

Rights and Responsibilities: an international perspective

Francesca Klug

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Responding to the speech by Justice Kate O'Regan, Constitutional Court of South Africa

I agree with Kate O'Regan that bills of rights are meant to reach parts other legal documents don't. I see bills of rights a bit like the Tardis. On the outside they are often quite neat and simple statements of the fundamental rights of individuals. But if you delve further you discover layers that are not immediately visible to the naked eye.

Some rights – like free speech, assembly and trade union membership – also signal the principles of a democratic society. Others define the spirit of a nation which shines even when the rights themselves are flagrantly breached – the 'who or what are we' question which America is engaged in now. And a Bill of Rights can symbolise values shared by society as a whole (not just states), for example tolerance, pluralism and justice. In this context bills of rights *should*, in my view, legitimately encourage a sense of solidarity and mutual responsibilities.

I also agree with Kate O'Regan's take on freedom involving more than the absence of restraint. The 'human' in human rights means that we need to recognise that we all faced with moral choices and dilemmas and are all capable of abusing the rights of others. But more importantly than what I think, this is the approach adopted by the post-war human rights framework – precisely because it was post-war and in response to an episode of unparalleled conflict in which hundreds of thousands of people contributed to the persecution and degradation of their fellow human beings.

The founding mothers and fathers of what I call 'second wave human rights'¹ debated the moral purpose of rights charters endlessly. Their whole take on rights was different to the enlightenment pioneers who came before them whose preoccupation was naturally with freedom from tyrannical states and an oppressive church.

The drafters of the 1948 Universal Declaration of Human Rights (or UDHR) saw themselves as explicitly embarked on a *moral* endeavour to create a more harmonious world which they viewed as only possible if individuals – who they saw as social, not autonomous, beings – live in flourishing communities to which they owed duties (to paraphrase UDHR Article 29).

Renee Cassin, one of the prime drafters of the UDHR, was emphatic that the declaration was not "a mere offshoot of the eighteenth century tree of rights". He said the "first article in the UDHR that all human beings 'should act towards one another in a spirit of brotherhood',

¹ See Francesca Klug, *Values for a Godless Age*, Penguin 2000.

corresponds to the injunctions familiar to the Abrahamic religions that we should 'love thy neighbour as thyself' and 'love the stranger for you were strangers once'. This encapsulates the human rights ethic; solidarity and universalism.

That this vision of human rights should be reflected in the principles and values of a domestic bill of rights is – in my view – not only unproblematic but part of the very *purpose* of a bill of rights. It is also urgent as it couldn't be much further than the image of human rights which has developed here in the last 10 years. In spite of all rumours to the contrary, the whole of human rights discourse is not really about giving bad people more rights – it is about duties and victims.

But what gives human rights a bad press (literally) in this country is the perception that in what one Daily Telegraph blogger this week described as the "irrational, immoral and irresponsible" human rights agenda, it is only states who have duties and only those who have suffered at the hands of the state who are victims. This classical approach to human rights might have had a lot of resonance in post-apartheid South Africa as it did in post-Nazi Europe but it doesn't, unfortunately, do a lot for the majority of the population here now (although there may be a change in perception with concerns about a surveillance society and detention without charge rising up the political agenda, on almost a daily basis). For the majority, it is fair to say – in their view, if not experience – the state is the body they look to in order to protect them as victims of anti-social behaviour or crime; and it is other individuals who cause most of the bother!

The Human Rights Act (HRA) – which Jack Straw described as the first bill of rights in three centuries when he introduced it as home secretary – is not only aimed at preventing the state from encroaching on individual liberties. Rights involve a duty-bearer and in his renowned discourse on duties, Henry Shue identified three types of duties on the state generated by human rights all of which are reflected in the HRA. First, there is the primary obligation on the state to refrain from infringing individual liberties directly. Second, there are obligations on the state to prevent people's rights from being infringed by other individuals or bodies (an obligation which the state usually discharges by limiting rights). Third, there are positive obligations on the state to take action to ensure people's rights are fulfilled, for example by, protecting the right to life through establishing an effective criminal justice system to deter crime (as the European Court of Human Rights has mandated states to do ²). But the fact that there are both positive obligations on the state to protect people from abuse by others³ - and legitimate and necessary limits on the exercise of individual rights in the HRA - is lost on all but a tiny circle.

The government has said it wants to introduce a Bill of Rights and Responsibilities that builds on the HRA which will bring out the responsibilities embedded with it (and perhaps include social and economic rights). Jack Straw, now Secretary of State for Justice, has said he hopes such a bill will address "the commoditisation of rights which have become perceived as yet more goods

² *X & Y v The Netherlands*, (1985) 8 EHRR 235, para 27; *Osman v UK* (1998) 29 EHRR 245, para 115.

³ See *Van Colle v Chief Constable of Hertfordshire* [2007] EWCA Civ 325; *Savage v South Essex Partnership NHS Foundation Trust* [2007] EWCA Civ 1375.

to be 'claimed'." He argues that this is apparent when "some people seek to exercise their rights in a selfish way without regard to others - which injures the philosophical basis of inalienable, fundamental human rights."⁴

Kate O'Regan has suggested that there are four possible mechanisms to incorporate responsibilities in a Bill of Rights. Two involve rights and two involve responsibilities. Of the two rights options – rendering rights directly enforceable against private citizens through a horizontal mechanism – is a non-starter here. People are already fed up with a perceived compensation culture and growth in litigiousness with the risk aversion this is said to create (although it is hoped that a Bill of Rights will deal with the YL⁵ problem, to widen the range of authorities which have *direct* legal responsibilities under the HRA, to in effect include public services provided by private bodies").

Rendering rights *indirectly* applicable between private parties is, as I said in discussing Shue's duties paradigm, an approach *already* embedded in HRA. Like the South African Bill of Rights, the HRA, through sections 3 and 6, applies to "all law", including common law and all organs of the state, including the courts (so, for example, we have seen the tort of confidence begin to evolve into a nascent privacy right in the context of press intrusion⁶).

But indirect liability on private individuals and bodies also flows from limitations on individual rights which establish the imperative to exercise our rights responsibly with due respect to the reciprocal rights of others. European Court of Human Rights jurisprudence, which our courts have to take into account (under section 2 of the HRA) has determined that the fact that a public authority is not *directly* responsible for a breach of an individuals' rights does not mean that the human rights framework is not applicable.

So, for example, the state is obliged to protect demonstrators from counter-demonstrators;⁷ children from physical abuse by their parents;⁸ pupils from corporal punishment in schools⁹ and trade unionists from rules which would restrict their right to free association.¹⁰ In each of these cases the state had a duty to stop private parties from abusing each other. And because the state has positive obligations to protect our rights (Shue's tertiary duty) these can *indirectly* extend to individuals as well. For example, parents and carers have a duty to safeguard the well being of children under the United Nations Convention on the Rights of the Child, not just refrain

⁴ "Towards a bill of rights and responsibilities", *Justice Journal*, 2008, Vol 5, No.1, p8.

⁵ *YL v Birmingham City Council and others* [2007] UKHL 27.

⁶ In *Douglas and others v Hello! Ltd* [2001] 2 WLR 992 Sedley LJ found that the law of confidence had developed to the point at which it could provide a right to privacy. This was a case between private parties but the court, a public authority itself under s6 HRA, was obliged to give effect to the Article 8 right to respect for private and family life. See also *Campbell v Mirror Group Newspapers* [2004] UKHL 22 and *HRH Prince of Wales v Associated Newspapers* [2006] EWCA Civ 1776.

⁷ *Plattform "Arzte fur das Leben" v Austria* (1988) 13 EHRR 204.

⁸ *A v UK* (1998) 27 EHRR 611.

⁹ *Costello-Roberts v UK* (1993) 19 EHRR 112.

¹⁰ *Young, James and Webster v UK* (1981) 4 EHRR 38.

from harming them, and the obligation is on the state to ensure they do so through the civil and criminal law.

But the difficulty with this *indirect* approach is just that – its indirectness. The link between *this* jurisprudence - and the symbolism of a bill of rights aimed at encouraging responsible behaviour - is obscure. You need a human rights lawyer to get it! This is not useful if the aim of a Bill of Rights is to foster mutual respect and underline common values – or, in Jack Straw's terms, address the "the commoditisation of rights".

Kate O'Regan offers two further roots to incorporating responsibilities in a Bill of Rights – enforceable duties and non-binding responsibilities.

Whilst some constitutions contain duties to vote, to national service or to remain loyal to the state, as Kate has said there are very few, if any, domestic bills of rights with a catalogue of legally enforceable duties and none with political and legal systems like ours. The whole point of a bill of rights, of course, is to provide some counterweight to the legal duties on citizens in the ever multiplying criminal and civil law.

The fact that the government seems to have dropped the phrase *Bill of Rights and Duties* – with its connotation of legal enforcement– in favour of the more amorphous Bill of Rights and Responsibilities hopefully indicates that they do not intend to go down this route. Certainly the Secretary of State for Justice and the Human Rights Minister shied away from proposing a catalogue of legal duties in their recent evidence to the JCHR inquiry on a Bill of Rights. But they *did* suggest that the courts should take into account the failure of individuals to exercise their responsibilities when they seek to claim their rights or demand remedies for the abuse of their liberties.

As we have seen, 'bad behaviour' – if you like – already acts as a significant break on the exercise of rights. Jack straw acknowledged this himself in the example he gave to the JCHR – you forfeit your right to liberty when you destroy the life and liberty of others.

Courts can already take account of a range of considerations when they award remedies. And there is also a *specific* provision in Article 17 of the European Convention on Human Rights aimed *directly* at individuals and groups who seek to rely on their human rights to destroy the rights of others, such as inciting racial hatred in the name of freedom of expression. But if we go beyond this to deny rights and remedies altogether to those deemed 'unworthy' do we not undermine the whole point of human rights which is to prevent *all* human beings falling so low that they are denuded of *any* rights and dignity?

Under the human rights framework, you lose rights in order to protect others and the wider community but only to the extent that it is necessary to do so (otherwise known as the doctrine of proportionality). Even lifers have a right to life and to communicate privately with their lawyers. A Bill of Rights which builds upon or incorporates the HRA should clarify this approach to rights. A clearly articulated interpretative clause aimed at the courts which spells out the doctrine of

proportionality – and how this should be applied to address conflicting rights and interests– could aid transparency.

Much of what Kate O'Regan described in her fourth option as non-binding responsibilities could be summarised in a suitably drafted preamble. A preamble along the lines of the United Nations International Covenant on Civil and Political Rights – which explicitly recognises that human rights can only be protected if we respect each others' rights – could begin the process of illuminating the *indirect* responsibilities on us all which underline the human rights framework. It will probably need a poet to write it if it is to resonate in the hearts of the British public!

In the current domestic debate on rights we are in danger of convincing ourselves that there has been no progress since the signing of the Magna Carta 800 years ago! Whatever the contents or means of enforcement of a domestic bill of rights, we do need to rehabilitate the idea of human rights as ethical values, just as the founders intended. Rights outside an ethical framework cannot long endure!