

## Round Table Discussion: Professor Jowell's Lecture

### “Why Is A Bill Of Rights Important?”

The constitutions of most democracies in the world start with a list of fundamental human rights (known as a bill of rights). There are few exceptions, – one of these being Australia. New Zealand and Canada came on board recently and so has the UK (which in 1998 adopted the European Convention on Human rights into its domestic law). Most UK Overseas Territories that recently revised their constitutions added a bill of rights.

What do we mean by these fundamental rights? What are they? What is a bill of rights? What will be different if you have a bill of rights? What is the importance of a bill of rights? What are rights?

In order to answer these questions, let us go back one step and ask: What is a democracy?

If you ask most people what is meant by a democracy, they will answer: Having a freely elected government, being able to vote for your government representatives, majority rule, and the opportunity to remove unpopular governments.

But is that enough? Think what popular elected governments have done in the past. A good example is Germany under Adolf Hitler. He was the leader of a party that was popularly elected and considers how he treated his own people. Look what many other governments have done in the name of the people: detained dissidents without trial, tortured them, crushed student uprisings or other demonstration against government, suppressed their critics. History is full of examples of popular governments – such as the former Soviet Union, acting without regard for the rights of their own people, and justifying their actions on the ground that they have the support of the majority

So there has to be another definition of democracy. This other definition of democracy that we should think about is one of a ‘rights-based’ democracy.

The rights-based democracy starts with the assumption that everyone in society has equal rights and equal dignity. Government should therefore treat everyone with equal respect. And there are some things that no government – even a popular elected government – can do to its people; such as torture them or detain them indefinitely without trial.

The first definition of a democracy (majority rule) already has one element of equality: We all have the right to vote. We all get one vote – whether you are rich, poor, famous, whoever you are - you just get one vote. A popular democracy has the notion of equality built into it, but not necessarily dignity.

That is why many countries over the years have been moving towards a rights-based democracy.

But where does this notion of dignity and equality come from?

Most people look way back to the 18<sup>th</sup> century, to the US Declaration of Independence and the French Revolution's Declaration of the Rights of Man. This is because, following their respective revolutions, France and the US were the first countries to introduce a bill of rights.

But let's look closer at what these declarations of rights said: The US Declaration of Independence reads: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness."

The French Declaration is very similar to the US one and speaks of certain inalienable rights such as resistance to oppression.

But where did these ideas come from?

Let's look at the US Declaration again. It reads "...that all men are endowed by their Creator..." [with these rights].

With other words the idea of having certain inalienable rights goes back to the ideas that are central to most of the world's great religions, such as the notion that you should love thy neighbour as thyself. That concept contains a profound notion of equality.

That is then an important source of rights. For different people, different sources, but overall it is deeply ingrained that people have the right to life and liberty and simply no government has the right to take these freedoms and liberties away. Unless they have a very, very good reason, and I will come to those reasons later.

So, as I have said, one reason why most of the world is moving towards rights-based democracies is to cherish the notion of individual dignity and equality. Another reason is more instrumental: For us to be able to exercise the first definition of democracy (majority rule and the ability to kick out a bad government and vote another in) we need a proper choice. And to have a choice, we need to be able to exercise the right of freedom of expression.

Governments can't do what General Pervez Musharraf from Pakistan has recently done: He announced that there will be general elections, but most of the opposition is in jail. It is rather difficult for them to express their views or persuade people to vote for them under those conditions. The lifeblood of any democracy is the free flow of information through political debate. It allows errors to be exposed. Some rights are simply essential if we want to vote with wisdom and integrity. We need knowledge and an understanding of what we are voting for.

Let me now turn to the content of rights. What rights are these days inserted in constitutions? The core rights are what are called civil and political rights. They are the

rights that were embodied in the first international instruments for promoting human rights.

One of the first such instruments was the UN Universal Declaration of Human Rights of Man, adopted after World War II. (US President Roosevelt's wife Eleanor Roosevelt worked very hard to get countries to sign on and agree on this). This declaration consisted of what we call ordinary civil and political rights, sometimes called 'blue rights': The rights to free expression, free association, the right not to be tortured, and no slavery.

Also built in was the right to privacy, a family home, the right to marriage, and of course the fundamental right of being treated equally irrespective of race, colour, creed, religion, sex or disability.

These are what are called basic civil and political rights, because they allow democracy to function and protect the rights of the individual.

Here I want to add that rights change as societies mature and problems represent themselves. Over the years the rights of children has come to the fore: No trafficking, no abuse. So too, have the rights of the disabled and the elderly.

The core civil and political rights do expand. Some countries have moved to new sorts of rights, sometimes called the 'red rights' or 'socio economic rights': The right to shelter, healthcare and a pension.

Some countries have brought these rights into their bill of rights in a guarded fashion, for example India, because they might not be able to afford them... In India these are listed as aspirations rather than rights. The courts cannot directly enforce them, but they are considered principles for which the country will strive in the longer term.

Then there are 'green rights'. Some countries, lead by South Africa, prided themselves in their environment and wanted through their constitution to protect their biodiversity, their oceans, to control pollution.

South Africans had a clean slate after apartheid and developed their own constitution. They said: We are going to look at what is important to us, what are our aspirations. Thus one of the rights in their bill of rights is:

“Everyone has the right to an environment that is not harmful to their health or wellbeing and to have the environment protected for the benefit of the current and future generation through measures that are reasonable; to prevent pollution and ecological degradation, while promoting economic and social development.”

These rights (in a bill of rights) are not stuck for all time. They do not constitute a boring catalogue. They are something that expresses the very identity of the country.

Another example out of the South African Constitution: They have the right to good, fair and just administrative action. This requires all public officials to exercise their powers in a manner that is fair and just. It gives citizens the right to access information and administrative justice.

It is a right that doesn't suit every country, but South Africa, with its background, felt that no-one should be treated with contempt by any government official (as so many of them previously had under the apartheid regime).

So new rights can develop. South Africa's rights are sweeping the world. The EU has included the right to administrative action in their bill of rights. The British Virgin Islands has a clause on the environment in their new constitution.

It becomes an exciting search to see what you as a country want to be about. What you want your constitution to stand for. So much for the need for rights, and for what rights may contain. But what is the purpose of a bill of rights in a constitution? It stands as a formal commitment in a constitution to those human rights that are considered in a given time in history to have certain importance. It is binding on the government and cannot

easily be overridden. If it is overridden, it must be properly justified. The government has to prove that it is absolutely necessary to do so in the interest of pressing objectives.

A bill of rights doesn't necessarily mean the rights contained in such a document are absolute. Some rights are pretty absolute – like no slavery and the right to life. Other rights such as freedom of expression can be limited by government. For example freedom of expression doesn't mean you can distribute pornography at schools – there are limitations written into these rights. Rights can be limited for the sake of national security or for the protection of other people's rights or morals.

But government has to argue hard if they want to limit these rights. With a bill of rights countries are moving away from a culture of authority to a culture of justification. Governments can introduce some limitations to certain rights, for example the right to detention without trial (such as were introduced in the UK after 9/11) but they have to argue hard and then the limitation must be proportionate and the least restrictive option

Is a bill of rights binding on everyone? The US model says yes. In the UK the courts can strike down the acts in breach of rights of any public official, and they can review laws passed by Parliament, but can't strike them down. They can only declare an Act of Parliament to be incompatible with human rights. In all cases so far the government has complied with such a declaration, but it has in theory the option not to do so, thus preserving the sovereignty of the legislature.

So let me now address my last question, which is the title of this talk. Why is a bill of rights important? I should say, first, that I think it will be difficult to negotiate a new constitution with the UK without a bill of rights. Very few countries don't have one these days. Apart from that, however, there are powerful arguments in favour of a bill of rights. They are these:

- A bill of rights sets out people's rights. It affirms these rights. People will know about them, and children will be taught these rights in school. They are written down as an affirmation, a commitment to freedom, equality, and human dignity. If

people know their rights they will think twice before dismissing them and they will take pride in the fact that the country counts them as valuable.

- It expresses core values for which a country stands. It is a showcase to the world.
- It is a unifying mechanism for a population. For those who live there and for people coming to that country – they know what they have to sign up for.
- It makes us reflect on our existing relationships that we often take for granted. For example who appoints the judges? An independent judiciary is very important.

Mostly a bill of right is important, because it endorses the fact that we all possess fundamental freedoms. And it is a constant reminder that the country in which we live has values and aspirations that go beyond mere majority rule.