

HUMAN RIGHTS: CAUSE OF OR CURE FOR THE 'MORAL CRISIS' IN LIBERAL DEMOCRACIES?

"Our youth today love luxury. They have bad manners, contempt for authority, disrespect for older people.

Children nowadays are tyrants, they contradict their parents, gobble their food and tyrannise their teachers. "

Socrates, 5 BC.

Every generation has their own 'moral crisis,' or course. Or at least that is the common perception of an older generation too weighed down by the responsibilities of adulthood to remember the 'moral crisis' they themselves were apparently responsible for generating in their own misspent youth (or well spent depending how you look at it).

It would be impossible to forget the waves of moral panic created by my generation. Some of this was played out in this very institution, here at the LSE.

The legendary days of student activism largely occurred before my time, I hasten to add. But when I arrived in the mid- 1970s we were aware that we had a reputation to live up to - or should I say down to.

The crèche which I believe still functions to this day was a direct result of the week-long sit-in the student union organised in the then Director, Ralph Dahrendorf's, newly painted office.

When it was over I remember being given a dressing down that was curiously like the one Socrates issued nearly 2000 years earlier.

But today there is perhaps a slight difference. It is not just youth who are in the frame. The finger is still frequently pointed at my generation -hardly young - and the one which came immediately after it -the 'my generation' and the 'me generation' if you like- for institutionalising a preoccupation with selfishness and license that apparently threatens to turn us into a nation of self-seeking, individualists.

Politicians, religious leaders, and political commentators across the spectrum, regularly express concern that the sense of community and responsibility which once sustained the life of this nation is on the wane if it hasn't disappeared altogether. This is a concern which has surfaced on and off in many western liberal democracies since the 1980s but has been a particularly well worn theme here. And it is a concern which, in different forms, finds expression on the left and right as well as by the 'new Labour' government.

On the left it is consumerism, accumulation of individual wealth and the decline in trade unionism and other expressions of collective endeavour that is cited as reflections of the modern malaise of individualism. On the right it is crime, truancy, and the waning of deference and patriotism which are quoted as evidence of irresponsible selfishness.

From new Labour's 'third way' perspective it was the libertarianism of the 1960's and 70's combined with the license of the 1980s and 1990s which brought us to the point where we lost sight of our responsibilities to the wider community and the common good.

But if we are to go beyond finger wagging at successive generations, who - or what- is to blame for this apparent demise? What has led us to this supposed moral wasteland?

How about the end of the ban on witchcraft in 1951?

This was one of the main culprits according to Lord Ashbourne. You may not have heard of him but this was the view he expressed in a House of Lords debate on morality initiated by the Archbishop of Canterbury, Lord Carey, in July 1996.

For the Archbishop himself it was moral relativism - the absence of common values, and religious ones in particular - that was the problem. He warned against "a widespread tendency to view what is good and right as a matter of private taste and individual opinion only."¹

But for others there was one overwhelming candidate for blame. Human rights. According to Lord Jakobovits, the late Chief Rabbi,

"...could it be that the greatest moral failure of our time is the stress on our rights, on what we can claim from others – human rights, women's rights, workers' rights, gay rights and so on – and not on our duties, on what we owe to others?"²

This was quite an indictment, when you think about it. Rights are not just equated with individualism and selfishness. They are not just a bad thing unless coupled with duties. They actually represent "the greatest moral failure of our times."

But this was not an eccentric view by an isolated religious leader in the twilight of his life. I have a whole file of comparable quotes at home in which 'rights' are presented as the Sodom and Gomorrah of the modern world by a wide array of personalities from the present and the past.

The Reverend Lord Habgood, for example, argued in a lecture at Westminster Abbey in 1998 that:

"the indiscriminate use of the concept of rights can undermine morality at its very core by focusing attention on what the world owes us, rather than on the network of mutual obligations and shared assumptions which compose the fabric of a healthy society."³

Perhaps, in part, because there has been no real tradition of positive rights in this country (as opposed to common law liberties) the term 'right' has become associated with license and excessive individualism in the minds of many religious and political leaders, academics and social commentators.

The esteemed moral philosopher, Baroness Warnock, for example, has argued that to defend a right:

¹ *House of Lords*, col 1692, 17.7.96.

² *ibid*, para 1717.

³ Lord Habgood, *The Sydney Bailey Memorial Lecture*, April 1998.

"is to demand something for oneself, or the group to which one belongs. On the other hand private or personal morality is based, not on such self interested demands, but on the possibility of self-denial or altruism...Even to feel indignation when the rights of others are infringed, rather than our own...may be divorced from any feeling that we want to be good *ourselves*. It is easy to inveigh against countries with a 'bad human rights record,' which do not impinge on us. We can adopt such a stance while neglecting more domestic wrongs.⁴"

For reasons such as these Warnock concludes that "there cannot be a morality *founded* on the concept of rights.⁵"

The identification of rights with selfishness and permissiveness took off during the years of the Thatcher government but in the present era, this equation is most associated with commentators and politicians who advocate the particular form of communitarianism associated with 'third way' politics.

Of influence on both sides of the Atlantic (although probably less so now than a few years ago) has been American Sociology professor, Amitai Etzioni who launched a quarterly magazine called *The Responsive Community* which was notably subtitled 'rights *and* responsibilities' with the emphasis on *and*.

Closer to home, the political philosopher David Selbourne, one of the Home Secretary's favourite academics, has coined the phrase 'dutile rights.' He has warned that,

"...the ethics and politics of dutiless rights, demand-satisfaction and self-realisation through unimpeded freedom of action have been a costly moral failure in the corrupted liberal orders⁶."

Sunday Times columnist Melanie Phillips put it rather more simply when she argued:

"In our culture of rights what we desire is elevated to an entitlement regardless of the consequences for others.⁷"

It is no defence, according to Phillips, to claim that rights infer responsibilities as from her point of view the former tend to obliterate them. If, she argues, rights were to form the basis of a new moral order as human rights activists propose:

"This would mean replacing the network of duties on which western civilisation is based by the apotheosis of individual self-gratification in the mistaken belief that rights and duties are mirrors of each other's virtues.⁸" Not so, says she.

This concern - that our preoccupation with rights has tended to obliterate our understanding of duties - is not confined to theorists and commentators but has influenced practitioners and policy makers as well. The former Chief Executive of the Qualifications & Curriculum Authority, Dr Nicholas Tate, spoke for many rights sceptics when he said at a major conference in 1999:

⁴ Mary Warnock, *An Intelligent Person's Guide to Ethics*, Duckworth, 1998, pp73-4.

⁵ Ibid, p71.

⁶ David Selbourne, *The Principle of Duty*, Sinclair Stevenson, 1994, p277.

⁷ Melanie Phillips, "Why I am really a progressive," *New Statesman*, 14 February 2000.

⁸ *The Observer*, 7.7.96.

"Rights are important...rights often need to be strengthened; but we have heard so much about them in recent years that we have sometimes come to forget that at the other side of the coin are duties. We have somehow developed a public image of human life which is all about self-creation, self-satisfaction, the pursuit of pleasure, doing one's own thing – the 'me society'...We need to redress the balance."⁹

I know it will shock you to learn that the New Labour government has tended to position itself on neither one side nor the other in this debate. Confusingly perhaps, it has tended to portray itself as both a major advocate and a significant detractor of the idea of fundamental rights.

This, after all, is the government which -after two hundred years of debate - has brought us our first modern bill of rights through the Human Rights Act or HRA- an extraordinary and admirable voluntary dispersal of power by any standards. (Although we have not heard one word of this achievement in the election campaign so far).

- This is the government which gave enforceable human rights a central role in the devolution legislation and Good Friday Agreement.
- This is a government which has talked frequently- and I have no reason to doubt, sincerely - of wanting to build a culture of rights and responsibilities in the UK and made a stab at developing an 'ethical dimension' to foreign policy .
- [I'll move swiftly on at this point, I think].
- But this is also a government which has been keen to distance itself from what is perceived as the prevailing culture of so-called dutiless rights. (Which is, of course, why the government is being so trappist about the HRA in the campaign).

The formula to express this balancing act was conjured up by no other than Peter Mandelson who wrote:

" Whereas the left appeared to argue for rights without responsibilities and that one was responsible for oneself alone, New Labour stresses the importance of mutual obligations."¹⁰

Or in the words of the Prime Minister:

" At the heart of everything New Labour stands for is the theme of rights and responsibilities. For every right we enjoy, we owe responsibilities... You can take but you can give too. That basic value informs new Labour policy."¹¹

Behind this approach is the unmistakable message that rights are at heart about selfish individualism - about what you can demand for yourself or your group in Baroness Warnock's terms- with responsibilities acting as the civilising force necessary to tame the rights beast. In the words of Tony Blair "rights and opportunity without responsibility are engines of selfishness and greed."¹²

Given that this is the Prime Minister's own position, it was not entirely surprising that an exaggerated version of it found its way into cries of horror which greeted the arrival of the

⁹ *Speech*, IPPR citizenship and education conference, 16.6.99.

¹⁰ Peter Mandelson and Roger Liddle, *The Blair Revolution: can new labour deliver?* Faber & Faber, 1996, p17.

¹¹ *Speech*, Cape Town, South Africa, 14.10.96.

¹² *Ibid.* p4.

Human Rights Act last October 2nd. Most of the media and many commentators did not just confine their objections to well worn claims that the courts would be swamped or the judges politicised.

The shrillest screams were about the naked individualism - quite literally with regard to the tabloids' sex in school showers scare story- which it was predicted would flow from the consequence of incorporating a revered human rights treaty (the European Convention on Human Rights or ECHR) into our law.

Why, uniquely, the introduction of a bill of rights based on international human rights principles should mean the end of civilisation in the UK when there has been no such moral collapse in virtually every other democracy which has long gone down this road, was never explained?

In the run up to October 2nd the almost unshakeable assumption -from friends and foes of the HRA alike - was that the value of individual liberty was about to trump the common interest in virtually every human rights case that reached the courts. Individualism had apparently been legally entrenched by a government that prides itself on its communitarian values.

A few so-called 'black-letter' English lawyers contributed to this assumption. Unused to the purposive, value-laden approach of human rights law they took the plain words of the ECHR at face value and read all sorts of fanciful scenarios into phrases like 'the right to privacy' or 'to liberty.' But then, as Jeremy Bentham once notably said, "lawyers are the only persons in whom ignorance of the law is not punished."

The extent to which this libertarian vision -for better or for worse - has not materialised as case after case before the domestic courts has been used to reinforce the message that a balance between the individual and the wider society lies at the heart of the ECHR, has left many subeditors speechless -in every sense of the word.

Given the equation between rights and selfishness - promoted by a spectrum of thought which runs from the most esteemed academics to the roughest end of the tabloid trade - there is obviously some explaining to do here.

This requires -first of all - the withering away of the iron curtain which somehow separates our understanding of human rights when they are something foreigners lack from our understanding of human rights when they are in question nearer to home. As Martin Luther King said: "Injustice everywhere is a threat to justice everywhere."

To understand the idea of human rights we have to go on a journey:

- we have to travel back in time to an era of revolutions and conflict, religious persecution and autocratic monarchical rule;
- we have to become aware of the social and political factors which -as much as technical, legal principles - shaped the way the way rights were conceived in a given era.
- and we have to follow the evolution of rights through what can be described as three distinct 'waves' characterised by different, but overlapping, sets of values;

Now students of international human rights are usually taught about two (and sometimes 3) generations of rights:

- negative civil and political liberties

- positive social and economic rights
- and collective environmental rights.

Although this classification serves a useful purpose, I personally don't think that on its own it is very helpful as a means of depicting the evolution of the idea of rights over time or explaining its peaks and troughs, for 3 main reasons.

First, to my mind, the idea of generations of rights creates too rigid a distinction between rights. It has often been pointed out that a number of first generation so-called '*negative* civil liberties' do not simply require governments to leave people alone. Some, like the right to life or to a fair trial, inevitably require the state to take *positive* steps to uphold rights and spend money in the process in the form of a police force and criminal justice system -for e.g.- blurring the distinction with so-called second generation positive rights¹³.

Second, this characterisation implies a straight sequential order between civil and political and social and economic rights which is somewhat misleading:

The civil and political liberties which gained recognition two hundred years ago at the time of the American War of Independence and French Revolution were *in fact* further developed, and in some senses transformed, by the international human rights treaties drafted after the second world war. And this was the same time that so-called second generation social and economic rights were first given international recognition.

Conversely, Tom Paine, the great British radical and major proponent of the 'natural rights' tradition in the late eighteenth century, developed a complex scheme for securing individuals' social and economic rights which would shame the manifesto of any modern, mainstream, British political party.¹⁴

[I was thinking of getting a leaflet printed: WANTED TOM PAINE (OR THE LATTER DAY EQUIVALENT) TO RESTORE SOME BIG IDEAS TO MODERN BRITISH POLOITICAL LIFE].

Third, the classification of rights according to their external characteristics leaves largely unexplained the question *how* or *why* rights have *evolved*. It is as if they came down from on high as tablets of stone; a questionable successor to the ten commandments. The people and events that shaped them do not even hover as ghosts in the background.

The idea of rights did not - of course -emerge fully clothed out of the minds of the great philosophers to be handed over to judges and legal theorists for interpretation. Their evolution has been shaped by people who chose to act together to claim rights in different circumstances and with varying goals in mind.

For this reason I prefer the term 'wave' to 'generation'- 3 waves rather than 3 generations of rights.

¹³ See Rabinder Singh, *Human Rights in the United Kingdom*, Hart 1997, pp51-58 for a discussion on "the myth of negative rights."

¹⁴ Tom Paine, "Ways and Means," *Rights of Man*, [1791] Penguin, 1984 .

The word 'wave' seems to better capture the dynamism involved in change. Implicit in the term, is a recognition that there have been distinct periods when the idea of rights has come to prominence and others where its influence has waned.

The analogy with the sea also suggests that the distinctions between the different waves are not rigid but that ideas flow between them. Judicial interpretations of a first wave bill of rights like America's, for example, have been influenced to some degree by the jurisprudence (or case law) of a second wave human rights treaty like the European Convention on Human Rights which was in turn inspired by first wave charters.

The first wave of rights burst on the scene in the period known as 'the Enlightenment.' Ideas like the 'natural rights of man' gave intellectual coherence to a generalised discontent with despotic rulers and church leaders. Together with the suppression of religious and intellectual freedom in parts of Europe and the New World, these factors helped to fuel the French and American uprisings at the end of the eighteenth century.

Although the philosophical basis of the movement for 'inalienable rights' has roots which go back much further, it was only in this period that the idea became sufficiently popular to bring about widespread change. Citing 'god' or 'nature' as the source of man's fundamental rights which no living mortal could justifiably take away, governments which did not base their rule on respecting such rights were held to forfeit their legitimacy.

While liberty, autonomy and justice were not the only values driving these revolutions they were certainly the predominant ones.

It is true that American jurisprudence has introduced interpretative techniques which take it a long way from the simple words of the 1791 bill of rights. Sometimes it is the value of liberty which is woefully lacking in fact. (It is salutary to recall that in the last 25 years 683 people have been executed, in the USA).

But as one leading American academic recently said to me. "We get our rights from the constitution. All our obligations come from elsewhere." The idea that the two can be combined in one rights document offends the predominant value given to individual freedom in first wave rights thinking.

The Second wave of rights developed in a very different context. It was, of course, a direct response to the horrors of the second world war, and subsequently the Gulag. This was the era when the international human rights movement as we now know it was born.

Whilst the UN's 1948 Universal Declaration of Human Rights (or UDHR) - and the plethora of human rights declarations and treaties it gave birth to - still sought to protect individual freedoms and liberty this was in a new context.

It was not only states that were implicated in the persecution and genocide which had disfigured the world. The inhumanity that individuals had shown to their fellow human beings, under orders or otherwise, conveyed to the drafters of the UDHR that a neutral concept like 'freedom' was an insufficient basis on which to build the peaceful and tolerant world they sought to achieve.

In essence the transition from the first to second wave of rights is represented by a shift from a preoccupation with the rights and liberties of individual citizens within particular nation states to a preoccupation with creating a better world for everyone.

The right to bear arms or the predominance given to free speech over all other rights for which the American Bill of Rights is famed, is nowhere replicated in second wave rights charters. There is no better illustration of the difference in approach between the two waves than to contrast the first amendment of the American Bill of Rights with Article 10 of the ECHR which explicitly recognises that the exercise of free expression "carries with it duties and responsibilities."

In the words of Mary Robinson, the esteemed UN High Commissioner for Human Rights (at least for another year) the UDHR was "an elevating force on the events of our world."¹⁵

Since this time, the drafters of international human rights treaties have sought to establish a framework of ethical values driven not just by the ideals of liberty and autonomy but also by such concepts as dignity, equality and community.

It is by looking at these values in turn that we can illuminate the evolution from first to second wave rights.

To take dignity first, I must confess I am actually quite nervous to use this word now. Until a few weeks ago I thought it was an uncontroversial term. But when I used it with the eminent Justice Laws and Baroness Warnock (on the Clive Anderson radio show, *Unreliable Evidence*) they both seemed - how can I put it - not entirely happy with the concept - or in other words they jumped down my throat, challenging whether the term had any validity at all in a rights context.

There is an old Yiddish saying that if you want people to think you are wise agree with them. Well at the risk of appearing an idiot I am going to argue that the concept of human dignity provides the foundation for second wave rights.

The UDHR is peppered with the term. It appears to denote a recognition that human beings have more complex needs than to be free from restraint. To quote from the Declaration, all human beings, endowed with "reason" and "conscience," have a "personality" whose "free and full development" are essential elements of human dignity

This emphasis on the concept of dignity had two, very different, consequences.

First, it replaced the idea of 'god' or 'nature' as the foundation of 'inalienable rights.' This completed the transition from 'natural rights' to 'human rights;' a term which did not come into common usage until this time. An attempt to tie human rights to 'nature' in the preamble of the UDHR and bring 'god' into the text was specifically rejected.

Rights were to be accorded to all human beings without distinction because of the essential dignity of all humanity.

This allowed delegates with different religious and philosophical convictions to find common ground. Defying the assumption that human rights charters are entirely driven by liberal, secular thought, the drafters of the UDHR drew from the ethical principles of *all* the major religions as

¹⁵ Mary Robinson, "The UDHR: the International Keystone of Human Dignity," in *Reflections on the UDHR, a 50th anniversary anthology*, Kluwer, 1998, p59.

well as a range of eastern and western philosophies. The idea of dignity is a consistent theme in most of these belief systems.

But the concept of inherent dignity had a **second crucial implication for the development of human rights thinking**. If the dignity of human beings is to be respected then it follows that the state has to do more than refrain from interfering or oppressing. It has to take POSITIVE STEPS to ensure that the basic requisites of human dignity are provided for.

The idea of respect for human dignity illuminates the obvious point that the freedom to choose your own path in life is pretty hollow if in reality you have few choices.

What does it mean to have a right to life, for example, unless you have the wherewithal to live in economic terms. *This is* the route into so-called second generation social and economic rights which are fused with civil and political in the UDHR

[It is also the route to the growing case law under second wave human rights charters that rights have to be practical and effective and not just formal -to use the old Marxist phrase - which can mean that the state has 'positive obligations' to interfere when the rights of individuals are breached by other private parties or corporations in certain circumstances.]

[What a long distance we have travelled from the first wave idea that rights charters are there to get the government off your back, not to interfere between private relationships.]

Turning to what I see as the second major value distinguishing second from first wave rights, **equality**, an obvious objection is that this was a major facet of the first wave as well - wasn't the French revolutionaries rallying cry " liberty, equality and fraternity?"

But when the drafters of the American and French charters spoke of everyone having equal rights, they did not mean it - at least not in the way we understand it now:

- By equality they meant equality before the law (i.e. that no-one is above the law, in the famous formula of the 19th British constitutional lawyer, AV Dicey). Or in the memorable saying of Anatole France "The law in its majesty equally forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

- By minorities the proponents of first wave rights usually meant numerical minorities (often religious dissenters but also property owners and even slave traders).

- Women were initially largely excluded.

- Of course to obtain equal human rights you have to be counted as human in the first place. In the America of the Enlightenment slaves were shockingly counted as three fifths of a man.

Yet freedom from discrimination -and racial discrimination in particular - is the unspoken first amendment guarantee of the UDHR. It has the same pre-eminence as free speech in the American Bill of Rights, by implication if not by law.

This is not really surprising. The Nazi holocaust against the Jews and other minorities influenced every aspect of the deliberations of the drafters of the 1948 Universal Declaration of Human Rights, leading to a new emphasis on the value of equality. This was no longer to mean only formal equality but but a requirement that states outlaw racial hatred and discrimination of all kinds.

Once people are told they cannot be free to choose who to let their house to or who to hire and fire if their choice is based on racial or sexual discrimination, for example, then freedom takes on a new and more complex meaning. In other words the meaning attached to the idea of equality in human rights instruments has transformed over the last 200 years.

[Lawyers amongst you may be interested to note that this dynamic, forward looking approach is reflected in another major principle of interpretation of the European Court of Human Rights that judgements should take account of 'present day conditions.' [This is virtually a mirror image of the classical English common law approach. Instead of a doctrine of precedent the Strasbourg court operates a doctrine of evolutionary law in which the most recent case law is usually the most persuasive].

But perhaps the most striking feature of second wave rights from the point of view of this lecture, is the incorporation of concepts like **community and responsibilities**.

One obvious lesson drawn from the descent into barbarism that had contaminated virtually the whole of Europe in the war, was that creating mechanisms to prevent states from abusing the rights of their citizens was plainly not enough to guarantee liberty. Individuals themselves needed to be inculcated with a sense of moral purpose if there was 'never again' to be a holocaust like the one unleashed by the Nazis.

[Although it is generally states who are the bearers of responsibilities under international law, the 1946 Nuremberg Tribunal, established to try war criminals, developed a doctrine of individual responsibility].

The view that the UDHR should include the responsibilities as well as the rights of the individual was widespread amongst the drafters from the outset. French representative, Rene Cassin, one of the Declaration's prime authors, was keen -in his words- not to present the UDHR as " a mere offshoot of the eighteenth century tree of rights."¹⁶

" All human beings ---should act towards one another in a spirit of brotherhood" commands Article 1.

Article 29 (first clause) states simply that:

" Everyone had duties to the community in which alone the free and full development of his personality is possible."

The wording of this Article expresses two intertwined ideas. First that individuals have responsibilities as well as rights. But second -and often missed -that individuals do not exist in the world as isolated beings but live in societies, or more specifically communities, to which they must act responsibly if they are to develop their true humanity. This is a more complex ethical vision than the observation by generations of philosophers that rights by their nature infer responsibilities.

UN Special Rapporteur on discrimination and minorities, Erica-Irene Daes, has maintained that this word 'community,' was also chosen to emphasise that individuals have duties, **not to the state whose legitimacy** (in human rights thinking) depends on it **upholding** the rights in the UDHR, but to the group in which they live. She wrote:

¹⁶ Johannes Morsink, *The UDHR, origins, drafting & intent*, University of Pennsylvania Press, p245.

“this provision is of a moral nature in the sense that it lays down a general rule for individual behaviour in the community to which the individual belongs.”¹⁷

Of course this is a moral exhortation in another sense; it is not legally binding. The Universal Declaration is as it sounds - a declaration.

But the second clause in the same Article 29, which sets out general grounds for limiting individual rights -like protecting the rights and freedoms of others and public order - is found in some form in most of the binding treaties which flow from the Declaration, including the ECHR (which is now part of our law through the HRA).

Such limitation clauses simultaneously set limits on how far governments can go in restricting rights whilst establishing the acceptable boundaries of individuals' rights.

This in turn provides a guide as to where the exercise of rights might hurt others, for example by inciting racial hatred through freedom of speech. In this sense the obligations of individuals to others and to the broader society in which they live are indirectly, but clearly, established.¹⁸

These **communitarian themes** -there is no better word for them -partly reflected the political, philosophical and religious backgrounds of the drafters of the UDHR which included Islam, Socialism, Communism and Confucianism¹⁹.

But they mainly stemmed from the same precipitating factor which influenced so much of the contents of the UDHR. In other words the emphasis on the social nature of human beings and their responsibilities to others and the wider community flowed from the task the delegates set themselves.

This was not just to set the people free but to find common values in which the liberties of individuals would be respected without weakening the bonds so necessary for human development. It was a different understanding of the concept of freedom. And it is a million miles from the caricature of rights as legalised selfishness beloved of so many commentators in the UK today.

Now we can begin to understand the thrust of judicial rulings under the HRA and *one* crucial reason why so few of the wilder prophesies of rampant individualism have come to pass (and I emphasise ONE; there are other, perhaps less noble reasons, but that is for another time).

In the recent landmark case of *Brown*: (which determined that our road traffic laws [or more precisely Scotland's] did not breach the right to be presumed innocent under the ECHR) Lord Steyn imported this second-wave, communitarian vision into his judicial reasoning. He said:

"The fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights. The direct lineage of this ancient idea is clear: the European Convention (1950) is the descendant of the Universal

¹⁷ Erica-Irene A. Daes, *Freedom of the Individual under Law, a study on the individual's duties to the community and the limitations on human rights and fundamental freedoms under Article 29 of the Universal Declaration of Human Rights*, United Nations, 1990, p17.

¹⁸ See *Taking Duties Seriously: individual duties in international human rights law, a commentary*, International Council on Human Rights Policy, 1999 p14.

¹⁹ See Morsink op cit p97 &343 and Thomas Hammarberg op cit.

Declaration of Human Rights (1948) which in article 29 expressly recognised the duties of everyone to the community and the limitation on rights in order to secure and protect respect for the rights of others."

Jack Straw was to this extent quite right when he commented about his new Act "Rights are the headings you find if you glance through the ECHR. But rights and responsibilities are what it is really about."²⁰

That said, not all rights in the ECHR are qualified or limited (for example, freedom of conscience, freedom from torture and from slavery can fairly be described as absolute rights) and - as will be well known to many of you here - limitations on rights cannot just be imposed at the whim of the state but must be "prescribed by law" and "necessary in a democratic society."

Translated into ordinary language, this **doctrine of proportionality** - now imported into our law through the HRA - means that restrictions that are necessary for the common good should nevertheless not be used if there is an approach which is less severe but is likely to have similar consequences.

We saw this in action in another recent landmark case under the HRA, that of *Offen*, (concerning the 2 strikes and your out legislation) where it was held that it would be disproportionate to pass a life sentence on someone who because of their individual circumstances was not deemed a real risk to the public, even if they had committed a second serious offence.

Now - I would argue - it is possible to make out the contours of **a third wave** in the evolution of rights (not to be confused with the 'third way' I hasten to add, but with some obvious overlaps): -You will not find this development identified in any international law book.

- I am not even sure that it can yet be said to have properly taken hold.

-But in retrospect the post-cold war era will probably be seen as marking a new wave in human rights thinking which is worthy of description.

Whilst there is still the same recognition of the values of dignity, equality and community as in the second wave (and liberty, autonomy and justice as in the first) there is now a growing emphasis on **participation or mutuality**.

[And by mutuality I mean something a little less self-serving than the definition I heard the other week, which was :- "if you don't go to his funeral he won't go to yours."]

In legal terms the **net of liability** is spreading ever wider under international human rights law. Corporations, charities and even private individuals in some circumstances are increasingly held responsible for upholding the rights of others (even if, under international law, this is indirectly through their governments).

More definitively than at the dawn of the second wave, it is now established that states are not the only, or always the main, abusers of power.

As significantly, there is a new emphasis on seeking to uphold fundamental human rights through trade agreements, education and persuasion as well as through litigation.

²⁰ Address to Civil Service College, 9.12.99.

Aided by new technology like the world-wide web, a cross-cultural dialogue on human rights is developing which involves a far wider set of participants than the jurists and standard-setters who dominated the second wave.

In essence this fledgling third wave does not so much involve a change in the characterisation of rights as an evolution in the place of rights within society.

So we find that the mutuality that New Labour argues defines their thinking in contrast to a rights approach, has in fact been at the heart of human rights thinking all along, at least in its modern form.

But then this myopia is not confined to government ministers. Most of us have completely missed the communitarian influence on post-war human rights charters, which -unlike a famous Prime Minister - certainly do recognise there is such a thing as a society.

Partly because we are such late-comers to incorporating international human rights principles into our law, there has been a broad failure in this country to recognise a second wave of rights, let alone a 3rd. As the author Lillian Helman once said, "People change and forget to tell each other. Too bad -causes so many mistakes." Well it is a bit like that with human rights.

But in seeking to promote the evolution in rights thinking we also have to be cautious not to muddle the message. The coupling of rights and responsibilities can sound as if rights are a reward for responsible behaviour.

In human rights terms, as we have seen, you only lose those rights that are necessary to protect the rights of others and the broader community. And, if rights are limited for those reasons, this must happen in a proportionate way to meet a legitimate aim in a democratic society.

So people who are a risk to others may need to lose their liberty for a while - maybe even for a very long while in some cases - but:

- prisoners still retain the right to privacy and free speech within prison,
- and - in my view -the right to vote
- ex-cons the right to be presumed innocent of any further crimes until proven guilty
- and even heinous murderers the right not to be subjected to torture, to a fair trial and to retain their life.

The concept of dignity – the most prevailing human rights value of all – requires this. For if any human being, or group of human beings, is deemed to fall so low as to not be deserving of any significant rights at all, this challenges our claim to a common humanity.

There is, moreover, a requirement in human rights terms for individuals to act responsibly in quite a different sense.

The preamble to the ICCPR, a UN treaty which is a direct descendant of the UDHR and which our Government is legally bound to uphold, proclaims that part of an individual's duty to the community entails promoting fundamental human rights.

This, in turn, must mean challenging popular culture where it denies human rights values, from which ever source it comes.

- It means encouraging others to see that even paedophiles need to live somewhere when they are released from jail.
- It means confronting the view that asylum seekers who make claims which fall outside the narrow grounds for refugee status are necessarily 'bogus,' rather than just unsuccessful.
- And it means having the courage to challenge the abuses of our own government - when appropriate - every bit as much as challenging the abuses of other governments.

And there is evidence that by presenting the human rights vision honestly and fairly hearts and minds can be changed. Opinion polls suggest that only one in four support capital punishment in the UK now compared to 70% in the mid-1990s. Just as well, considering that one of the best kept secrets of the last parliament was that the Human Rights Act - through incorporating protocol 6 of the ECHR - has made the abolition of capital punishment all but impossible.

To sum up: If, as I have argued, the human rights project is accepted as one which has evolved from a search for individual freedom to a quest for common, ethical values which involve us all, then the main criticism of rights as encouraging individualism and selfishness can be understood as way off the mark.

Those who blame rights for contributing to what they perceive to be society's disintegration, have missed the obvious point that they are potentially a force for moral cohesion .

Proclaiming the fundamental rights of men, women and (more recently) children is probably the only half-successful attempt there has ever been to establish a set of common values that are not intended to be exclusive to one religious group or nation, particularly important in a diverse country like the UK.

Of course the term 'rights' can be, and has been, co-opted to bolster any claim, from smoking on public transport to playing loud music unrestrained. But to exploit this phenomenon in order to make broad generalisations about the concept of rights is to miss the point entirely.

In fact the concept of inalienable rights is precisely aimed at distinguishing those rights which are essential for the furtherance of human dignity from those which are not.

-Far from the idea of fundamental human rights encouraging the moral relativism which religious leaders lament is the hallmark of modern times, it defines a common norm.

-Far from it promoting individualism, it establishes the limits of freedom and the obligations individuals, as well as states, owe to other individuals, as we have seen.

-Far from weakening the bonds of communities, it sets down a notion of the common good in a democratic society.

Think about it for a minute -whatever the specific terms of rights treaties - if people do not take individual responsibility for upholding the values underlying human rights standards then the entire enterprise is ultimately doomed to failure.

Most people have no wish or need to go to court to protect their rights in their every day lives. Not many individuals want recourse to privacy laws to prevent Hello magazine from publishing exclusive wedding photos they have promised to OK (or was it the other way round?). Even fewer write books about the security services and find themselves falling foul of the Official Secrets Act.

Of course it is an essential ingredient of the human rights vision that in such circumstances people know, and can claim, their legal rights. But most of us have to rely on other individuals to protect our fundamental rights.

- We need our neighbours to respect our right to a private life uninterrupted by unacceptable noise levels or intrusion.
- We require our parents or teachers or employers to let us speak our mind and give us the opportunity to do so.
- Despite legislation to outlaw race, sex or disability discrimination there can be little meaningful exercise of these rights if colleagues subtly degrade or undermine their fellow workers on such grounds.
- No state can constantly intervene to guarantee such personal interactions without destroying the foundations of a remotely free society and recreating the conditions that led to demands for fundamental human rights in the first place.

But I want to finish on a note of caution. As Spinoza warned over 300 years ago, " if you want the present to be different from the past, study the past."

While the idea of human rights is not an ideology as such -and it would be its death knell if it were ever to become one in my opinion - any set of values which is presented as self-evident is ultimately doomed to failure. The case for human rights will always need to be made and remade. In this sense at least , it is a struggle which can never be won.

If, with our new bill of rights, the idea of human rights is to prosper in the years ahead, then clearly its grip on the popular imagination will need stronger roots than international law understood by a tiny elite.

It will not be enough to say that awarding compensation to the families of IRA terrorists for unfair investigations into their deaths is correct simply because the European Court of Human Rights says so. If people are to see the value in such rulings then the basic philosophy underpinning human rights will need to be as widely understood and debated as democratic principles now are in the UK.

This is not in any way to underplay the significance of human rights law and enforcement mechanisms in establishing the position that human rights currently occupies in the world. If human rights values were not translatable into enforceable laws then they would probably be no more than pipe dreams.

But on its own this can never be enough to create or sustain an environment in which human rights values flourish. And insofar as the law and legal culture contribute to mystifying the basic principles which are the foundations of human rights, then their role can be counter productive.

It is not possible in a democracy to attempt to create a human rights culture without involving the people in its formation. It is simply not sustainable to pin so much on the idea of human rights, both domestically and internationally, without widespread participation in developing its meaning and scope.

In the final analysis, the idea of human rights stems from the lessons human beings have learned to make life liveable.

So how have we got it so wrong as to persuade virtually all punters that human rights law speaks only to defendants and prisoners and not to the victims of crime? What hope is there of making the case for universal human rights in this country if we cannot persuade people that being safe from physical harm is a fundamental aspect of the right to human dignity- explicitly recognised as such by the European Court of Human Rights - which states have a positive obligation to uphold?

If human rights defenders are to influence the century ahead with the aim of making it less bloody than the one that has just passed,
-if we are not to be deemed as irrelevant by the end of this century as Christian missionaries were perceived to be by the end of the last,
-we are going to have to engage more fully with the rest of the population in terms which relate to peoples' lives.²¹

It is not enough for human rights defenders, however sincere, to claim that human rights values are absolute for them to become so. These claims will forever be contested.

But there is every reason to be optimistic. This is, after all, a uniquely propitious time to be having such debates, not just in the UK but in the wider world.

After a century of failed utopias there is an openness to fresh ideas most of us have not seen in our lifetime. The tightly drawn ideological battles between east and west or capital and labour which drowned out most of the subtleties of the human rights project since its inception no longer dominate the world. Human rights arguments seem fresh and appealing in many quarters where once they sounded weak and stale.

There *is*, moreover, a way in which - in this fledgling 3rd way phase - the universality of human rights *is* gradually being realised. It is through the developing conversation which is taking place on a global scale and is growing in volume and scope.

Far from us witnessing the end of history as some would have it, we are seeing the birth of new debates and perspectives.

Through this global conversation the values and language of human rights are engaging more and more people who judge the merits or otherwise of state and private power increasingly in human rights terms.

This, I believe, is the legacy that the third wave of rights inherits, two hundred years after the first wave took the world by storm.

Francesca Klug, LSE, 17 May 14, 2001.

²¹ The social commentator, Polly Toynbee, has recently argued more or less the opposite view point when she wrote " Even if we don't like to admit it, we are all missionaries and believers that our own way is best when it comes to the things that really matter...Our culture is the culture of universal human rights and there is no compromise possible." "The West really is the best," *Observer*, 5.3.00.