Human Rights Leadership: Priorities and Concerns

Introduction

Hello, you are listening to the human rights 2020s podcast brought to you by the Human Rights Consortium Scotland. This episode is a recording from an event entitled Human Rights Leadership: Priorities and Concerns for Scotland, which was held on the 15th of June 2022. The keynote speech was delivered by Murray Hunt, the director of the Bingham Centre for the Rule of Law. The event was chaired by Naomi McAuliffe, Programme Director of Amnesty International in Scotland.

Naomi McAuliffe

Hello, welcome, everyone. My name is Naomi McAuliffe. I'm head of Amnesty International Scotland office and welcoming you here today to the Human Rights Consortium Scotland event on human rights leadership: priorities and concerns for Scotland. It’s quite an auspicious day for us to be holding this meeting, I'm sure lots of you heard last night or woke up this morning to the news that the European Court of Human Rights stopped the flight to Rwanda of asylum seekers. And unfortunately, today, we have seen now quite a few MPs and ministers coming out and questioning our involvement in the European Convention of Human Rights. So it's very timely that we should be talking about this, that we should be coordinating and mobilising, because there's lots of threats on the horizon. So with that in mind, I'm going to hand over to our first keynote speaker. We are going to be hearing from Murray Hunt, who is director of the Bingham Centre for the Rule of Law and a former adviser to the Westminster Joint Committee on Human Rights. He has also been a former member of the National Task Force on Human Rights Leadership. And he will be sharing his perspective on Scotland's human rights. So can I hand over to you, Murray, thank you.

Murray Hunt

Thank you very much indeed, Naomi. Good morning, everybody. Thank you very much to the Human Rights Consortium for inviting me to speak to you and to be with you this morning, which I'm absolutely delighted to do. As Naomi said, I'm going to be providing an outsider's perspective on Scotland's human rights leadership. I'm sitting in London, as I speak to you. And as Naomi said, things look rather different from down here, I will pass on my way into the office, a news stand with virtually every front page, raging about the role of the European Court of Human Rights following yesterday's interim measures. And so one of my perspectives is going to be the view from London on Scotland's human rights leadership. And I'm also going to briefly look at what it looks like as well from a European perspective, and also, globally. So the view from the UN and the rest of the world. Very, very briefly, the first thing I want you to do, you'll see the date there is significant for the bigger sense for the rule of law, I wanted to wish you all a Happy Magna Carta day. Now, I realised that Magna Carta doesn't have an awful lot of resonance in Scotland, although it's sort of parallel in the claim of right I suppose. But it's quite interesting that today is not universally seen as Magna Carta today, because in its time Magna Carta was quite an interesting bit of human rights leadership. And it's provided an opportunity for some human rights leadership by the UK over the centuries. But it's an opportunity which hasn't really ever been taken by the UK and it continues to be rather torn in terms of the approach that the UK wishes to take in its foreign policy in relation to human rights. It aspires to show human rights leadership as part of the global Britain aspiration, but actually is deeply conflicted about how it does that and the reasons why it's doing that. Now, I don't know whether many of you know about this. But in France, just after the war in 1947, there was an attempt, a discussion within the government about whether the 15th of June should actually be made Magna Carta day specifically for the purposes of schools celebrating it in Britain, the US and the then British Empire. This was pre-decolonization, of course, and the reasons that the idea was dismissed pretty summarily within the Foreign Office are really quite interesting. “There's a possibility that the celebration of Magna Carta day in the colonial empire might be used for purposes very different from those which we desire. In some colonies were ill-disposed politicians ever on the lookout for opportunities to misrepresent our good intentions. Its celebration might well cause embarrassment. And in general, there is a danger that the colonial peoples might be led into an uncritical enthusiasm for a document which they have not read, but which they presumed to contain every so-called right, they might be interested at the moment in claiming.” So that was 1947, 75 years ago. Now, of course, Foreign Office Communications are a little bit more subtle these days. But I think we can see some undertones in the sentiments underpinning this rejection of the idea of having a Magna Carta day, in the UK, its position today in relation to human rights. So I thought that was quite an interesting reflection on this particular date.

So to move on to how Scottish human rights leadership looks from down here from Westminster. Now, I really want to just frame this in the context of the two different directions of travel on our respective human rights journey, which is really couldn't be more contrasting between the leadership being shown in Scotland and by Scotland, and the backsliding which is going on a UK level and down here at Westminster. We only need contrast recent developments in Scotland, the UN Convention on the Rights of the Child incorporation Bill setback, as it has been by the Supreme Court's ruling, but now hopefully back on track, with this reintroduction, the exciting new human rights framework. And as Naomi mentioned, I do have the benefit of a little bit of an insider perspective, having been an independent member of the National Task Force in relation to the human rights framework, which I think is potentially a hugely significant step that Scotland could take in the next couple of years. The contrast between that and what's going on at UK level, where we have, of course, Brexit, which needs no further discussion, we're all very familiar with it, but it's not going away. We have a general retreat from internationalism and international law. And all this, at the moment very much focused on the repeal of the Human Rights Act, and its replacement by a so-called Bill of Rights, which is today very, very much in the news following the European Court's decision last night. So I want to start by saying a few words about the UK’s retreat from internationalism and international law because really this week, leaving aside the reaction to yesterday's European court ruling, we've seen, I think, a new low point in this retreat from international law, in the shape of the Northern Ireland Protocol Bill. Now the bill was introduced on Monday. And it contains provisions, which are breathtakingly broad in the extent to which they will essentially rip up most of the significant provisions in the Northern Ireland Protocol to the Withdrawal Agreements with the EU. And the legal justification, which is relied upon in the summary of the government's legal position is, let's say, tenuous, I think at best. It relies on Article 25 of the International Law Commission's draft articles on state responsibility and an argument of necessity. And that argument is an argument which should only be resorted to in international law to not perform international obligations in the most narrow of circumstances as an absolute last resort when there's no other possibility available, and when there's a grave and imminent peril to the interests of the state. And there will be a lot of argument about this over the next few days and weeks. But I think I'm fairly confident in saying it's a legal position which is just not going to withstand scrutiny. That position under that interpretation of Article 25 is extremely tendentious. The threshold is extremely high, it's very unlikely that it's been met. And there is, of course, a specific provision in Article 16 of the Northern Ireland protocol, which provides for emergency measures to be taken. And in those circumstances necessity as a matter of international law doctrine can't be resorted to under Article 25. So the Northern Ireland protocol, I think, is really a new a new low point really, in marking the UK’s retreat from internationalism and from international law generally. And it's been preceded by a number of bills, some of them now acts, in which again, this approach to international law is really quite in stark contrast to the UK’s traditional reputation for upholding international law and promoting the importance of an international rules based order.

So the UK internal market bill, the precursor to the Northern Ireland protocol bill contains an express provision, which was on its face probably in breach of international law, or at the very least provided ministerial powers to breach international law. The Nationality and Borders Act contains provisions which, on their face, breach the Refugee Convention, and the parliamentary debate and discussion of that bill focused very much on whether or not the provisions were in breach of the Refugee Convention. The overwhelming view of informed commentators and advisors is that the provisions do breach the Refugee Convention. The difficulty, of course, is that the Refugee Convention doesn't have an international court, which interprets and enforces it. And therefore, we're in the territory of the government asserting that what they're doing is compatible with the Refugee Convention. And it'd be difficult for domestic courts to actually determine that question. Although it will probably become an issue in a judicial review that will be heard in July. I've covered other bills, as mentioned there, but I won't, in the interest of time, dwell upon them. The Overseas Operations Bill and Troubles Legacy Bill, both of these bills in which provisions controversially appear to be incompatible with international legal obligations. So there's a very distinct trend and quite marked now, I think, indication that the government doesn't really have the same approach to wanting to be seen to be acting compatibly with international legal obligations, and taking a leadership role in upholding that approach to international law as being important to the international order. And finally, I mentioned briefly the Bill of Rights proposals, I'll come back come on to this in a moment. But again, there's a provision in the consultation paper, if this does appear in the bill itself, which will very directly cause difficulties with the UK’s compliance with Article 46 of the convention, the article which requires states to implement judgments against them, because it's a proposal which will undoubtedly lead to standoffs with the European courts, which are likely to breach that important article in the European Convention.

So we have this general retreat from international obligations. And in that context, we are waiting for the Bill which will repeal the Human Rights Act. And obviously this is the one that probably have most direct relevance and concern to us all here this morning and the history you will all be very familiar with the Independent Human Rights Act review, which was set up by the former law Chancellor Robert Buckland, conducted a very extensive evidence gathering exercise, held a lot of hearings around the country, established an evidence base and came up with some fairly measured conclusions that generally speaking, the Human Rights Act is working pretty well. And there may be scope for some tweaks here and there, there may be some recommended amendments that could be made to the Human Rights Act to improve its operation. But broadly speaking, it's working well, and the main problem is disseminating, understanding, broadly understanding exactly what it does and how it upholds people's rights and trying to get more public ownership of the rights which the Human Rights Act protects. And to get them more embedded in people's consciousness. The consultation paper, which was published in December, there's no relation to the Independent Human Rights Act review, and it’s really quite a different proposition and contains a number of critiques of the Human Rights Act. And I've given some examples, here are some of the assertions in a general narrative which is extremely hostile to the idea of Human Rights Act. And the examples from that narrative, it asserts that there's been a judicial expansion of rights, that court judgments on Human Rights Act issues frequently defy common sense, that the act has had the effect of sidelining Parliament and elected politicians and is therefore anti-democratic, that the rights in the Human Rights Act are often abused by unworthy claimants such as foreign national offenders, prisoners, illegal migrants, and the positive obligations, which the ECHR imposes on public bodies, such as the police, are onerous and get in the way of them making decisions about how they should spend their resources. So it's a very hostile narrative in the consultation paper. And we're all holding our breath to see what's going to be in the bill, which is, we think, probably now quite imminent. And I think, just to relate back to the initial comments following yesterday's European Court of Human Rights interim measures in relation to the Rwanda flights, there will undoubtedly now be a very concerted campaign, in effect I think we can already see on the front pages of today's tabloids, the bonfire being stoked for the Human Rights Act to be repealed in the bill which is brought forward.

So briefly, in terms of the Bill of Rights, or the so-called Bill of Rights, which is going to be brought forward insofar as we can tell obviously, this is prior to the bill being published, but if the consultation paper proposals are followed through on, there are some extraordinarily broad indications about what this Bill of Rights is going to do. It's going to decouple the rights which will remain in UK law from convention rights. So the language of the convention rights will remain in UK law, but they will be decoupled from the convention, including the Strasbourg court’s interpretation of the convention rights. There will be a removal of the obligation to take into account ECHR case law on courts and probably on decision makers. The current interpretive obligation in Section three is likely to be removed.

Positive obligations, that dimension of rights which is so important, and on which I think Scotland is showing extraordinary leadership, it is said in the consultation paper are going to be removed. And that remains to be seen how that's going to be done. But it is an important part of, first off, that approach in the consultation paper. The current Secretary of State does not believe that rights have a positive dimension, which impose obligations on public bodies, and is opposed in principle to such positive obligations. The proposals suggest that the rights that will remain in the so-called Bill of Rights are going to be more difficult to enforce by the introduction of various procedural obstacles. So there will be a downgrading of access to justice in relation to the rights, the level of rights protection is going to be made contingent on the conduct of the claimants. So the “less worthy” individuals will have a lesser level of protection for their rights under the under the Bill of Rights. And finally, this proposal to introduce a democratic shield, so-called in the consultation paper, against adverse Strasbourg judgments, and the implications of this, I think, really needs to be taken on board fully. It's proposed that there will be an institutionalisation of a mechanism which will enable the government to put before the House of Commons shortly after an adverse Strasburg judgment a motion, which will essentially say to the Commons, should we follow this or not? Should we implement this or not? And we can imagine if that replaced this morning, that motion on the Rwanda interim measures would probably be on the order paper and debated in the Commons as an urgent matter this morning. And we can see exactly where that's going to lead. It's institutionalising what happened in Hirst at the insistance of some backbenchers where emotion was put, essentially asking the Commons who should decide prisoner voting, should it be the Commons? Or should it be this interfering foreign court? So this democratic shield proposal is going to institutionalise that in our arrangements, and will undoubtedly lead in cases which are unpopular with the government, to a standoff with the Strasbourg Court and over time, undoubtedly breaches of the article 46 obligation to implement judgments. So overall, there's no doubt that this is not at all a Bill of Rights. It doesn't meet the general criteria of what counts as a Bill of Rights in terms of actual legal protection for fundamental rights, which have some degree of protection greater than just being contained in a statute. And as Adam Wagner memorably said, it'll be the only bill of rights in history which has been introduced to actually lessen the rights that are protected. So it's a bill of less rights, which we're expecting to be introduced.

So that's the context from which we view, in Westminster, Scotland’s proposed human rights framework and the leadership that's being shown in Scotland. And I've just pulled out here, some of the elements of the proposed human rights framework, which from the perspective I've just outlined, do look like Nirvana from Westminster. So just briefly to identify some of those features. The process, which has been conducted to get to this point, has been, in my view, an exceptionally inclusive process. It's been a very good example, in practice over a long period of time, of how constitutional change and constitutional reform around Bills of Rights and human rights protections ought to be conducted. It's been patient. It's been inclusive. And again, the contrast between that process and the so called Bill of Rights that's going to be introduced here in any week now could not be starker. The second feature is the range of rights protected- the inclusion of economic, social, cultural and environmental rights. The approach to these being indivisible, which underpins the proposals, is a truly modern Bill of Rights, again, as contrasted with the UK government's proposals, which they also call a modern Bill of Rights, which has no track whatsoever with any of those sorts of rights, as well as hollowing out the approach to civil and political rights. Another of the features is the internationalist approach and the maximalist approach. So the aspiration to incorporate the rights in the UN human rights treaties that haven't yet been incorporated to the maximum possible extent. And to try to do that in a way which gives real practical effects at the Scottish level, to the substance of these rights in a meaningful way, which changes people's lives. I think that aspiration is genuine internationalism, and again, is a great contrast to the trajectory that's currently going on at UK level. The embedding of a commitment to progressive realisation, again, a really important feature. And my involvement in the Task Force really revealed to me the extent to which it's understood how that needs to be done. It can't just be a vague declaration of progressive realisation that needs to be embedded, it needs to be made real, there needs to be mechanisms, processes, machinery, in public authorities, for making sure that there is actually that direction of travel. And that's literally baked into the design of the whole scheme. The multi-institutional and collaborative approach, which is already been taken in Scotland through the Scottish National Action Plan, but which is also central to the recommendations of the task force, again, very much to be applauded, and admired from the perspective down here. The centrality of monitoring and reporting and the importance of that constant evaluation, the constant commitment to improvement, absolutely has to be built into any meaningful legal framework for human rights, the importance of access to justice being acknowledged. Again, the contrast that I've described here, the centrality of people with lived experience in the whole scheme, the importance of involving them, and the significance of their perspectives on being the victims of rights violations, or simply not having the benefit of rights which exist on paper, again, an absolutely crucial feature of the framework. And finally, the acknowledgement that resources are absolutely crucial. That human rights framework isn't just an abstract legal framework on paper, it's also got to translate into commitment of resources, to the protection of human rights, and therefore budget setting is also an important human rights issue.

Okay, so that's my selection of the features of Scottish human rights leadership, which I think really stand out to an outsider such as myself. I just want to finish briefly, then moving to see how it looks from Europe and then on to the UN. So viewed from a European perspective, the current president of the European Court of Human Rights, Robert Spano has talked to this being the age of subsidiarity in the European Convention system. Now he means subsidiarity, in the correct sense that what the Convention does is to impose duties on states to make sure that there's adequate protection in their national legal system for the convention rights. And then to the extent that that isn't successfully achieved at the national level, the court itself has to get involved. Now, subsidiarity is often misunderstood and invoked, often by critics of the Human Rights Act, in the wrong sense that it means the European Court of Human Rights and the convention system are subordinate to or secondary to the national system. But actually, it means that the national system has to take human rights seriously, and actually has to embed them in a meaningful way into its national legal systems. And that is exactly what the proposed human rights bill in Scotland is going to do, it's subsidiarity in action, in a meaningful sense, and it's the genuine proper sense of which subsidiarity is used in the Council of Europe's convention and whole human rights system. So it fits very well with that some current age of subsidiarity and will be an exemplar of subsidiarity in action.

It's also worth noting that post-Russia’s exclusion from the Council of Europe, there's a moment or an opportunity for the Council of Europe and this is beginning to be to become real, to consider exactly what it's for. There's going to be a reflection on the human rights leadership with the Council, which the Council of Europe itself provides. Now that the lowest common denominator has been excluded from the organization, there is an opportunity for states to come together and to consider what more can the Council of Europe do to actually be a much more proactive human rights-promoting organisation and how could it embed those more effectively in its member states, there's going to be a lot of reflection on that over the next period. The Council of Europe needs leadership and it needs examples of leadership to be able to do that. The UK is clearly not going to be able to provide that, it's bringing forward a bill which is going to undermine the course. So again, Scottish human rights leadership, I think, is going to be very important for that process. Also, the European institutions, the Council of European institutions, often signal the importance of strong human rights institutions. So the importance of strengthening the Scottish Human Rights Commission is going to continue to be a relevant matter for discussion. It also champions having democratic human rights machinery such as parliamentary human rights committees. So the Scottish Parliament's Human Rights Committee is also going to be an important part of the coming discussion about its place under the new legal framework, and also the importance of the role of civil society with which you will all be very familiar and much more expert than me. But that is going to be an incredibly important part of the coming discussion about the new legal framework in Scotland, from the European point of view, again, something of great interest to Europe. And Europe is also looking for some very good examples, to be able to hold up for others to follow.

Very quickly to look at the view from the rest of the world or from the UN, We've got the UN Secretary General's 2020 call to action for human rights. And many of the things which the Secretary General was calling for are embodied in the proposals for the new Scottish human rights framework and approach to human rights, which accepts their indivisibility, an important emphasis on prevention being better than cure, not choice between the two, but a new shift in focus to prevention, and the development of human rights-based approaches to a number of policy areas, broadening out human rights based approaches to policy and demonstrating how they lead to better policy outcomes. At UN level there's also, of course, the build back better after COVID aspiration. It's important to mention this because after the pandemic, I think it has really reframed the human rights, discussion and discourse internationally, it hasn't at UK level yet, but it has done internationally, I think there is now a greater awareness of the importance of security of the role of the state and actually providing financial security, the importance of the state in actually protecting people's health, and generally showing the importance of positive obligations in all those rights with which we're very familiar. So again, that's very much an open door, to demonstrate how the Scottish proposals are meaningfully doing that, and playing into international discussions about how to do that in a meaningful way. There are some UN draft principles on Parliaments and human rights, which again, focus on the role of Parliaments as actors in protecting human rights as part of a multi-institutional collaborative approach to human rights protection. And again, the role of the Scottish Parliament Human Rights Committee in living up to those principles, which it’s declared it wishes to do, will I think be an important part of the ongoing discussion, There are UN recommendations on NMIRFs, national mechanisms for implementation, reporting and follow up. And again, Scotland's approach and multi-institutional approach will develop from SNAP, which is already a good starting point, under the new framework in ways which I think will contain some important lessons for the UN, as it develops its approach to NMIRFs. And of course, there's also a new awareness, post COP 26, or that now seems a long time ago, of the importance of environmental rights receiving constitutional protection. And again, in that respect, Scotland's new framework will be pioneering internationally.

So just finally, some thoughts really, in terms of opportunities, there seems to be an exciting number of opportunities. We're very used to boosterism in London, and lots of references to things being world-leading. And we take it all with a pinch of salt these days. But there is I think, real potential for a Scottish legal human rights framework that's being considered to be genuinely world leading. If it focuses, as it proposes to do, on how legal protection for human rights actually improves people's lives, the practical ways in which it improves and improves people's lives, in concrete ways ordinary people's lives, and focuses on measuring, evaluating, demonstrating exactly how that is done. That is a huge opportunity to demonstrate to the world on how legal rights frameworks actually matters to people. And that's the nut that has never been cracked at the UK level as we're about to see, very painfully in the coming weeks. I've mentioned making ‘build back better after COVID’ meaningful, I think there's a huge opportunity here to situate the Scottish debates on the human rights framework in that broader international context, where the international community again is now going to be looking for examples of how to do that.

So my final, my sort of concluding remarks, I'd really like to encourage you all, I know you will be doing this anyway, but there are so many opportunities which we in London look at with great envy, get involved in the consultation on Scotland's human rights bill when it comes. Active involvement in that will be sought by the government and it's so important to develop and improve the proposals that will be brought forward. Please get engaged in the UK level debates about Human Rights Act repeal and the Bill of Rights proposals because the clouds are darkening in that respect. Get involved in the coming debates about the future of the European Human Rights system post Russia's exclusion and post Ukraine because that's also a debate which is now gathering momentum. And finally, continue to be involved in all the international monitoring that the UN does, which involves Scotland. So I greatly applaud the Consortium's engagement with the UPR process. It's a great submission. And it's really important, I think, to engage with all those monitoring mechanisms. As part of this, we're going a few minutes over. Back to you Naomi.

Outro

Thank you for listening to the Human Rights 2020s podcast. For more information about our work as Scotland civil society network for the protection and promotion of human rights, please visit our website at [www.hrcscotland.org](http://www.hrcscotland.org) or follow us on Twitter @HRCScotland. Thank you.