



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



CommDH/Speech(2011)17
English only

***“British contributions are needed
in the global struggle for equality and diversity”***

Equality and Diversity Forum
London, 13 December 2011

Speech by Thomas Hammarberg
Commissioner for Human Rights of the Council of Europe

I was happy to accept the Equality and Diversity Forum's invitation to speak today because I am aware of the excellent work that the Forum and all its individual members do to uphold human rights and promote equality. Your work at national level is complementary to my own at international level.

The more I learn about protecting human rights, the more I value organisations such as EDF. Your work is at the centre of human rights protection. Equal opportunities – whether on the basis of age, disability, gender, gender identity, sexual orientation, race, religion or belief – are essential. My travels across Europe highlight the importance of civil society, and of national human rights institutions. Both assist governments to comply with their human rights obligations.

Human rights are sometimes thought to be all about law. Sometimes they are even portrayed as protecting only those who break the law. Due process is of course essential to a democratic society. But human rights matter because they are central to everyone's wellbeing and our control over our own lives. They are fundamental to strong democracies. They set out the basic principles by which institutions and individuals interact. They provide a framework within which diverse communities can live together harmoniously. And when things go wrong, the courts should set them right.

Perhaps most importantly, human rights are the values that should underpin how the state treats people: protecting life and liberty, ensuring humane treatment, and distributing resources fairly – to health or to education.

Human rights help ordinary people live the lives to which they aspire. I know that here in the UK they have helped children with Downs Syndrome to get the best education. They have helped women who are escaping domestic abuse. They helped an autistic man challenge a decision to take him into care and keep him there against his and his family's will. Such human rights success stories have changed lives for the better.

Yet, sometimes people think of human rights and equality as “luxuries” to be pursued in the good times, and set aside when the going gets tough. I would argue the opposite.

Human rights mean that the burdens arising from economic crisis should be shared in a fair manner; they also require that the weakest and most vulnerable be protected.

Human rights should not be seen as an obstacle standing in the way of some political actions, but rather as a set of rules which support the authorities in choosing approaches which protect the genuine interests of individual human beings – not least in situations of crisis.

My comments this evening will focus on two areas.

I will identify some of the human rights challenges which face many European countries. Many are issues relevant to your own work here in the United Kingdom.

I will also say something about the European Court of Human Rights, and about implementing the Convention at the national level.

The Mandate of the Council of Europe Commissioner

But I want to begin with a few brief remarks about my work as Commissioner.

I was elected by the Parliamentary Assembly of the Council of Europe, 'to foster the effective observance of human rights', and assist states to implement human rights standards. So my job is to engage the 47 Council of Europe member states in 'dialogue', to promote awareness of human rights, and to identify 'possible shortcomings' in the law and practice.

My mandate covers the whole spectrum of social, economic, civil and political rights that are protected by the European Convention on Human Rights, the European Social Charter and international treaties such as the United Nations Convention on the Rights of the Child. These treaties were drafted by states, and states have promised to respect the rights they contain.

Today these rights protect the safety and wellbeing of large numbers of vulnerable people in every European country, including children, women, older people, ethnic and religious minorities, refugees, people with disabilities, migrants and stateless persons, prisoners, sexual minorities, and Gypsies and Travellers.

It is my job to report publicly on positive and negative rights practices, and recommend improvements where necessary.

I also comment on broad human rights issues, such as discrimination, xenophobia, media freedom, Roma rights and protecting the rights of those suspected of terrorism.

Although the Convention and the judgments of the Court are the guiding principles for my work, my office is independent from the European Court of Human Rights.

Challenges facing European states

Europe is rich compared with other parts of the world. Despite this very many people in Europe – perhaps 150 million – live in poverty. Many elderly people and people with disabilities live in very poor circumstances. Women still suffer from pay inequalities and job discrimination. Even in rich countries like the UK, over 2.5 million children live in poverty¹ and I know this is a concern across the political spectrum. Social exclusion is passed on from one generation to the next. Inequalities prevent social mobility. These problems are not new, but today human rights are being further tested by the current economic crisis. Unemployment is rising and resources for social welfare are shrinking. Governments all over Europe consider it necessary to put in place austerity budgets.

Experience across Europe shows that it is often the least well off who suffer most from economic crises, including elderly people, people with disabilities, homeless people and migrants. Women and children are also deeply affected by reduced social welfare as well as cuts to services such as children's centres or affordable housing. Public services, particularly in poor communities, are being reduced at a time when needs are growing. The risk is that the social gap will grow, with more people living in poverty and needing aid.

This is an extraordinary challenge for all European governments, at all levels. Wise leadership is needed if we are to come out of the crisis with our liberties reinforced. A central question is whether we can create a more just society for future generations.

Obviously, there are different views about the way forward on the economy. One of the strengths of democratic governance is open public debate about these political choices. This debate is a good thing and should lead to better decision making. Underpinning different party political approaches, however, the human rights to which states have committed themselves should act as guiding principles for decisions.

The standards to which the countries of Europe have committed themselves include rights to social security, an adequate standard of living, food, education, housing, health and work. Now more than ever, governments must respect, protect and fulfil these standards. We need concrete national strategies that promote social cohesion and prevent any watering down either of human rights standards or of the routes by which people can secure those rights in practice.

Governments should engage local authorities, national human rights structures and civil society organisations in their budget plans. We can only be sure that human rights are being protected if budgets are audited from a human rights perspective.

So it is clear that the economic crisis presents a major threat to human rights protection across Europe. But we have also seen some hugely encouraging progress.

For example, European rules have helped to drive up standards of legal protection against discrimination on grounds of age, sexual orientation and religion and belief. At the same time there have been encouraging changes in public attitudes in these areas.

¹ Source: Joseph Rowntree Foundation <http://www.jrf.org.uk/work/workarea/child-poverty>

Despite this welcome progress, in a number of European states people are still stigmatised because of their **sexual orientation or gender identity**. Some are harassed by the police, left unprotected when attacked, or deported to countries where they risk torture or execution.

This is not a new human rights issue; lesbian, gay, bisexual and transgender people have always – in theory - been protected, because human rights apply to ‘everyone’. What is new is the wider recognition that this discrimination is a human rights violation. I welcome the UK’s decision to give priority to combating this form of discrimination during its Presidency of the Council of Europe. I hope civil society groups like the EDF will monitor domestic and international progress in this regard.

The Revised European Social Charter contains the first binding human rights provision for the **protection of older people**. During my travels throughout Europe I see at first hand the need for this protection. I have visited modern institutions with excellent care. But I have also seen centres in which elderly residents were treated more like numbers than human beings. I read with concern the conclusions of the inquiry by your own Equality and Human Rights Commission, which only last month found that home care often fails to respect older people’s basic rights.² Such monitoring by national human rights institutions should take place in all countries.

There are more than 80 million **people with disabilities** in Europe. Their rights are protected – in theory – but progress from theory to practice is slow. Disabled people themselves are now rightly demanding a shift from charity to rights based action. The fundamental principle is that people with disabilities must be able to participate in all decisions affecting their lives. Increasingly, disabled people are also linking up with other civil society groups to promote common agendas, as they do in EDF’s work.

Throughout Europe, countries are closing their borders to **refugees** as well as to **migrants**. States have a right to control their borders. But they also have a duty to protect the rights of everyone inside their territory, including migrants and refugees. The challenge is to strike a proper balance between protecting the rights of those inside, while maintaining control of the frontiers. Criminalising irregular migrants is a disproportionate measure which goes beyond a state’s legitimate interest in border control.

Criminalisation also creates opportunities for smugglers and traffickers. Refugees who leave their countries to escape death or persecution often have no choice: if they cannot seek asylum in another country legally, they are compelled to travel irregularly. These tragic situations have sparked an extraordinary response from civil society, including many religious groups, who provide support against destitution and inhumanity.

Austerity budgets are cutting legal aid. It is sometimes forgotten that **access to justice** is a fundamental human right. Without legal aid, vulnerable people struggle to get the legal help they need to secure justice. At the same time, the ‘front end’ costs saved through the cuts may well be dwarfed by later costs: the costs of deporting a migrant who misunderstood the time limit for applying and thus became irregular will far outstrip the costs saved in providing legal advice at the outset.

² <http://www.equalityhumanrights.com/news/2011/november/home-care-often-fails-to-meet-older-peoples-basic-rights-says-inquiry/>

There are challenging **balances to be struck between different rights**. Here in the UK I see that an important and sometimes heated discussion is underway about freedom of expression, press regulation and the right to respect for private and family life. Clearly the unauthorised hacking of someone's phone or email is an offence unless there is a clear justification. That such intrusions appear to have been widespread is of great concern. Striking the right balance to allow for good investigative journalism whilst protecting a person's privacy is difficult. I congratulate the UK government on setting up Justice Leveson's Inquiry into these topics.

I know that EDF members work on all these issues. You are part of a broad family of human rights advocates across Europe. We all have much to give to and learn from each other. A powerful, passionate voice for human rights will be heard across Europe if groups campaigning on separate human rights issues can work together. The prize of course is greater protection for the people who need it most.

The Significance of the European Convention

I now turn to the role of the **European Convention on Human Rights** in today's world. As you know, the Convention was drawn up after the atrocities of the Second World War with UK lawyers playing a major role. The UK was one of the first countries to ratify the Convention in 1950.

Today the Convention is perhaps the most successful international instrument for protecting human rights in the world. All Council of Europe member states – with 800 million inhabitants - have ratified the Convention. Its provisions represent common democratic values – values that matter to people in all European countries and that many have had to struggle to secure.

When they ratify the Convention, States promise to respect certain basic human rights, such as freedom from torture and from inhuman and degrading treatment, the right to a fair trial, the right to respect for private, home and family life, and the right to non-discrimination in the enjoyment of Convention rights. To make sure that states live up to their promises, the Convention set up the European Court of Human Rights. Individuals can go to the Court if they believe that a state has failed to respect their Convention rights.

The Court's judgments have played an important role in protecting the rights of ordinary people, including vulnerable groups, in the UK and across Europe as a whole. In most European countries, including the UK, the law is now heavily influenced by the Court's decisions - on asylum and migration, mental health, access to justice, the treatment of terrorist suspects, equality and non-discrimination, the rights of children, and the rights of people with disabilities.

The key characteristic of this system is the right of **individual petition**, giving an individual the right to seek justice, as a last resort, at supranational level. This possibility is used to an increasing extent. Last year more than 60,000 new applications were filed and the number of pending cases is now 154,000.

In other words, the Court has been overwhelmed by its own success. This is the background to the intense discussion within the Council of Europe on how to reform this mechanism in order to protect it from becoming dysfunctional.

However, the primary question is not why the Court has difficulties coping, but why so many individuals feel the need to go there with their complaints. The answer is that much more must be done to protect human rights at home, at the domestic level.

The European system was never intended to act as a long-term substitute for national mechanisms – quite the reverse. Each individual should be able to seek and receive justice at home. Recourse to an international court should be seen for what it is – essentially a failure to provide proper national remedies. This fundamental principle of subsidiarity is enshrined in the Convention itself.

The major cause of the Court's troubles is the **systematic failure of some states to implement the Convention** - their national courts just do not provide sufficient protection of individual rights. It is vital therefore that all member states, including the UK, ensure that their domestic law and practices fully incorporate and operationalise Convention rights.

A number of arguments have been made for changes in the balance between the role of the Court and that of national authorities. It has been argued that where national authorities have fully implemented the Convention, the European Court should not normally need to be involved.³ In other words, member states whose parliaments have incorporated the Convention into national law - and their judicial systems apply these standards - should be allowed considerable latitude before the European Court intervenes.

In fact, this is already the practice - not because the Court makes any distinction between countries but because the issues in such cases have been competently dealt with at national level.

It has also been argued that some European Court judgments should not be enforced if there is a clear and democratic expression of opinion against it by a particular country's parliament. The proposal is that there should be a possibility for "parliamentary override". I can understand why this idea might be seen as attractive, but it is fundamentally inconsistent with the concept of the Convention as an international charter of fundamental rights and freedoms.

What seems to be forgotten by some of the critics also here in the UK is that the Convention is built on the notion of a collective guarantee. It could be described as a reciprocal agreement between state parties that recognises that they – and their people - have an interest in the protection of human rights also in other states.

The fact that one state has a treaty right to question the behaviour of other states, provided that it accepts the *quid pro quo*, has been of enormous importance in the efforts to ensure respect for human rights globally.

³ William Hague, Strasbourg, 7 November 2011.

Apart from the right of petition by individuals, the European Convention makes it possible for states to bring to Strasbourg a case against another state, as happened when Ireland filed a complaint against the UK in the early seventies on torture, inhuman or degrading treatment and the policy of internment without trial in Northern Ireland.

Another reflection of the notion of a collective guarantee is the peer-review procedure through which the Committee of Ministers in Strasbourg monitors the implementation of the Court decisions.

The idea is that we will all benefit from a situation where human rights are respected all over the continent. Less than ever are the nation states isolated from their neighbours – I do not need to mention the obvious link between human rights and peace; or the relationship between human rights and migration; or the simple fact that each and every state nowadays has citizens in other countries.

When asked *“What’s in it for us?”* I believe we should stress the significance of this inter-national dimension. This is of course an argument about legitimate self-interest.

Moreover, I am naïve enough to trust that there is even today space for idealism in our societies. Many people do indeed care about the situation of people in other parts of the world, especially for people who – because of repression or fear – cannot defend their own rights. Our politicians should pay respect to such solidarity.

However, the European Court should be protected not only because of its rulings on cases in certain problem countries: its supervision is an asset for every one of the member states – also for the United Kingdom.

Need to Counter Misunderstandings

I must say that I find some of the criticism here in the UK against the Strasbourg system surprisingly ill-informed and I have hoped that the politicians who know better would stand up stronger against this populist and xenophobic discourse. Reading the tabloids one gets an impression of warfare between the UK parliament and judiciary on the one side and the stupid foreigners in Strasbourg, on the other.

Sir Nicholas Bratza, the current President of the European Court, has corrected many of the misunderstandings in an article in a law journal recently – among them the notion of unwanted judicial “activism”.⁴ He mentioned that of the 1,200 applications relating to the UK, 1,177 were declared inadmissible or struck out. Only 23 – less than three per cent of the total – resulted in a judgment of the Court, several of which resulted in findings of no breach.

He also pointed out that the Court had taken up some cases on which they actually agreed with the decision and reasoning of the English Court of Appeal - because the issue itself was of great importance for the interpretation of the Convention and therefore would be an essential contribution to the Strasbourg case law - with an impact on other countries.

⁴ European Human Rights Law Review, Issue 5, 2011

Such clarifications seem, however, to be totally overshadowed by the vitriolic anger against some controversial rulings. Outstanding among those has been the decision five years ago, which is still unimplemented, against **a blanket ban on the right of any convicted prisoner to be able to vote**, irrespective of the nature and circumstances of their offence.

I do not want to hide that I have been disappointed by statements made by parliamentarians and others on this issue. Universal suffrage is a fundamental principle in a democracy. As the Canadian Supreme Court stated when it ruled nine years ago that prisoners should be able to vote: it is necessary to confirm that “everyone is equally worthy and entitled to respect under the law”.

My position is that a blanket, automatic ban does indeed violate basic principles. If deprivation of the right to vote is to be a punishment then this should be expressly spelled out in each individual case by a judicial authority. Moreover, there should be a logical link between the nature of the crime and this particular punishment.

In fact, several other states in Europe – among them Denmark, the Netherlands and Switzerland – do allow prisoners to vote with the rest of the population. This is a non-issue in these countries. Why is the UK so different?

The UK Chairmanship and the Human Rights Act

The United Kingdom has recently taken on the rotating six-monthly **Chairmanship of the Council of Europe**. The UK has put reform of the Court as a priority and I welcome this. I also welcome the constructive framework within which the question of reform is being pursued. The Foreign Secretary has made it clear that concerns about the Court are intended to emphasise rather than to undermine the UK government’s absolute commitment to the ECHR, and to ‘upholding the rights and freedoms set out in the Convention’.⁵

It so happens that the Chairmanship coincides with a discussion about the **Human Rights Act**. The Convention rights became part of UK law when Parliament adopted the Human Rights Act.

The Act has been applied in a series of important judgments. UK courts have taken into account decisions of the European Court of Human Rights, alongside traditional British common law liberties, to protect vulnerable individuals and to uphold basic rights.

The Deputy Prime Minister made this helpful remark in a speech earlier this year: “The Human Rights Act and the European Convention on Human Rights have been instrumental in preventing local authorities from snooping on law-abiding families, in removing innocent people from the national DNA database, in preventing rapists from cross-examining their victims in court, in defending the rights of parents to have a say in the medical treatment of their children, in holding local authorities to account where they have failed to protect children from abuse, in protecting the anonymity of journalists’ sources, and in upholding the rights of elderly married couples to be cared for together in care homes.”

⁵ William Hague, Strasbourg, 7 November 2011.

Today, the UK courts are looked to by courts far outside Europe when they apply human rights law. Our distinguished Chair this evening, Lord Justice Sedley, has been an author of some of these important judgments.

With the Human Rights Act the UK has found innovative and positive ways of combining its own long-established legal and political traditions with the modern expression of human rights principles set out in the Convention. The Act upholds parliamentary sovereignty while strengthening the doctrine of the separation of powers by giving some more authority to the judiciary.

It enables individuals to seek remedies at the national level, rather than having to go straight to Strasbourg. In the past, the UK was one of the countries with the most cases pending before the European Court: the HRA has changed this.

The prestigious Joint Parliamentary Committee for Human Rights, which scrutinises draft legislation to check its compatibility with the Convention, has rightly concluded that the UK 'can generally be proud of its record on national implementation of the Convention'.⁶

For most people the impact of the Human Rights Act has probably been less from the courts, and more from the requirement that public authorities in general respect human rights in everything they do.

Service users can now use human rights arguments if they are abused, or if they are excluded from decisions about their own care, or if their needs – for adequate care or humane and dignified treatment – are ignored. I know this has had considerable impact.

Protecting Established Standards

While in Belfast the other day, I met politicians and representatives of civil society and the newly appointed members of the NI Human Rights Commission. Their common message was the centrality of human rights to peace building and the importance of maintaining and building on the advances to date. They expressed grave concerns about any potential changes to the Human Rights Act or weakening of its protections.

As Commissioner I share this concern. Any weakening of the human rights protections in the Act would be noted outside the UK, and welcomed by less democratic states as tacit encouragement to weaken their own human rights protections. What the UK does today will send a powerful signal to other states about what they can do tomorrow.

It is vital that the UK use its current chairmanship of the Council of Europe to good effect in promoting our common goals of securing democracy, the rule of law and universal human rights. This country is widely respected across Europe for its long and strong tradition of upholding civil liberties and it therefore has a vital role to play in securing and indeed improving on European human rights standards.

Needless to say a UK foreign policy devoted to human rights will only be seen as legitimate to the extent that it also reflects an active human rights policy at home: foreign

⁶ Joint Parliamentary Committee for Human Rights, 15th report: 'Enhancing Parliament's Role in relation to human rights judgments'. Para. 18

and domestic policies are inter-twined in this regard. I have said elsewhere that there are no grounds for complacency about human rights across Europe.

This is as true for the UK as any other member state.