



Charter 88 and Liberalism

David Howarth MP



This pamphlet is based on a speech given by David Howarth at Liberal Democrat Party Conference in 2008, at an Unlock Democracy lecture. Our lecture and pamphlet series are intended to provoke debate on and interest in issues relating to democracy and human rights. As an organisation promoting democratic reform and human rights, we may disagree with what our contributors say - but we are always stimulated by and grateful to them.

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Charter 88 and Liberalism

David Howarth MP

It is 20 years since I signed up for Charter 88. I should confess that like many Liberals, for that is what I was then, I had some mixed feelings about it. Although I supported every single item in the Charter itself, I felt a residual resentment at the political assumption behind the launch of the Charter: that the one political party that put democratic and constitutional reform at the heart of its programme (indeed, in those days, before the penny on income tax for education, constitutional reform was the party's programme) would not and could not win.

But what was in Charter 88 and to what extent have its demands been met in the intervening 20 years?

The first and most important demand – the demand for a Bill of Rights – I shall deal with at length later. Before that, I want to deal with the other demands. The second article was a call to “subject executive powers and prerogatives, by whomsoever exercised, to the rule of law.” This call was about the prerogative powers – mainly foreign and defence policy powers (the power to make treaties, declare war, deploy troops, and so on), but also some important domestic powers such as the power to dissolve parliament. These are powers which the government claims to exercise without the need for statutory backing and without the need for any form of parliamentary approval. The whole idea of ‘inherent’ powers of the state is a dangerous one, although the courts have corrected the situation to a great extent, subjecting the exercise of many prerogative powers to judicial review. The problem is now as much one of democratic accountability as of the rule of law, although the two interact: it would be better to put the government's accountability to parliament on a statutory footing than simply to rely on Standing Orders of the House of Commons, which can be suspended any day by resolution. That is why it is disappointing that the Constitutional Renewal Bill proposes to subject only the treaty making power to statutory accountability, and not the war powers or the power to dissolve parliament.

The third demand was for freedom of information and open government. We do at last have a functioning Freedom of Information Act, although the commitment of the government and the political establishment in general to the principle of open government is far from clear. Incidents such as the attempt to exclude parliament from the scope of the Act – opposed only by the Liberal Democrats among the major parties – and the government's, now thankfully abandoned, proposals to make it much easier for public authorities to reject freedom of information applications are only the public face of the deep resentment of freedom of information at the top of government. The Information Commissioner will say that he is optimistic that the culture of the civil service is changing, but in my experience permanent secretaries are still deeply suspicious of the entire idea.

The fourth demand was for electoral reform, for proportional representation (PR). There has been some progress since 1999: PR now applies to elections to the European Parliament, the Scottish Parliament, the Welsh Assembly, the Greater London Authority and now Scottish local government. However, thanks to the Labour government's obsession with the closed list system (whether for reasons of party

control or simply, as I suspect, for reasons of trying to discredit PR by choosing the worst method), only in Scotland and Northern Ireland are any elections fought on a good system, namely Single Transferable Vote. And for the House of Commons, no reform and no hint of a reform. Only the Liberal Democrats are opposed to a system that consistently throws away the votes of most of the electorate and allows unpopular governments to be elected time after time.

Even for an elected House of Lords, the Charter's fourth demand - which is making painfully slow progress - there is no consensus in favour of proportional representation. The Tories want first past the post for House of Lords elections, and Jack Straw is keeping the option open. This is a particularly senseless bit of reactionary conservatism, since the only coherent argument put for first past the post - that it is likely to produce a decisive result in favour of a single party of government - does not apply to the House of Lords, which, unlike the Commons, does not decide who makes up the government. Indeed, the Commons' main job is to give confidence to or withhold confidence from governments, in the process making or breaking them, a role that will always at least to some extent compromise its ability to hold governments to account. This is one important reason why we should have a second chamber in the first place, and why it needs to reflect political opinion in the country as a whole.

That brings us to the sixth demand of Charter 88: placing the executive under the power of a democratically renewed parliament. In fact this would follow fairly automatically from proportional representation for the Commons and an elected Lords, but what I think we have learned since 1988 is that there is a limit to what can be done short of those reforms. Calls for the end of whipping are, frankly, naïve, because whipping works on the basis of some basic aspects of human nature: ambition, fear and loyalty. Moreover, the government's need to maintain the confidence of the Commons means that democratic control of the executive is a game of chicken in which the rebels normally pull out at the last minute. The recent rebellion on the 10p tax fiasco was an interesting case in point. It fizzled out principally, and paradoxically, because it was too strong. Its success would have threatened the government's very existence, triggering a general election in which many of the rebels would themselves have been swept away.

I might add that another measure that would increase democratic control of government by parliament would be fixed term parliaments, which would neuter the government's threat to its backbenchers that it would call an election if it lost a confidence vote. Fixed term parliaments were not on the original list of demands, but they should have been.

The seventh demand was to ensure the independence of a reformed judiciary. What lay behind the idea of a 'reformed' judiciary, I seem to remember, was the traditional view of the left that the judges were Tories in wigs who favoured the interests of property and capital. For the left to accept the idea of a Bill of Rights, and even the idea of the rule of law, they had to be assured that there would be a different sort of judiciary, from a broader set of social backgrounds. There has been reform of the selection of judges in the Constitutional Reform Act 2005, which set up the Judicial Appointments Commission. The Act also contains protection for the concept of judicial independence (though it is still an open question whether there is judicial independence in a country in which judges can be removed by a vote of each House of Parliament). It is too early to judge how useful or effective this reform will be. There have been problems, but it has only been operating for two years. I myself have never accepted the underlying view that judges are inherently anti-progressive. On the contrary, much to the fury of authoritarians in governments of both the other parties, especially David Blunkett, judges often turn out to be dangerous liberals. But an independent system of judicial appointment is a good thing in itself, and a massive improvement on the previous system of 'soundings'.

But there is still unfinished business in this area, particularly regarding the relationship between the government and the prosecution authorities. The question of the role of the Attorney-General lies at

the heart of the BAE Systems scandal. Even if we are still a long way away from getting at the truth of what happened when the Director of the Serious Fraud Office called off the investigation of BAE Systems' alleged involvement in bribery and corruption in the notorious Al Yamamah deal (and I for one have grave doubts about the accepted account of what happened) the fact remains that the Attorney-General, a politician, nowadays often a cabinet minister, currently has the power to interfere in investigations of the SFO, and to interfere in prosecution decisions by the Crown Prosecution Service. The Constitutional Renewal Bill contains proposals for a partial reform, ending the Attorney's power to intervene in some cases, but the power would remain in cases like that of BAE Systems, because they concern national security - and guess who decides, conclusively, what counts as a matter of national security under the Bill? Yes, the Attorney-General. There should be a clear separation of all prosecution decisions from political influence. Prosecution should be seen as closer to the judicial branch of government than to the executive.

The ninth demand was for devolution. Discussion of the devolution settlement, and where it will go next, would take a series of lectures in themselves, but we are in a crucial period now that Labour has lost power entirely in Scotland. Many in Labour thought that they would be able to retain the political power it appeared to be giving away in Scotland by keeping it within the party. One of Labour's constant offences is failing properly to distinguish between the party and the state. But now even the vestiges of party power have gone.

But the issue that lies behind that of devolution is the centralisation of power. Labour's view of local government remains that its job is to deliver government policies. Labour finds some variation of method acceptable - at least in theory, though often not in practice. But it still does not see local democratic politics as having its own legitimacy that rivals that of central government.

The tenth demand was for a written constitution. There has, of course, been no movement at all in this direction. Gordon Brown made some noises about the possibility, when he was still keen to look like a progressive, but there was no follow-through, and the whole idea has now disappeared from view. The Liberal Democrats are still in favour of the idea, and this week we have reaffirmed our commitment to a particular way of doing it, through a constitutional convention containing a large element of ordinary members of the public - a kind of vast citizens' jury. This is a way around the problem that if writing a constitution is given to ordinary politicians to do, they will incorporate too readily the methods of ordinary politics: evasion, compromise and misrepresentation. Admittedly, there is no immediate crisis for a written constitution to resolve. The problem we face is one of piecemeal reform, often lacking in coherence, and certainly lacking a clear view on some fundamental questions, such as the relationship between different levels of government, the relationship between the two Houses of Parliament, the function of the second chamber, and the proper relationship between the courts, the government and parliament. The process of writing a written constitution might help to resolve some of these questions, although it will not of itself resolve them all, and it will be a long job.

But I want now to go back to the first demand, for a Bill of Rights - or, more specifically, to "[e]nshrine, by means of a Bill of Rights, such civil liberties as the right to peaceful assembly, to freedom of association, to freedom from discrimination, to freedom from detention without trial, to trial by jury, to privacy and to freedom of expression."

One preliminary point: as a Liberal I was always struck by which rights the Charter used as exemplars and which not, and the order in which the exemplars were listed. A Liberal, for example, would have mentioned freedom of thought and religion, which the Charter omits, and would have started with freedom of expression, not ended with it. The order was designed to be attractive to Labour activists of the 1980s: starting with the right to peaceful assembly, that is, demonstrations and picketing, then moving on to freedom of association, which to a 1980s Labourista would have meant the rights of

unions to organise, and then to freedom from discrimination - again important in the pre-New Labour rainbow coalition, but, interestingly, mainly a right one citizen has against other citizens, rather than a right against the state.

Many people might think that the demand for a Bill of Rights has been fulfilled by the Human Rights Act 1998, but that is not exactly the case. Some of the rights mentioned in the Charter are not included in the Human Rights Act or in the European Convention on Human Rights, on which it is based. The most important is the right to jury trial, which is frequently under attack, most recently with regard to fraud trials. Also of note are the government's constant attempts to extend detention periods, not just without trial but without charge. The 42 day debate is not over, and is certainly not lost by those of us who oppose it, but it is infinitely depressing to listen to ministers who have no idea at all of why it is so important to let accused persons know what they are accused of, in the interests not just of fairness but of getting at the truth. Detention without trial is straightforward oppression. Detention without charge is in some ways worse, because it is playing Kafkaesque mind games with those detained.

As for privacy, although the courts have made considerable progress in defending citizens from an over-mighty and often malicious media, the government continues to threaten our right to privacy with its obsession with enormous databases - including the stealthy advance to a universal DNA database and, worst of all, a national identity database. In combination with the negligent, even lackadaisical attitude of some of those handling data collected by the state, these databases are the greatest threat to privacy the world has ever seen.

Not only have some of the rights demanded in the Charter not been conceded, there are still shrill calls for the repeal of the Human Rights Act. As Stephen Sedley, the Court of Appeal judge, notes in the current issue of *Legal Studies*, the tone of the debate is best captured by a *Sun* editorial that screamed that a government minister had "refused to repeal the hated Human Rights Act, the Act that frees murderers to kill again."

As everyone who studies the situation seriously knows, the anti-human rights campaign is based on bizarre misrepresentations and distortions. The idea that the Human Rights Act prioritises offenders' rights to be released over protection of the public is an utter myth, as the later investigation of the Anthony Rice case demonstrated. So is the weird notion that the Act prevents the publication of the photographs of escaped prisoners. Equally bizarre were the media's obsessions with school nativity plays, prisons supplying pornography to murderers and police giving food and drink to people evading arrest by hiding on a roof - none of which have anything to do with human rights.

But we can expect the campaign to continue, because its origins lie in two of the most powerful motivations known to the British media: self-interest and anti-European bile. Self-interest because the media, and the tabloid press in particular, has developed a particular loathing for the possible use of human rights standards to create effective protection against media intrusion and invasions of privacy. Anti-European bile because, although the European Convention on Human Rights' origins and institutions, including the court, are quite separate from the EU, not only does its title include the hated word 'Europe' and thus provides a convenient opportunity for deliberate obfuscation, it is true that the EU now makes compliance with human rights standards a condition of entry into membership.

There was a hope, expressed by Ronald Dworkin among others, that adopting a Bill of Rights would transform the British political 'culture of convenience', under which the law is seen merely as a specific technique of government, one of the various ways government gets its way, and being shaped constantly to facilitate the government getting its way. Dworkin suggested that a Bill of Rights would create, by contrast, a 'culture of rights', in which government recognised that its own powers came from the law and that the rights of individuals should be respected, not just as a matter of convenience,

but because otherwise government itself would lack authority.

I think it is fair to say that this has not happened. Instead, there have been other kinds of reactions, rather less favourable or progressive.

Some people believe that other people (not themselves, obviously) have developed a culture of entitlement and complaint. They mix the human rights myths concocted by the media with the equally mythical 'compensation culture' (in fact, all the evidence is that compensation claims are falling in number, not rising) to paint a picture of a society dominated by people who are interested only in taking, not giving back. This is the picture used by those who demand that rights should be somehow dependent on duties. It is never exactly clear how this would work. Are we to say that the right not to be tortured does not apply to criminals? If not, as I would hope, what about other rights? The right to free speech, unlike the right not to be tortured, is not an absolute right. It can be limited by libel law, for example, or contempt of court law. But limiting the right is not the same as making it conditional. What does it mean to say the right should be dependent on fulfilling a responsibility? It would be interesting to hear the views on this of those journalists who talk so loosely about rights and responsibilities. Do they mean that journalists who are caught speeding or fiddling their expenses should lose their right to publish? And if that is not what they mean, what do they mean?

There is a profound error in all this. The problem is treating morality, including political obligation, as an exchange – I'll scratch your back if you'll scratch mine. Rights are not exchanged for responsibilities or 'bought' by them. They are not commodities. Doing the right thing, whether it is carrying out a duty or responsibility or asserting a right, is the right thing to do for its own sake. We might say that we want everyone to do the right thing, not just some people. But that is a different principle, and a better one, the principle that we should act in a way we would want everyone to act, and not give ourselves special exemptions from standards we expect from others. But universalising rights and responsibilities does not make rights conditional on responsibilities.

A different reaction to the adoption of human rights legislation has been to say that the problem is that a culture of rights does not help people to bind together as a single unit, but that it tends to separate people from one another and atomise society. This is the conventional socialist, nationalist and now communitarian critique of liberalism. But there is a new element in the mix: the problem of the social integration of religious and ethnic minorities, and in particular the question of the alienation of Muslims, especially young male Muslims. The argument goes that concentration on rights has not resulted in any greater respect or affection for the source of those rights - in liberal discourse, for the state, though in socialist and communitarian discourse it often comes out as for "society". Alienated minorities, according to this view, claim their rights but do not in exchange give any allegiance. The solution then presented is that rights should be associated with integration - a rights-for-responsibility exchange but at a higher level of abstraction, and not necessarily involving legally enforceable responsibilities.

This is what Gordon Brown and Jack Straw seem to be talking about when they attempt to link the rights and responsibilities debate with ideas of "Britishness". The problem with the whole idea is that there is nothing specifically British about human rights. The whole point of their being "human" rights is that they are not attached to or derived from any particular country or culture. There is, of course, a debate about the extent to which the values of human rights are culturally specific to western or northern Europe or to North America, and sometimes there are problems of parochialism in how we see other societies' views of human rights, but that does not undermine the basic point that it is simply a contradiction to try to appropriate avowedly universal standards to specific countries and political systems.

What is wrong in what Labour is saying goes back to their starting point that rights atomise society.

I would not deny that it is possible for there to be a culture of atomising rights – a society of Gordon Gekkos transferred to politics – but I would deny that this is a necessary consequence of recognising human rights. I can see, however, that it might matter in what context people exercise their rights. If the context is one in which, in general, people refuse to take responsibility for the consequences of their actions, human rights may come to be seen as entitlements to ignore the interests of other people, to do one's own thing regardless of the consequences. And one can sometimes hear an echo of that attitude in the way the phrase 'human rights' is used. If, however, the context is one of a society in which people tend to take responsibility for the consequences of their actions, human rights will come to be seen as justifiable protection from harm, principally protection from harm by the state. The European Convention on Human Rights itself tries to anticipate this problem by saying that the rights it lists are not to be used to harm other people, but the text itself cannot create a social and moral context. The question, then, is what kind of society are we?

I do not believe that Britain is the kind of asocial, irresponsible place that would make the recognition of human rights unattractive. But I can see a different sort of tendency, a tendency to stand back from political decisions and to treat politics purely as a spectator sport, to talk about 'politicians' as a separate and alien species. It is a dangerous tendency, because it tends to dissolve the idea of democracy as a creative process of discussion and the discovery of new solutions to problems, instead treating democracy purely as a matter of counting heads – a sort of politics by television ratings. In the long run, the counting heads version of democracy will collapse, because it will generate fewer and fewer solutions to conflicts and the conflicts themselves will become more and more entrenched. It is not 'Britishness' that binds us together, but a process of solving problems together in a way that gives as many people as possible access to the discussion.

Indeed, I think that the current government has been taken in by a theory of accountability, possibly derived ultimately from business management, that elevates spectator-democracy to the status of a theory of government. This is the idea that what we need to do is select one person who is to be rewarded if things go well, or blamed if they go badly. The rest of us do nothing to help solve the problems that we have delegated to this one person. We do not treat solving the problem as anything to do with us. Instead, we just sit on the sidelines and make judgments. This is the theory behind the appalling idea of elected executive mayors, the clearest example of modern 'accountability' theory and its tendency to exclude people from decision-making in the interests of clear lines of sight.

The problem with human rights protection in some circumstances is that it might possibly make the tendency towards counting-heads democracy worse, because it simultaneously says to people 'politicians are out to violate your fundamental rights and you need human rights protection to stop them' and 'there is no need to take part in politics because your fundamental interests are protected by law'. This is not, however, an argument for not protecting those rights, for otherwise I cannot see how a state could be legitimate at all. But it should lead us to take countervailing action.

What I think was missing from Charter 88 was a clear and coherent view of citizenship as the activity of taking part in the governance of one's own community (a Hobbesian view of citizenship, I realise, but on this, though not on other things, I follow Hobbes). There is a tendency for the government to think about citizenship as volunteering. Volunteering is a good thing, but citizenship is not the same thing. Citizenship is taking part in government. If there is a connection between volunteering and citizenship it is that taking part in running voluntary organisations is good practice for political participation, which is itself a good thing. But it is only practice, not the real thing.

If I were to make another Charter today, it would certainly include human rights, but they would be balanced, not by 'responsibilities', but by trying to promote a sense of responsibility for the whole society - a desire to take part in government oneself, to get out of the stand and onto the pitch. In

terms of institutional design, that means making participation easier and more widely available, which is itself another strong reason for decentralisation and localism. It means, for example, increasing, not decreasing, opportunities for participation in public decision-making. The number of lay magistrates is falling. It should be increasing, and their responsibilities should be extended wherever possible. The number of councillors is also falling, as local government reorganisation continues. Although I generally support the idea of unitary authorities, at least for urban areas like Cambridge, I do not see the reduction of the numbers of local councillors as an advantage of the creation of unitaries. It is one of the offsetting disadvantages. The corresponding advantage of unitaries is that the additional powers should attract more people to take part in the first place.

I would also not just defend jury trial but seek to extend it. There is evidence that participation is contagious, and that, for example, sitting on a jury, and making serious decisions about other people's lives, leads to an increase in the chance that the person will vote. I would like to discuss bringing back the use of the civil jury, which has been almost entirely abandoned over the last 75 years. We should even, as part of the discussion of the independence of prosecutors, think about reinstating the grand jury.

Charter 88 was a valiant attempt to win the left for liberal politics, or perhaps to win liberal politics for the left. It succeeded more than many at the time expected, but in many ways – proportional representation for the House of Commons being the most important – it failed, or at least has not yet succeeded. But looking back at it now, the enduring impression is that what it spotted was a trend to lawlessness in government, a trend that many who signed it believed would be reversed by the election of a Labour government. What in fact happened, as Liberals always suspected, was that despite some progress in some areas, the core of the Labour view of the world would not shift away from an instrumental view of power ultimately incompatible with legal constraint (although what we never suspected was that Labour lawlessness would emerge most clearly in international law, in the invasion of Iraq). But so it proves almost every day as Labour's throwaway attitude to civil liberties comes through in almost every bill the government proposes. Charter 88 was both ahead of its time and of its time. The coalition it tried to create is still out there, and still needed; but perhaps this time, it should recognise itself for what it needed to be, but never quite was – liberal.

David Howarth MP

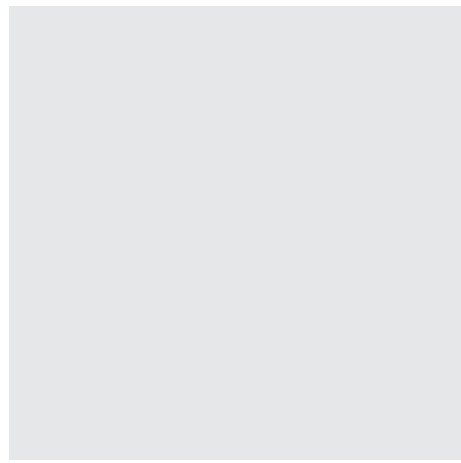
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