

## **The *British Institute of Human Rights Brief* Interview with Francesca Klug**

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**Looking at your previous and current positions and your published work it is clear you have had a full career. Was your path into the field of human rights one of design or accident?**

In some ways more accident than design. In 1989 I went to Liberty and became Director of the Civil Liberties Trust (which I have just become a trustee of, incidentally). This was obviously a conscious decision on my part, but it happened to coincide with the time that Liberty was actively addressing fundamental questions around whether they needed to re-orientate their focus to embrace international human rights standards which, as a home-grown civil liberties organisation, was not a major priority for Liberty before the late 1980s. As Director of the Trust I was responsible for the research profile of Liberty and I had the opportunity to do lots of reading and thinking about human rights as an idea and to saturate myself in international human rights standards.

What struck me the most was that these standards appeared to address some of the problems I had faced in my previous post as a special adviser to the Chairs of Social Services and Community Development Committees at Hackney Council (during its pseudo-revolutionary period!). At Hackney there were frequent conflicts and tensions between different vulnerable or minority groups and there was no common or consistent ethical framework with which to address these. When this occurred, disputes tended to be settled through numerical strength or 'voting power.' For example, the Council piloted an independent living scheme for people with disabilities which was contested by some members of the trade unions. This wasn't a classic conflict between poor and rich and therefore could not be adequately addressed by the socialist framework which was paramount at Hackney Council at the time. It was a conflict between two groups both of which had reasonable arguments about what was fair and just. When I came across international human rights standards I could see how they could be applied to these important bread and butter issues as much as they were relevant to the classic concerns about liberty, free speech or the

criminal justice system. It struck me then that human rights were a set of ethical values – the accumulated wisdom of human beings down the ages which addressed situations of conflict at both the macro and micro levels, involving the individual and the state or different individuals and indeed different groups within society. So I found my way into human rights from that angle. And now of course we have had case law under the Human Rights Act which successfully addresses very similar dilemmas and conflicts to the ones we faced in Hackney (most notably *East Sussex* concerning the 'manual handling' of disabled people).

**What do you think about the renewed focus by politicians on the notion of “rights and responsibilities”? How does this fit into a human rights perspective?**

The language of “rights and responsibilities” has some overlap with the human rights perspective but largely it is actually a misunderstanding of the idea of human rights. I say this because the post-war international human rights framework tried to move on from the individual rights position, which is associated with traditional civil liberties here or with the American or French Bill of Rights. The focus now is not just on the rights of individuals but on how to create a *society* in which the human rights of all are respected. This more collectivist approach to the enforcement of human rights started to emerge after the Second World War when the drafters of the UDHR, a number of whom were social democrats, socialists or communists deliberately inserted a different perspective into the then rather individualistic, rights framework (for example, see UDHR Article 29). Influenced also by religious values, including from Islam and Confucianism, they concluded that for individuals to have human rights it is not enough for the state to refrain from oppressing its citizens; the society in which people live has to function and flourish as well, something that you can't achieve as isolated individuals. One of the implications of that idea is that the state has to positively intervene to address the tensions and conflicts within society, many of which are created by inequalities in power and wealth. Another implication is that for individuals to have their human rights respected other individuals need to accept legitimate limits to their own freedoms in order to create a society in which the right of all can be protected. So although you do not have to act responsibly as an individual in order to claim rights, as those rights are inherent in you from the moment of your birth, if in the course of expressing those rights you reduce or infringe the rights of others the state may have to intervene to limit your rights. But the state should only do this to the extent, and only to the extent, that it is necessary to achieve the social good of protecting the rights of others or the wider community. That, in a nub, is the post-war human rights philosophy.

The David Davis and Conservative party attack on the Human Rights Act plays to the common caricature of rights as nothing but individual, selfish wants and needs; an

old idea going back more than a hundred of years to both Edmund Burke and Karl Marx (funnily enough). When New Labour politicians talk of “rights and responsibilities” they sometimes appear to endorse this distortion. They seem to be saying that you only get rights - a term they seem to use interchangeably with wants - if you behave responsibly. This is quite different to the human rights vision which, as I have said, cannot be effective unless individuals respect each other's rights but which also recognises that rights are inherent in everyone and not, to that extent, contingent on 'good behaviour.'

**How much will the proposed Commission on Equalities and Human Rights add to the protection of human rights in the UK? Does it have the powers and tools you think it needs to be effective?**

My hope is that the proposed Commission has, at the very least, the minimum powers necessary to be effective. Quite obviously it is not going to have the maximum powers that it could. If I didn't believe the Bill to establish the CEHR would contain the minimum powers that are necessary for it to work successfully, then I wouldn't have engaged or participated in the process to date. If in the end it doesn't, I will be as outspokenly critical of the proposals as anyone. We know that CEHR will not be empowered to support individuals to take Human Rights Act cases but the White Paper indicates it will have an explicit power to intervene in HRA cases and to conduct formal inquiries into the protection of human rights by public authorities. The success of CEHR will, of course, not only be determined by its powers and duties. I think a lot will depend on the political climate when the CEHR is set up, the Commissioners themselves and how the different parts of the Commission operate and work together, which are all things that will emerge over time.

There has been some disappointment expressed that the proposed Commission will “only” have promotional powers with regard to human rights. I think that the powers proposed in the White Paper are much broader than the narrow understanding of promotion as relating to public education only. This in itself is a hugely important and currently neglected function. But the White Paper goes much further. Provided its proposals are reflected in the Bill, we are talking about a body which provides a helpdesk for individuals seeking first order advice about the Human Rights Act, a body which would monitor, audit and disseminate case law to the those public and private bodies with responsibility for implementing human rights and a body which can carry out inquiries on any human rights issue and which can intervene in any HRA case. All of those activities come under the mandate that the government has set for the body. Should these White Paper proposals materialise, and I sincerely hope and believe they will, the proposed Commission will be in the business of promoting compliance with the HRA as well as promoting good practice and the

values which drive human rights. If this is the case, I think it will have sufficient powers to be effective.

**You were one of the driving forces behind the Human Rights Act and were a member of the Government's Human Rights Task Force charged with overseeing implementation of the Act. What were your expectations of the Act and have these been surpassed, met or disappointed?**

There was a whole group of us lobbying for the Act from individuals such as Anthony Lester QC who championed this for decades, through to organisations such as Liberty and BIHR. During much of this period I was a research fellow at King's College law school employed by Professor Robert Blackburn specifically to work on models for incorporating the ECHR into UK law. I was privileged, therefore, to be able to work on developing a model for the HRA which, whilst allowing the courts a significantly enhanced role in terms of human rights enforcement, would not overturn the principle in this democracy that parliament should have the final say as to which legislation remains on the statute book.

At the time there was a rather elite, but nevertheless active, debate between those who believed that the only bill of rights (or incorporated treaty) worth having was one which was fully enforced by the judiciary who should be empowered to overturn statutes if necessary, and those who took a contrary view. Crudely put, the latter argued that as bills of rights or their equivalents can never aspire to the precision of technical, 'black letter' law, they should be enforced differently. From this viewpoint, as the purpose of bills of rights is to provide a legal framework within which to interpret other laws and policies, there will always be debate about where the boundaries between different rights should lie and the most appropriate place for those decisions to be made is the democratic sphere.

I was mostly somewhere in the middle of much of this debate but I ultimately came down on the side of the 'democratic sphere' as I shared the view that it is counterproductive to the goal of creating a culture of respect for human rights to have a highly judicialised system of enforcement. In our culture, where there was no appetite for enhancing judicial power, no people on the streets demanding that there should be a Bill of Rights enforced by the courts, it would have been counterproductive for the Human Rights Act to appear from on high and suddenly people find that parliament which they think they have some influence over (however small) can no longer change the laws because judges have the final say. I was worried that this would lead to a backlash comparable, perhaps, to the one we have seen with the European Union constitution. I wasn't convinced there was enough of a groundswell supporting human rights to survive that kind of backlash. As a result I was mostly involved in developing the model reflected in section 3 and section 4 of

the Human Rights Act which has given an enhanced interpretive role to the courts but does not allow them to overturn Acts of Parliament. My expectations about how the model would work have been largely fulfilled. Like everyone else, I haven't always agreed with every single judicial interpretation of the relative weight that should be given to s3 & s4 of course, but I think their intersection has opened up the space for dialogue and debate which I was very worried would be closed down by a fully judicially entrenched HRA.

The other crucial part of the model was the proposal for a joint parliamentary committee to scrutinise legislation for compliance with the HRA. This was a proposal I first worked on at Liberty when drafting *The People's Charter*, which was an early attempt at developing a 'democratic approach' to entrenching rights. One of the legitimate criticisms of the HRA is that if the courts do not have the final say to determine acts of parliament, the government of the day will, because parliament is so weak under our voting system. Therefore it was essential to have a parliamentary committee – a joint one which the whips could not easily control – so that MPs would intervene in the debate about the balance between conflicting rights and so forth and put pressure on the government in the process. I think the members of the Joint Committee on Human Rights have excelled themselves in the credibility, respect and influence they have achieved.

None of this, of course, means that we have got the perfect results in human rights terms that we wanted, and of course the initial failure of the courts to overturn the 'detention without trial' provisions of the anti-terrorism legislation could be put down to the model that I championed. However, when talking about a broad framework like human rights, what you have to do is create a situation where the climate can be changed and I think the combination of the various official reviews, the Joint Committee's reports on the Anti-Terrorism, Crime and Security Act and the SIAC and subsequent cases (which wouldn't have been heard before the Human Rights Act and which succeeded at the first level) have created a pressure for change which might ultimately prove successful. Although we are operating in a very difficult climate, which has tested the credibility of the HRA model of the extremes, I feel it has stood up reasonably well to the scrutiny.

**What would you hope to have changed, either in a work context or otherwise, in ten years time?**

I hope that the Human Rights Act, or potentially a successor to it, will begin to fulfil the foundational, inspiring role that the American Bill of Rights fulfils – even at times like this. I hope it will come to be understood as a set of ethical values which provide a sort of bottom-line framework within which we can debate, discuss, protest, argue and judicially intervene on laws and policies that we don't like.

I hope, too, that the Commission will be up and running (and running well), partnering and supporting organisations like BIHR doing crucial work on the ground. The work BIHR currently does in promoting 'good human rights practice' within the public and voluntary sectors won't go away but in fact will become more important once the Commission is operating, in helping to translate the human rights framework to terms that can be absorbed by a wider group of society than lawyers and human rights specialists.

Speaking personally I hope I will be at least semi-retired, having a good time and watching a younger generation try to iron out all the difficulties that we now face, taking the human rights debate forward into a new era. I am getting too old to have a utopian vision of ten years from now. I know there will still be huge injustices and that the people with least power will suffer the most and those with most power will get away with the most, but I hope that we will be able to feel more confident that we have achieved an enduring, foundational bill of rights.

*The full text of the Winter 2005 BIHR Brief that this interview appeared in can be found online at: [http://www.bihr.org/pdfs/newsletters/bihr-news-winter\\_02-05.pdf](http://www.bihr.org/pdfs/newsletters/bihr-news-winter_02-05.pdf)*