

Why Human Rights?

Francesca Klug

Professorial Research Fellow at the Centre for the Study of Human Rights, LSE, and
Commissioner on the CEHR

This article was first published in the May-June 07 issue of *Catalyst*

When the fledgling United Nations passed the Universal Declaration of Human Rights (UDHR) in 1948, Apartheid had just been introduced into South Africa. The Declaration's resounding affirmation that "All human beings are born free and equal in dignity and rights" must have sounded very hollow to the millions of people living under colonialism and segregation around the world, in so far as they were even aware of it.

Nelson Mandela suggests otherwise. "During the many years that followed" he said, the Declaration "served as a shining beacon and an inspiration to many millions of South Africans...proof that we were not alone, but part of a global movement against racism and colonialism, for human rights and peace and justice".¹

It was the growth of that movement, and its capacity to inspire and unite, which moved Martin Luther King to suggest to his followers in the mid- 1960s that "It is necessary for us to realize" that "we have moved from the era of civil rights to the era of human rights... rights that are clearly defined by the mandates of a humanitarian concern".²

The ethical framework that Mandela and King identified is what gives human rights its definition. Whilst drawing inspiration from the old 'Enlightenment' values of liberty, tolerance and justice, the UDHR set new standards of what it meant to be 'fully human' which encompassed dignity, solidarity and mutual respect,³ access to basic social and economic entitlements and the first modern formulation of the right to be protected from discrimination.⁴ These rights were not just aimed at securing "freedom justice and peace in the world"⁵ but at "small places", as Eleanor Roosevelt put it "where every man, woman, and child seeks equal justice, equal opportunity and equal dignity without discrimination."⁶

Many people around the world continue to draw inspiration for their struggles for equality and dignity from human rights principles, from Shirin Ebadi in Iran to Aung San Suu Kui in Burma. The UDHR has spawned numerous regional and single issue human rights treaties including the European Convention on Human Rights (ECHR) and the International Convention on the Elimination of all Forms of Racial Discrimination which individuals and groups use to try to hold

¹ Quoted in *Reflections on the UDHR: a fiftieth anniversary anthology* (Kluwer, 1998) p256.

² Martin Luther King, Jr 'To Chart Our Course for the Future', address to the Southern Christian Leadership Conference, South Carolina, 1967, pp. 2-3 (King Library and Archives, King Center, Atlanta).

³ "All human beings...are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." UDHR, Article 1. See also Article 29.2. and reference to limiting right to secure "due recognition and respect for the rights of others."

⁴ UDHR Articles 2 and 7.

⁵ *Preamble*, UDHR.

⁶ Eleanor Roosevelt, 'The Great Question', address to the United Nations Commission on Human Rights, 1958. Eleanor Roosevelt was the wife of the American President and the prime architect of the UDHR.

their governments to account. Human rights are in many ways the *linga franca* of the contemporary world as new technology has facilitated ongoing global 'conversations' on rights and justice which cut across generations and cultures.

Here in Britain, however, there is still much anguished debate about what human rights are and who they are for, fuelled, in part, by myths and misconceptions from the tabloid press.⁷ Once we were told that councils banned employees from ordering black coffee because of the Race Relations Act. Now we read that the mass murderer Neilson received pornography in his cell because of the Human Rights Act. Both are complete rubbish. But until now, there has been no statutory Commission to rebut the nonsense which, at its worst, threatens to discredit the idea of human rights in this country, uniquely in the Western world.

We were one of the last democracies without a bill of rights when the Government introduced the Human Rights Act (HRA) in 1998, to allow the rights and values in the ECHR to be enforced in the domestic courts and be absorbed by public authorities. The Commission for Equality and Human Rights (CEHR) will provide the first institutional support for the HRA⁸ but there is still uncertainty as to how useful human rights will be in addressing inequality.

Writing in this journal last October, Nick Johnson, the CRE's Director of Policy and Public Sector, suggested that "the human rights culture" could be a "huge obstacle to CEHR's ability to become a significant player in the public policy debate". His concerns centred on both the effectiveness of the HRA in "challenging unfair treatment" and its apparent "individualistic approach" to public policy.⁹

Even before the CEHR is up and running, the HRA has already played a vital role in plugging some of the protection gaps in anti-discrimination law. Like all bills of rights, the HRA operates differently to single-issue legislation such as the Race Relations Act, supplementing rather than substituting for it. Its broad values influence and inform *all* other laws and policies which have to be interpreted to comply with its terms where possible, from housing and employment law to mental health and criminal justice legislation.

The HRA outlaws discrimination, but only in relation to the civil and political rights upheld by the ECHR. Its scope is much wider, however, providing protection for groups that are currently inadequately covered, if at all, by specific equality laws. These have included gay partners,¹⁰

⁷ It is not difficult to imagine what a field day some of the tabloids would be having with recent equalities legislation if the CRE and EOC respectively had not been able to quash rumours about councils banning 'Ba Ba black sheep' or 'manhole covers' in the 1980s.

⁸ The CEHR has a duty to promote and protect human rights and a specific duty to encourage public authorities to comply with the HRA s6. It has the power to conduct enquiries and intervene in human rights cases and to judicially review public authorities for breaches of the HRA. It can only support individuals in cases taken under equalities legislation where it is open to the CEHR to cite the HRA to strengthen a discrimination case.

⁹ "The Right to a Good Society?" *Catalyst*, 27 October 2006.

¹⁰ *Ghaidan v Mendoza* (2004) and *R (SG) v Liverpool City Council and Secretary of State for Health* (2002).

family carers,¹¹ elderly people facing home closures,¹² mothers in prison,¹³ gypsies and travellers¹⁴ and destitute asylum seekers.¹⁵

With the strengthening of race, gender and disability discrimination laws in recent years, resort to the HRA to prove discrimination in these areas can be unnecessary. However organisations like the Disability Rights Commission (DRC) have successfully demonstrated that the rights in the HRA – to dignity, autonomy and participation – which are not reliant on finding a ‘comparator’, can strengthen anti-discrimination claims or even substitute them.¹⁶

Mrs Bernard won the right to a suitably adapted home because her right to a family life – to be able to care for her own children – was severely impeded by her accommodation.¹⁷ A Local authority was required to amend safety guidelines that had left severely disabled people segregated in their own homes following an HRA case involving the DRC.¹⁸

Successful challenges to the detention without trial, or house arrest without charge, of Muslim men, that have compounded the alienation of many members of the Muslim community, have relied on the HRA and could not have been taken under the Race Relations Act alone.¹⁹ The family of Zahid Mubarek did not have to prove he was discriminated against to win the right to an independent public inquiry into his death under the HRA. His right to life had been violated.²⁰

But to some extent comparing and contrasting human rights and anti-discrimination laws is to miss the point of the human rights approach to equality which extends far beyond equal treatment. The guiding principle behind the idea of human rights is that human beings are entitled to certain protections or outcomes simply because they are human. We all have an equal right to respect based on our common humanity. Equality is a fundamental human rights principle. As Rabinder Singh QC has commented “everyone” is the most important word in human rights treaties. It is a value that justifies certain substantive entitlements rather than being an end in itself. Human rights are never about the equal distribution of misery or injustice.

There will always be debate about what these outcomes or entitlements should precisely consist of, but they will be driven by what is deemed necessary to fulfil our lives as human beings; such as the opportunity to participate in our local community or the wherewithal to determine our own destiny. It is widely recognised in recent human rights case law that positive action, or

¹¹ *R (L and others) v Manchester City Council* (2001).

¹² *Cowl and others v Plymouth City Council* (2001).

¹³ *R (P) v Secretary of State for the Home Department and R (Q) v Secretary of State for the Home Department* (2001).

¹⁴ *Price and others v Leeds City Council* (2006) and *South Buckinghamshire District Council v Porter* (2004).

¹⁵ *R (Limbuela and others) v Secretary of State for the Home Department* (2005).

¹⁶ *R (Bernard) v Enfield London Borough Council* (2002) and *R (A and B) v East Sussex County Council* (2003). A stop and search case under the RRA, for example, could be strengthened by reference to rights to liberty or privacy under the HRA.

¹⁷ *Bernard* above.

¹⁸ *East Sussex* above.

¹⁹ *A and others v Secretary of State for Home Department* (2004) and *Secretary of State for the Home Department v JJ and others* (2006).

²⁰ *R (Amin) v Secretary of State for Home Department* (2003).

'reasonable adjustments', (to borrow a phrase from disability discrimination legislation) may be required to achieve these outcomes in practice.²¹

The human rights framework is commensurate with the 'capabilities approach'²² to equality adopted by the Equalities Review, chaired by Trevor Phillips, which will provide a reference point for the new Commission.²³ The 'capability list' selected for the Review is drawn from "the international human rights framework", - refined by "democratic deliberation" - which constitutes an "irreducible core" of "capabilities"²⁴ necessary to achieve "substantive human freedom or real opportunities".²⁵

None of this means, as is sometimes feared, that a human rights framework blurs distinctions and denies the specific experiences of particular groups. Quite the contrary! Conceived from the horrors of slavery and the Nazi holocaust - the "barbarous acts which have outraged the conscience of mankind"²⁶ - the impact of being a member of a group that is vilified, ignored or discriminated against must be remedied. As the House of Lords judge, Brenda Hale has put it "it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. Democracy values everyone equally, even if the majority does not."²⁷

What of the CEHR? It has a wide range of powers and duties to promote and protect human rights which should be mainstreamed into its work. An enquiry into the disproportionate number of black people in the mental health system should extend beyond discrimination to include dignified treatment, respect for privacy and opportunities to associate with others. A judicial review of hospitals suspected of neglecting or abusing people with learning difficulties could be based the right to be protected from torture and inhuman treatment under the HRA. Good practice guidelines for public sector workers should range far wider than *equal* treatment to include *standards* of treatment. With training from the British Institute of Human Rights and others, the HRA and its case law is already being used by some sectors to develop a framework for addressing difficult ethical dilemmas when rights collide, as they inevitably do. The resolution of the dispute with Catholic adoption agencies over gay adoption, for example, was entirely consistent with human rights principles.

The CEHR is specifically charged with "promoting the importance of human rights" which extends beyond the HRA. Nick Johnson worries that this means "defend[ing] individuals and their rights with little context of how those rights fit in with those of the wider community". His concern was addressed by Martin Luther King forty years ago.²⁸ In the last year of his life King called for a "human rights revolution." According to scholars, his point was that rights properly understood are not whatever people claim as their due, but are what is required for everyone by the 'higher law' of justice. Rights and responsibilities are therefore not a dichotomy but

²¹ See Sandra Fredman, 'Human Rights Transformed: Positive Duties and Positive Rights' (2006) *Public Law* 498.

²² Developed by Professor Amartya Sen and others over three decades.

²³ 'Fairness and Freedom: The Final Report of the Equalities Review', 2007. See pp125-132 on the capabilities approach.

²⁴ Polly Vizard and Tania Burchardt, *Developing a Capability List: final recommendations of the Equalities Review Steering Group on Measurement, paper 2*, p11.

²⁵ Note 23.

²⁶ *Preamble*, UDHR.

²⁷ *Ghaidan v Mendoza* (2004), para 132.

²⁸ Note 2.

interwoven. Individuals have a moral responsibility to secure just rights for themselves and others.²⁹

When the drafters of the UDHR met nearly 60 years ago this is just the vision they had in mind when they proclaimed “everyone has duties to the community in which alone the free and full development of personality is possible”.³⁰

This communitarian approach to human rights is reflected throughout the HRA, which explicitly allows for rights to be limited in a proportionate way, to protect the rights of others and the common good.³¹ It is embedded in the South African Bill of Rights and all the other post-war human rights charters throughout aimed at building just and harmonious societies. Human rights are, in essence, an ethical framework for a diverse world drawn from the common insights of secular and religious belief systems on how human beings can successfully live with each other. In Mary Robinson’s³² terms, they are “an elevating force on the events of our world”.³³

The Commission for Equality and Human Rights has a big vision with limited resources. It will need address to areas of conflict between individuals and groups as well as enforce legislation and promote social change. Human rights provide an established framework within to approach these goals, based on the values of equality, dignity and solidarity that inspired Nelson Mandela some 60 years ago.

²⁹ ‘From the Mountaintop: The Changing Political Vision of Martin Luther King, Jr.’, Stewart Burns, *The History Teacher*, Vol. 27, No. 1. (1993), p12. See also *From Civil Rights to Human Rights, Martin Luther King Jr and the struggle for economic justice*, Thomas E Jackson, Penn, 2007.

³⁰ UDHR, Article 29.1.

³¹ For example, Article 10, on freedom of expression, states that the right carries with it duties and responsibilities and may be limited as is necessary in a democratic society, including for the protection of the reputation or rights of others, the prevention of disorder or crime, the protection of health or morals and in the interests of national security.

³² Former UN High Commissioner for Human Rights.

³³ Note 1, p59.