift from a bipolar conception of the relationship between the citizen and the state, to a triangular conception of that relationship. The classical and simple concept of 'freedom under the law' demands two actors: the individual (whose scope of action is unlimited save by what the law prohibits) and the state (which prohibits certain actions in the public interest). Following the paradigm shift, we now have scope for the judiciary to interpret the state as being deficient if it fails to enable one citizen to exert certain rights vis-à-vis another citizen. In article 8 of the European Convention on Human Rights, for example, we read that 'everyone has the right to respect for his private and family life'. There is no indication of how far, over time and under the aegis of an evolving jurisprudence, these ill-defined but pregnant words will lead to one individual being able, through the courts, to compel the state to act against other individuals who are, in some arguable way, failing to "respect" his or her 'private and family life'. With this shift from bipolar to triangular relationships, we have, in effect, a shift from liberties to positive rights, whose scope and whose effect on liberties we are currently in no good position to estimate. It may well be that, over time, the jurisprudence will enable me, through the courts

and the state, significantly to limit the liberties of my neighbour to behave as he sees fit, on the grounds that he is infringing my rights to 'respect' for my 'private and family life'.

Conclusion

To notice these phenomena - to be aware of the paradigm shift - is not to acquire, by magic, easy answers to dizzyingly complicated questions. The preservation of a civilised society depends on achieving an intricate and ever changing balance between conflicting values. Security, welfare, freedom and a host of other absolute principles must all somehow be accommodated, each being given due weight in a politics that responds to changing circumstances. But we cannot hope to conduct such a politics - or to preserve that delicate balance and the civilised society that depends upon it - if we do not even so much as recognise that a profound shift is occurring. Nor can we make progress until we recognise that the cause of this profound shift is a combination of the *absence* of proper parliamentary checks and balances and the *presence* of a raft of new and fundamental (but little understood) legislation. It is time, now, for British politics to begin to acknowledge these realities, and to begin to debate their consequences. We cannot expect to preserve our freedom if we do not concern ourselves with its fate.

II

Freedom under the law: a conservative response

John Marenbon

Oliver Letwin argues that a deep change (what he calls a 'paradigm shift') has taken place in the relationship between British people, their law and their government. Formerly, the law was mainly concerned to forbid certain sorts of action. Whatever the law did not prohibit was allowed, and governments did not think it their business to restrict this ample 'freedom under the rule of law'. Now governments are increasingly eager to enforce or encourage types of behaviour they consider desirable, both through taxation and benefits, and by means of the law itself. So over-mighty government encroaches on Englishmen's freedoms, and Parliament, their traditional champion, is in thrall to a dominant executive. But, Dr Letwin believes, they have found a champion in the judiciary. No longer limited to resolving legal niceties, judges have been given by new human rights and related legislation 'great but uncertain power to defend the citizen against the intrusions and arbitrariness' of the agents of the state. Instead, then, of the 'bipolar' relationship, involving the individual and the state, there is growing a triangular one, between the people, their government and the judiciary. But Letwin also recognizes another possible effect of the judges' new position: in the name of the human rights of one citizen, they might require government to restrict the freedoms of others.

Letwin, then, pictures the judges as being fundamentally upholders of the individuals' liberties who, as an unfortunate side effect of their well-directed efforts, may end up by reducing certain freedoms. He thus presents us with a paradox. I shall suggest that the solution to this paradox lies in making two distinctions. One of them, between negative and positive

rights, is adumbrated by Letwin himself. The other, between external and internal liberalism, is a new one.

The new way of thinking about human rights

Letwin is too kind to the judges. Human rights legislation, as now interpreted by the judges - and, more broadly, the whole movement of thought about human rights that carries the judiciary along with it - does much more to remove liberties than to uphold them. At first sight, this claim might seem unlikely. According to one influential analysis, human rights are best regarded as limits - trump cards - that can be invoked by individuals to protect their interests against the actions of the state, even when the state is acting for the common good. Most of the provisions of, for instance, the European Convention on Human Rights (ECHR) are of this sort. They prohibit states from killing, or unfairly imprisoning, or silencing, their citizens. How could such laws be inimical to liberty? But the ECHR is now being interpreted in line with a new way of thinking about human rights (one already shaping the language and form of broader political policy) that has changed their character.

Rights and duties

In order to understand this new way of thinking and how it has derived from earlier ideas about human rights, we must look a little more carefully at the general concept of a right. In principle, every right is correlated to a duty. If A has a right to ϕ then there is a duty on some person or group of persons or entity to enable A to ϕ. The principle is very clear in the case of acquired rights. If I promise to give you ten pounds, then you acquire a right to be given ten pounds by me, and there is a correlative duty on me to give you ten pounds. Human rights are, of course, considered to be natural, rather than acquired, and because there is therefore no person or group of people in

particular from whom they are acquired, there can often be difficulty in locating on whom exactly the correlated duty falls. The rights might, therefore, be described as being 'of vague application'.

In more traditional thought about human rights, however, this vagueness has not usually been a source of difficulty, because the rights are negative. They are rights *not* to be tortured, *not* to be unjustly imprisoned, silenced and so on. The duty corresponding to a negative human right is a prohibition, and although such prohibitions are vague, in the sense that it is not possible to identify individually those who are actually affected by the prohibition (who would have so acted had they not been forbidden), they are not vague at all about those to whom they apply. They are general prohibitions, which apply to everyone, whomsoever. In practice, most of these negative human rights forbid types of behaviour that almost every national law prohibits from one citizen towards another. The role traditionally left to the laws on human rights is that of prohibiting the agents of states from certain sorts of behaviour towards citizens. (And so negative human rights might be recast in terms of prohibitions on the agents of states against certain sorts of action toward the citizens.)

Positive rights

The new way of thinking, however, introduces positive, as well as negative, human rights. Ethical philosophers, in particular, have started from the idea of an adequate human life: one in which the various distinctively human capacities are allowed to develop - a much diminished version of the flourishing life described by Aristotle in his *Nicomachean Ethics.* They then attribute to every person rights to the conditions that make an adequate human life possible. These rights include not merely negative provisions to allow people to develop and fulfil their capacities as they will without interference, but also positive provisions for physical welfare (food, shelter, healthcare) and

for education. The vagueness of such positive human rights can have a sinister consequence.

Suppose that you have a right to food, shelter, healthcare and education. Whose is the duty to provide them for you? Not mine, not anybody's in particular. And so it is left for states to undertake the duties correlated to those rights. These duties cannot be performed without large amounts of money and, since states have no money of their own, they must tax their citizens to raise it. When they spend what they consider to be public money, states are rarely content to allow citizens to decide to do with it as they will, even within a particular sphere. Consider, for instance, education. Suppose - as is the case among most politicians today - it is held that every child has the right to an education. For this right to be fulfilled, the state must take upon itself the duty to provide schooling. Once it is providing schooling, it takes upon itself the responsibility for determining what counts as an education - that is to say, what is to be taught in schools; and even the responsibility for deciding on levels of academic excellence. Impoverished by the taxes necessary for the state to meet the duty it has undertaken, most citizens will be forced to use the supposedly free education provided. Parents will have to let their children be educated according to a curriculum and values decided, not by them, but by the state. In this way basic liberties are lost once a conception of positive human rights dominates political thinking.

The human rights lawyers have not yet gone so far as the philosophers. The example I have just discussed shows the effects, not of human rights *law,* but of the new approach to thinking about human rights as it has helped to mould political policy. There is, however, a way in which human rights law itself, as interpreted by the judges, is beginning to incorporate this new way of thinking, much to the detriment of freedom. From human rights that were originally conceived as negative

are derived further supposed rights, which are positive and vague in their application (and so, in practice, require action by the state). A clear example of this tendency, mentioned by Letwin and discussed in more detail (pp. 29-30) by Martin Howe, is the transformation of the negative right of a person 'to respect for his private and family life, his home and his correspondence' (ECHR, Article 8) into an explicitly positive set of rights, regarding information, personal identity, social and sexual life, which the state is obliged to put into effect.

The same tendency is at work, although perhaps not yet so explicitly formulated in legal practice, with regard to the tolerance of different practices and ways of life. Tolerance is no longer regarded as sufficient; society as a whole is expected to grant equal esteem to the various ways of life, beliefs and practices followed by its various members, so that the members of no group should feel scorned or excluded because of how they choose to live. It is not enough, for example, that people are free to follow their own religions; particular religious beliefs, whatever they may be, are now almost beyond the bounds of criticism or satire, and in many spheres of life a strict religious neutrality is enforced so as not to cause offence to any particular believer. Or to take an even more striking example, the public is no longer allowed merely to tolerate homosexual practices: it must approve of them, or so at least an ever more powerful political and legal lobby would have it. Its members are not content with laws that allow consenting adults (and now consenting youths) to engage in homosexual activity. In order to safeguard the self-esteem of those who choose a way of life execrated by many cultural traditions, including our own, the state must reform and re-educate society; and if the parents themselves turn out to be a lost cause, their wishes must be disregarded when it comes to indoctrinating their children into this new world order.

External and internal liberalism

The new thinking about human rights is, therefore, a threat to some of our liberties. But why is this a matter for concern? Freedom is not, after all, an absolute good, as conservatives understand perhaps better than others; and one freedom must sometimes be abated so that another may be preserved. In order to see why, from a conservative point of view, the new thinking on human rights is particularly repugnant, and even the older conception of human rights cannot be accepted, we must distinguish between two types of liberalism.

One sort is an external liberalism. It holds that, given the lack now of a social consensus about values, governments should not try to impose on society any particular shape but limit themselves to enforcing the basic laws needed to maintain civil society and other measures (such as the relief of poverty and a degree of monetary redistribution) on which there is almost general agreement.* There is every reason why conservatives should embrace external liberalism. For it to be right for a government to enforce a set of values on society, there needs to be near certainty that these values, and not some others, are the right ones. Whatever the strength of conservatives' convictions about their particular values, they cannot plausibly claim the degree of certainty for them which would justify their general enforcement. Moreover, external liberalism represents the one dispensation under which, today, it might be practically possible for conservatives themselves to live their lives according to their values.

The other sort of liberalism is internal liberalism. Unlike external liberalism, which is strictly a political doctrine, and claims no ethical content, internal liberalism rests on an ethical

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* I have described this liberalism at greater length and argued for it in a previous essay also written in dialogue with Oliver Letwin: *Little Platoons* or *A Free Society* in *Conservative Debates* (Politeia 1999), pp 19-49.

doctrine about the basis of value, which it finds in the desires of each individual and their fulfilment. Of course, internal liberals accept that there must be restrictions on how far one man's desires may be fulfilled, in so far as they clash with another's fulfilment of his desires. And internal liberalism can be made more sophisticated by introducing second-order desires (desires for desires), and of conditions with regard to information and rationality, so that values are based, not on the desires people happen to have, but on those they would have if they were completely rational and fully informed. Nonetheless, even these more developed forms of internal liberalism see values in terms of individual humans and their desires.

When people nowadays talk of 'liberalism' or 'social liberalism', they mean this internal liberalism, or rather, the attitudes and general values that follow from it - in particular, the view that there is nothing wrong with any sort of behaviour or practice so long as no one is harmed by it. Although some of the more empty-headed members of the Conservative Party proclaim themselves social liberals, this internal liberalism is quite incompatible with their professed political allegiance since, if any one belief is fundamental to conservatism, it is that there are real values - moral, aesthetic and cognitive - that are independent of the desires of any person. Whereas conservatives should, if they are clear-thinking, accept external liberalism, they cannot be internal liberals (nor, therefore, social liberals) whilst remaining conservatives.

Conservatives and human rights

The distinction between external and internal liberalism shows why conservatives should denounce the threat to liberty posed by the new way of thinking about human rights. For, clearly, the positive rights of vague application proposed by this thinking require states to legislate and mould society in ways incompatible with external liberalism. It also shows why

conservatives should not accept even the older way of thinking about (negative) human rights. To think in terms of human rights at all is to enter the conceptual space of internal liberalism where, instead of starting from real values, the philosopher sets out by envisaging a world of individuals with desires: their negative rights mark out certain central areas where, at least, their desires are not to be thwarted. This is not to say that conservatives approve of torture or the imprisonment or execution of the innocent, but they condemn such behaviour because it involves governments, officials and their subordinates in failing their duty, by acting in a way that they are obliged to avoid. To censure such actions because they infringe the supposed human rights of the victims is precisely to miss what makes them a disgrace: not the suffering of the innocent which, unfortunate though it may be, is no different in itself from the innocent's suffering or dying from a disease or as the result of an accident, but the evil of the torturers, jailers, executioners and those who have given them authority.

Conclusion

My difference, then, from Letwin is a matter of degree and emphasis. He is right to point how human rights law is evolving in a way that threatens our liberties, and he is right, as a conservative, to wish to protect these liberties, which belong to external liberalism. But he does not, perhaps, sufficiently emphasize the imminence of the danger, nor how thoroughly the way of thinking he identifies has penetrated political, as well as legal, thought; nor the gulf that exists between conservatism and even more familiar and, apparently, less threatening conceptions of human rights. There is also the question of what action, if any, should be taken as a result of these observations. Letwin puts the problem admirably when he explains that the 'preservation of a civilised society depends on achieving an intricate and ever-changing balance between conflicting values', but he does not make it clear that both the

'paradigm shift' he has described, and the wider paradigm within which that shift has taken place, are inimical to the conservative wisdom captured by this remark.

The concept of paradigm shifts was originally devised by philosophers of science. In science there is no going back from one paradigm to an earlier one. But that is because the newer paradigm explains all the evidence used in the old paradigm, and more. Paradigm changes are the jolts forward on the path of scientific progress. Great changes in approach to law and morality (and, more generally, in culture and philosophy) are different. Calling them 'paradigm shifts' may usefully underline their importance, but it over-dignifies them. They are mere changes in fashion, and very often changes for the worse. What the Conservative Party needs, both in its dealing with human rights, and more widely in its response to modern society, is the courage to be unfashionable.

III

The Rise of Rights and the Decline of Liberty

Martin Howe

It used to be thought that our freedoms lay in the certainty of the law. Clearly defined laws, administered with the minimum of arbitrariness or discretion, left the citizen free to do anything that the law did not prohibit. The absence of discretion in the application of the law made it more difficult for state officials to exert pressure on the citizen to refrain from doing things which they disapproved of, but were not against the law. This was the central strand of thinking of the lawyers and judges of the common law courts who provided so much of the intellectual weight in the struggles of Parliament against the Crown in the 17th Century.

The British historical tradition, later exported across the Atlantic, concentrated on rights as being the obverse of limitations on state or official actions. Used in this sense, a 'right' can be equated with a freedom: a right to be left alone and so to continue to enjoy the freedom flowing from the absence of restrictions or interferences imposed by the state or its agents. On the other hand, the word 'rights' is now increasingly used in the sense of entitlements rather than freedoms: a 'right' to be provided with social security benefits or with health care, which imposes burdens on the state and, through it, on the citizens from whom it levies its taxes; or a 'right' to privacy, which in fact amounts to a restriction on the freedom of others to disseminate information.

Fundamental Rights in British History

As is well known, the British constitution does not lay down any defined category of fundamental or protected rights. However, it is possible to list the statutes and instruments which are widely recognised as having expressed or reaffirmed fundamental rights.

Magna Carta is the starting point.[1] The most important and enduring article of *Magna Carta* concerns the imposition of penalties:

> 'No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we pass upon him, or condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man, either justice or right.'[2]

This famous article contained two principles. First, that penalties could not be imposed by the King or his officials arbitrarily, but only in accordance with the law and through the law's recognised procedures. Secondly, the law itself should be administered in a fair and non-arbitrary manner.

At the same time, the Act of Confirmation of the Charters[3] prohibited the raising by the Crown of charges or taxes 'but by the common consent of the realm, and for the common profit thereof, saving for the ancient aids and prises due and

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[1] Originating famously as a compact between King John and his barons at Runnymede, the 'Great Charter of the Liberties of England, and of the Forest' was confirmed by Edward I, and as so confirmed is regarded as having the constitutional status of an Act of Parliament.

[2] Magna Carta, Chapter 29, 1297 (25 Edw 1).

[3] 25 Edw I, Chapter 6.

accustomed.' This restrained arbitrary seizure of property by the Crown, since parliamentary consent would be required for any form of new tax or levy by the Crown. The next stage in the evolution of fundamental rights took place as a result of the struggles between Crown and Parliament before, during and after the Civil War. The Petition of Right 1627, to which the King was compelled to assent, prohibited the raising of forced loans by Royal Commissioners and the by-passing of the ordinary law courts by the use of special commissions purportedly enforcing martial law.

But the most comprehensive expression in English history of the protection of fundamental rights can be found in the Revolution settlement of 1688-9. The most central document is the Bill of Rights itself, which, after reciting the abuses of Royal authority committed by James II, provided:-

'Suspending Power: That the pretended power of suspending of laws or of the execution of laws by regall authoritie without consent of Parliament is illegal.

Late dispensing power: That the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath been assumed and exercised of late is illegal.

Ecclesiastical courts illegal: That the commission for erecting the late court of commissioners for ecclesiastical causes and all other commissions and courts of like nature are illegal and pernicious.

Levying money: That levying money for or to the use of the Crowne by pretence of prerogative without grant of Parliament for a longer time or in other manner than the same is or shall be granted is illegal.

Rights to petition: That it is the right of the subjects to petition the King and all commitments and prosecutions for such petitioning are illegal.

Standing army: That the raising or keeping a standing army within the kingdom in time of peace unless it be with consent of Parliament is against law. ...

Freedom of election: That the election of members of Parliament ought to be free.

Freedom of speech: That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

Excessive Bail: That excessive bail ought not to be required not excessive fines imposed nor cruel and unusual punishments inflicted.

Juries: That jurors ought to be duly impanelled and returned.

Frequent Parliaments: And that for redress of all grievances and for the amending strengthening and preserving of the laws Parliaments ought to be held frequently ...'

To the Bill of Rights itself can be added the Habeas Corpus Act of 1679[4]. This laid down a detailed procedure whereby unlawful imprisonment by the executive or others could be speedily challenged. The Act of Settlement 1701 laid down that the judges of the higher courts could not be removed from office except with the consent of both Houses of Parliament, so guaranteeing their independence from the Crown. Thus there were three strands in the British model of the protection of fundamental rights.

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[4] This Act had been passed earlier, in the reign of Charles II. James II attempted to by-pass it by ordering imprisonment using special courts and commissions, a practice itself outlawed by the Bill of Rights.

First, the rights defined were limitations on state powers: the right not to be imprisoned except in accordance with the law, or the right not have property taken away in taxes or levies except as laid down by Parliament.

Secondly, strong procedural safeguards to ensure the effective and non-arbitrary enforcement of the law by an independent judiciary.

Thirdly, the outlawing of special courts and tribunals, such as Star Chamber, which operate outside the framework of the ordinary courts. 'The provisions made by the law for the liberty of the subject have been found for ages effectual to an extent never known in any other country through the medium of the summary right to the writ of habeas corpus..' [5]

These same strands played an even stronger part in the American Revolution and in the Constitution which evolved after independence. The cornerstone of the US Constitution is the separation of powers, enshrining the independence of the judiciary from the executive or legislature. The American Bill of Rights was very largely modelled on the English one, but in many important respects went further. The right of free speech which the English Bill of Rights conferred on Parliament, was extended by the First Amendment in the US Bill of Rights to everyone, explicitly restricting the ability of Congress to legislate against free speech or freedom of religion. All the rights conferred by the American Bill of Rights were, at least as originally understood and interpreted, true freedoms rather than entitlements which could restrict the freedoms of others

The development of entitlement-rights

The history of the development of the protection of rights on the Continent differed radically from the evolution of the

[5] Lord Denman CJ in R v. Batcheldor (1839) 1 Per & Dav 516 at 567.

British approach as outlined above. Stemming from the Declaration of the Rights of Man in the French Revolution, the tradition has been the enumeration of lists of rights which are expressed in general terms. Such lists can of course mean much or little, depending upon how they are interpreted and applied. Their effective application has been greatly affected by two other strands in the development of Continental public law: the exemption of the state and its administrative acts from review in the ordinary courts of law, and the exercise of wide discretionary powers by agencies of the state.

In the 19th Century, the British constitutional lawyer A.V. Dicey argued that, in contrast to the real protections existing under the British system, under Continental systems, despite high blown declarations of the rights of man, protection for individuals against arbitrary state action was illusory.[6] Dicey was specifically concerned to contrast the common law with the French *droit administratif*,[7] a model which has strongly influenced the public and administrative law of many other Continental countries, as well as providing the model upon which the Court of Justice of the European Communities was based.[8] The fundamental rule of French administrative law is the exemption of state and administrative acts from review in the ordinary law courts.[9] Instead, state and official acts are

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[6] A.V. Dicey, Law of the Constitution, 1885.

[7] A.V. Dicey: '[The rule of law] means…the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the 'administrative law' … of France. The notion which lies at the bottom of the 'administrative law' known to foreign countries is, that affairs or disputes in which government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs.'

subject to a separate system of judicial or quasi-judicial bodies, chief amongst which is the *Conseil d'Etat.* When Dicey was writing, this body was little more than a puppet of the government: its membership had been extensively purged in 1879, in order, in the words of the Minister of Justice at the time, that it should 'be in total agreement with the Government.'[10] In all, 38 members of the *Conseil* were dismissed or resigned.

Of course things have moved on since then. However, it remains the case today that the members of the *Conseil d'Etat* lack formal security of tenure of office, although they are nowadays protected from removal by custom and practice. It remains formally a branch of the higher civil service rather than of the judiciary, and there is interchange of personnel between it and the administrative part of the civil service at senior levels.

Thus, the Continental model for the protection of individual rights against administrative or state organs relies heavily upon a body which exercises its own discretion, supposedly to curb misuses of discretion or arbitrary excesses by the administrative machine which it is meant to supervise. Its

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[8] Napoleon may perhaps be thought of as the principal though involuntary, 'inspiration of the European Court; unlike the short-lived empire he founded by the sword, the Communities have a firm basis ... in the principles of administrative law that his own institution, the *Conseil d'Etat,* has evolved during the last 190 years.' Brown and Bell, French Administrative Law, 4th Ed 1993, Clarendon Press.

[9] This principle goes back to the French Revolution (and probably before): 'Judicial functions are distinct and shall always remain separate from administrative functions. It shall be a criminal offence for the judges of the ordinary courts to interfere in any manner whatsoever with the operation of the administration, nor shall they call administrators to account before them in respect of the exercise of their official functions' - Article 13 of law of 16-24 August 1790 (still in force today)

[10] Cited in R. Errea, 'Dicey and French Administrative Law' (1985) PL 695 at 697.

exercise of its powers is necessarily discretionary because of the general terms in which entitlement-rights are defined. In the case of the French system, where the body upholding the rights sits at the apex of the administrative machine which it is supposed to hold in check, there is necessarily a concern that the interests of the administration will be given undue weight when they come into conflict with the rights of the individual.

The infusion of entitlement-rights into British law

Oliver Letwin in his piece has identified a two-fold development which has occurred in Britain. First, the discretionary powers of the state and its agencies have vastly increased over the years. Secondly, the judges have either developed for themselves or had conferred on them wide ranging powers to regulate and control the powers of state agencies. What is important to recognise is that the powers of the judges are themselves discretionary, and in many cases their exercise will involve making value judgements of a political nature.

The freedom of the citizen used to depend upon the laws being as certain as possible in their content, and on those laws being interpreted in a rigorous and non-discretionary manner. Now in many areas the freedom of the citizen depends first upon how an official, minister or agency will exercise a discretion to prohibit or allow what the citizen wants to do and, secondly, on whether or not the courts will intervene to exercise another discretion by overturning that decision. That is not the same as enjoying a freedom, since the citizen is dependent upon the uncertainties of judicial discretion and the vagaries of litigation.

Of course, it is not possible to make the transition overnight (if ever) to a nirvana in which the discretionary powers of present-day state agencies are all re-written as fixed rules of law. Even

beginning to attempt such a task would be a mind-boggling undertaking. For the future, the mechanisms of democratic accountability and the scrutiny of law-making do need to be strengthened. But the need now exists and will continue to exist for the wide ranging powers of state agencies to be kept under control.

But is our present system the best way of achieving this objective? What is remarkable about our present system of judicial review is how little thought has gone into constructing it. It has simply grown up like topsy. The huge growth of judicial review was initially driven by the judges themselves, from around the 1960s onwards, purportedly 'developing', but in fact radically re-writing and expanding the ancient common-law powers under which the Court of Queen's Bench supervised the activities of inferior tribunals. This process has culminated in the creation of a fully-fledged Administrative Court as a division of the High Court.

In parallel, European Community law has vastly increased the opportunities for the domestic courts, with or without a ruling by the European Court of Justice, to strike down the acts of British ministers or officials or even of Parliament itself. It has also introduced into British law doctrines — such as 'proportionality' — which increase the powers of the courts to investigate and question the merits of official acts. And most recently, the scope of judicial review has been greatly expanded by the Human Rights Act.

There was a remarkable omission in the debate about the Human Rights Bill. The debate was almost entirely about whether the incorporation and entrenchment in domestic law of a code of human rights is, or is not, a good thing. There was almost no debate on an equally vital question: if we are to have special rules for the protection of fundamental rights in British law, is the set of special rules selected – the European

Convention on Human Rights ('ECHR') – actually the appropriate model which suits the legal and historical traditions of this country?

It must be recognised that the 'rights' conferred by the ECHR are different in kind from the rights or freedoms which form part of our own historical tradition. The ECHR is not of course wholly Continental in origin, in view of the significant part played by Britain in drafting it. However, the jurisprudence of the Court of Human Rights at Strasbourg has necessarily been far more heavily influenced by the Continental tradition than by the common law. The ECHR is heavily based on entitlement-rights, rather than the freedom-rights more familiar to our own traditions.

'What is wrong with that?' some may ask. A large part of the answer is the effect that this has on the rôle of the judiciary. Deciding whether entitlement-rights have been infringed ceases to be a matter of analysing powers and their boundaries, and becomes a utilitarian exercise in weighing one competing interest against another. The answer given depends upon the value judgements and political views of the person doing the weighing. No inherent preference is given to freedom over state action. In the name of such 'rights', judges can as easily make decisions curtailing freedoms as protecting them.

Judicial independence has been a cornerstone of the British constitution, but rests on the proposition that the judges are making legal and judicial judgements rather than political ones. If the judges are, willingly or unwillingly, drawn into politically second-guessing the political judgements of elected representatives, then judicial independence ceases to be a constitutional safeguard. It becomes instead a fetter on democratic accountability and on democracy itself, by restricting the right of the people to vote for policies which a self-regarding élite of judges and lawyers regards as unpalatable.

The problem arises from a failure to recognise the fundamental distinction between judicial and discretionary decisions. It is a judicial rôle to decide whether an official act is within the scope of the powers conferred by Parliament and taken in accordance with a procedure authorised by law. However, deciding whether a decision is 'fair' or whether it is 'proportionate' - i.e. whether or not it is proportionate to, and justified by, the desired objectives - is a decision of a wholly different kind. Even more obviously, deciding whether an official act is 'necessary in a democratic society' (as may be required under a number of Articles of the ECHR) is a value judgement of an inherently political nature quite different in kind from a judicial decision properly so called.

The judiciary are walking or being pushed, willingly or unwillingly, further and further down the path of taking politically-loaded decisions about the merits of political and administrative acts. This has a number of corrosive consequences. The personal political views of judges, which used to be regarded as largely irrelevant to their rôle on the Bench or their appointment to it, will increasingly be investigated, commented on and criticised.[11] The present government, most notably in the shape of David Blunkett, has launched furious attacks on the courts for arriving at decisions with which he disagrees. Having asked the judges to undertake the rôle of enforcing the Human Rights Act in the first place, New Labour reacts with fury when they do anything other than act as tame poodles in interpreting and applying the Act. The other problem is that our judges are not necessarily very good at reviewing official or political decisions on the merits, since they lack the time, and do not have the best

[11] For example, The Guardian on 19 July 1998 produced a full front page spread on the individual backgrounds of the Law Lords, the theme of which was that those who had made a career in commercial law or the like were unfit to be entrusted with interpreting the Human Rights Act when it came into force.

background or experience for understanding the policy issues and the administrative machine.

Nor should handing over discretionary decisions to judges be seen as necessarily strengthening the freedoms of individuals. If the judges are asked to interpret and apply a regime of entitlement-rights, the exercise of judicial discretion can actually threaten freedom by extending entitlement-rights which interfere with the freedoms of others. To illustrate that this is not merely a theoretical but a practical issue, I will take the example of how the right to privacy under the ECHR has been invoked to justify the creation by the judges of new and ill-defined laws which restrict the freedom of the press.

The right to privacy and press freedom

Article 8 of the ECHR states that everyone 'has the right to respect for his private and family life, his home and his correspondence.' On the face of it, the wording looks similar to that of the Fourth Amendment to the US Constitution,[12] which protects against unlawful searches and invasions of the home. However, the ECHR at Strasbourg has stated[13] that Article 8 'does not merely compel the state to abstain from such interferences: in addition to this primary negative undertaking, there may be positive obligations inherent in the "effective respect" for family life.'

Article 8 is interpreted far more widely than merely requiring the state not to invade privacy. The Strasbourg Court has ranged far beyond the protection of individuals from state

[12] 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

[13] In *Marckx v. Belgium* A 31 para 31 (1979).

action, and has created an extensive and amorphous structure of positive entitlement-rights: a right to 'personal identity', including such matters as the rights of transsexuals and of adoptive children; 'moral or physical integrity', which can cover such things as pollution damage in the home;[14] 'private sphere', relating to the collection and use of information, which may imply a right of an individual to access to information about him held by state agencies or even by private organisations;[15] sexual activities; and social life and the enjoyment of personal relationships.The problem with Article 8, when it is expansively interpreted, is that it is very wide and very vague. It ranges over many matters of social policy on which it is possible for there to be widespread legitimate differences of opinion as to what is the right solution. Furthermore, positive obligations may be imposed on both the state and others as a result of adopting particular interpretations – in fact, particular subjective value judgements – on many of the questions covered by this Article.

The problem with a right to privacy of this kind is that it can actually be the reverse of a freedom-right of the kind cherished by our own constitutional traditions. When an individual invokes his 'right to privacy' to prevent embarrassing information about himself being disseminated in the media or by others, he is actually asking the organs of the state to reach out and exercise their power to interfere with the freedom that others enjoy to pass on truthful information.

That is not to say that there should not be laws protecting privacy. But such laws require very carefully worked out checks and balances. Above all they require the highest possible degree of certainty so that the media and others know what they are free to publish. The worst of all worlds is a vague and ill-defined privacy law worked out by judges on an ad hoc

[14] *Lopes Ostra v. Spain* A 303-C (1994).
[15] *Gaskins v. UK* A 160 (1989)

basis. Yet that is what we are now getting.

The traditional position under our law has emphatically been that restrictions on the freedom of the citizen or on the exercise of his property rights cannot be invented or imposed by the judges however strong the arguments of policy or expediency. In the famous case of *Entick v. Carrington*,[16] Entick was suspected of publishing seditious libels. Agents of the Secretary of State entered and searched Entick's house and removed his private papers under a warrant issued by the Secretary of State. Entick successfully sued for trespass. Lord Chief Justice Camden held that at common law the Secretary of State had no power to issue search warrants and such a power could only be conferred on him by statute, however compelling the arguments of policy that he ought to have such a power. 'By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot on my ground without a licence .... If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have his judgment. ... Papers are the owner's goods and chattels; they are his dearest property.'

Lord Camden went on to say that 'the common law did not begin with the Revolution [of 1689]; the ancient constitution which had been almost overthrown and destroyed, was then repaired and revived.' It is worth noting how conscious the judges were in the 18th and 19th Centuries of the principles of freedom under the law which had been established and affirmed by the Glorious Revolution; principles which seem

[16] (1765) 95 ER 807; 2 Wils KB 275

almost to have been forgotten in the present day's legal ethos. The case of *Entick v. Carrington* protected the privacy of a citizen's papers against invasions by agents of the State. But the 18th Century judges were fully conscious that restraining the circulation of published information could only be done if there was a positive law to that effect. Simply invoking privacy or other important interests was not enough to allow the judges to invent a law which would impose such a restriction. This was illustrated nine years after *Entick v. Carrington.* Lord Camden was a member of the House of Lords which decided in the case of *Donaldson v. Beckett*[17] that the common law could not impose any restriction on the freedom of any person to copy a book once its author had published it. Whatever the arguments of expediency in favour of authors, the judges could not create a new right of property of this kind which would have the effect of restricting activities which at common law the citizen was entitled to do. Such a restriction could only be created by Parliament.

In reaffirming this decision in the later case of *Jefferys v. Boosey*,[18] Lord Brougham observed that 'there can be no property in human beings; the common law rejects, condemns and abhors it. But such a power has been established by human laws, if we may so call those acts of legislative violence which outrage humanity, and usurp, while they profane, the sacred name of law.' He pointed out that in a similar way the legislature could, if it so chose, enact laws which would impose restrictions on the copying of books. Of course we now do have a vast body of copyright laws, but they are set out in statute form and contain within them safeguards designed to prevent the copyrights of authors unduly interfering with freedom of speech and other interests.

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[17] (1774) 2 Bro Parl Cas 129; 4 Burr 2408; 17 Cobb Parl Hist 954.
[18] (1854) 4 HLC 815; 110 ER 681.

By contrast, the present generation of judges seems almost to have lost sight of the principle that freedom should only be restricted through a positive law. The current approach, much encouraged by the Human Rights Act and the ECHR, is that freedom of expression is just one interest to be weighed against other competing interests such as privacy. This means that there is no freedom to publish which can be called by the name. 'Freedom' cannot be said to exist if it depends upon the often uncertain prospect of whether or not a judge will decide that the interest of the publisher in freedom of expression is outweighed by other interests.

The judiciary used to consider themselves bound by the common law principle enunciated in *Entick v. Carrington* that the freedom of the citizen could only be restrained by a positive law, either a recognised rule of the common law or a statute. The ECHR has enabled them to cast off that shackle and they have treated the ECHR as a broad palette from which they can create new legal rules as they wish.

The first step was taken in *Douglas v. Hello!*[19] after Catherine Zeta Jones and Michael Douglas had a large and highly publicised wedding celebration in New York and entered into an exclusive commercial deal with *OK!* magazine for it to publish photographs of the wedding. *Hello!* magazine obtained and published 'unauthorised' photographs of the wedding from another source. The Douglases and *OK!* obtained an injunction in the High Court against Hello! preventing it from publishing the photographs. The Court of Appeal allowed the appeal and discharged the injunction on the facts of the particular case. However, in the course of doing so they endorsed some novel legal principles.

Lord Justice Sedley argued that 'the Human Rights Act 1998 requires the courts of this country to give appropriate effect to

[19] [2001] FSR 732.

to the right to respect for private and family life set out in the ECHR.' Accordingly, the law 'now recognises' and will 'appropriately protect' a law of privacy. It should be noted that in his view this was a wholly new law, not a development of the existing law of breach of confidence. Because of the highly public nature of the wedding, the Court of Appeal did not think it appropriate to grant an injunction at an interim stage, but the novel legal principles which they laid down were then available in future cases.

Such an occasion arose in the semi-farcical case of Footballer A, B PLC (a national newspaper), girl C and girl D. Footballer A, a married man, had sexual relations with woman C and woman D, who sold their stories to the newspaper. Mr Justice Jack in the High Court granted an injunction against the publication of the girls' stories and also ordered that none of the parties to the case should be identified in the media.

This decision was trenchantly (and justifiably) attacked by William Rees-Mogg in an article in *The Times.*[20] The basis of the decision was that 'the law should afford the protection of confidentiality to facts concerning sexual relations both within and outside marriage, although the precise ambit of the law's protection would depend upon the circumstances of each case.' This was a novel, and indeed bizarre, extension of the accepted law of breach of confidence. A legal obligation of confidence had previously only been recognised as arising from specific legal relationships, such as under contract, or between employer and employee or a professional and his client or patient. It had been recognised as arising from the legal relationship of marriage[21] but never before simply from a more or less casual sexual relationship.

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[20] 'The Queen's Bencher and a bedroom farce', William Rees-Mogg, *The Times*, 5 Nov 2001.

[21] *Argyll v. Argyll* [1967] Ch 302.

The idea that one party to a sexual relationship implicitly agrees with the other party to keep it confidential is indeed bizarre. As William Rees-Mogg pointed out, 'footballers have themselves been known to boast about such feats of youthful prowess'.

The decision was reversed by the Court of Appeal in March 2002,[22] ten months after the injunction had originally been imposed. In fact, the injunction lasted a few weeks longer, because it was extended until A's time for appealing to the House of Lords became exhausted. This illustrates an important practical fact. Urgent injunctions are comparatively easy to obtain, especially if they are applied for 'without notice' to the opposing party. Once obtained, they are in practice very difficult to discharge. The injuncted party has to go through expensive and time consuming proceedings during which every delay is to the benefit of the claimant. Even if he is successful in obtaining a decision to discharge the injunction, the claimant can often get the injunction extended while he appeals, on the ground that otherwise the cat would be irreversibly let out of the bag.

The media widely welcomed the Court of Appeal's decision. The media picked up on the quotation in the judgment of Lord Justice Hoffmann's remarks in an earlier case:[23]

'Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which "right thinking people" regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute...'

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[22] *A v B PLC* [2002] EMLR 371.
[23] *R v Central Independent Television* [1994] Fam 192 at 210-4.

The media were wrong to welcome the Court of Appeal's decision. The judgment, which was given by Lord Chief Justice Woolf, did emphasise that the freedom of the press is an important public interest quite apart from any specific public interest in publishing the particular articles in the case, and it did overturn the High Court judge's decision to impose an injunction on the particular facts. But in doing so, it endorsed wide ranging principles which will seriously interfere with press freedom in the future, as well as totally overthrowing the last part of Lord Justice Hoffmann's remarks about 'clearly defined exceptions laid down by common law or statute.'

First, the judgment extended the law of breach of confidence to any situation in which a person 'either knows or ought to know that the other person can reasonably expect his privacy to be protected.' This step was justified on the grounds that the Human Rights Act required the courts to adapt the common law to comply with Article 8 of the ECHR.[24] So, instead of confidence being dependent upon the existence of a legal duty arising from an agreement or from clearly defined facts, it now becomes simply a question of whether a judge in his discretion thinks that a privacy should be protected.

Secondly, the Court of Appeal made the enforcement or non-enforcement of this widened duty of confidence entirely into a matter of judicial discretion depending upon a wide range of factors. The fact that one party to a relationship wanted to disclose it to the media was a 'material factor' in deciding whether to allow it to be published. But this does not give the

[24]The reasoning by which this step was taken is itself highly suspect. Section 6 of the Act says that public authorities should comply with the ECHR. It was never intended that it should make the ECHR apply directly to private citizens or companies. However the court reasoned that it was a 'public authority' and so it should alter its interpretation of the law to fit the ECHR, and its altered interpretation would then bind ordinary citizens. This piece of sophistry negated the government's assurances that the Human Rights Bill would not create a new law of privacy affecting non-government bodies.

person an actual right to tell her story to the media because the judge might or might not, depending upon other factors and his whim or fancy, decide to prohibit publication. Again, the fact that one of the parties is in a public position is a factor. But it does not necessarily mean that publication will be allowed; it all depends.[25] The importance of press freedom is another factor; but it all depends.

A bewildering array of factors are to be weighed and balanced. Instead of any fixed rules of law, 'what is required is not a technical approach to the law but a balancing of the facts. The weight which should be attached to each relevant consideration will vary depending on the precise circumstances.' The upshot is that any certainty in the law is replaced by a miasmic sea of judicial discretion. The future freedom of the press now depends on favourable exercise of discretion, rather than on a right.

The decision is pernicious because the Court of Appeal has usurped the role of the legislature and has devised a whole new law of privacy under the guise of applying the Human Rights Act. The decision is pernicious because this new code of law is entirely unclear in its rules and leaves everything to undefined judicial discretions. Finally it is pernicious because it violates the principle of the rule of law which has underpinned the British constitution since the 17th Century. The citizen (or the press) is no longer free to do anything that the law does not prohibit; his freedom is now dependent on the approval of the judges in a utilitarian balancing exercise in which freedom is one interest to be weighed against the competing claims and interests of others.

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[25]To assist judges on this question, the Court of Appeal quoted from a Resolution of the Council of Europe on personal privacy and public figures. It used to be that the law of the land was laid down in statutes and in the common law. It is a remarkable new development that the declarations of politicians outside the Parliamentary process are now treated by our Courts as a direct source of law.

Conclusion: what is to be done?

I have considered the subject of privacy and press freedom in some depth. But it is only an example of a wider trend. The judiciary, both under the Human Rights Act and in other contexts, are increasingly bold in creating new laws and replacing fixed rules with ever widening judicial discretions.

Our historical tradition concentrated on protecting rights which amount to limitations on State or official actions. In this sense, a 'right' can be equated with a freedom: a right to be left alone and so to continue to enjoy the freedom which exists in the absence of a law which interferes with that freedom. The current trend is to seek to protect 'rights' in the sense of entitlements. Such 'rights' are different in kind from the rights or freedoms which form part of our own historical tradition: such entitlement-rights are not restrictions on State powers or actions, but instead may impose positive burdens on the State (and therefore indirectly upon the rest of the citizenry) or directly upon other private citizens or businesses, as has been demonstrated in the case of the right to privacy.

If we are to be effective in protecting freedoms, we need to recognise that adopting the ECHR into our law is a fundamentally flawed approach. If we are to have a statement of fundamental rights which Parliament instructs the courts to give special status, that can readily be compiled from our own constitutional statutes and legal decisions from Magna Carta onwards. If we are to have a charter of rights enforceable in the courts, it should be based on those principles and give the courts the role of protecting freedom and keeping executive and bureaucratic powers within their proper limits.

Controlling the exercise of bureaucratic discretions where they exist is a different problem. While the courts should control the legality of the exercise of powers, they are not best suited for

reviewing the merits of the exercise of discretionary State powers. Such a role is essentially administrative and political rather than judicial. A new mechanism, answerable to Parliament and intended to keep the governmental and bureaucratic empire in check, should supplement the powers of the courts rather than replace them.