Human rights: above politics or a creature of politics?

For the last forty years or more, this country has appeared to be in the grip of one kind of national panic or another. In the 1960s and 1970s it was a *moral* panic that took hold of 'middle England'. Self-styled hippies and lefties were charged by an older generation with threatening the fabric of society. In the 1980s it was threats to national security that appeared to strike fear in the heart of the nation, from IRA terrorists to the spectre of a Soviet nuclear attack. As the 1990s progressed we were back to a moral panic again. The view that contemporary society was characterised by 'too many rights and not enough responsibilities' was shared by politicians, priests and political commentators alike.

And then September 11 happened and the thousands of trees which were sacrificed to lament the 'me-too culture' of the previous decade obtained a reprieve. The nation's focus was once again on national securty. With the so-called 'war against terrorism' still raging – surely the first war in history with no discernible beginning and therefore potentially no end – this is where the nation's attention still rests.

This is not to suggest that every national crisis is a figment of people's collective imagination. There is plenty of evidence to support the Prime Minister, Tony Blair, in his assertion that Al Qaida and allied groups are motivated to kill as many civilians as they can for goals that cannot be met through "negotiable political demands" (Blair, 2004). (Although whether they have the *capacity* to do so is far less clear.) But the point is, in a world in which terrifying and tangible risks and dangers are mingled with perceived and exaggerated ones, it is understandable that many of us reach out for something (or someone) enduring to steady us.

From the earliest time, human beings have sought touchstones to protect them from the unpredictable. For many people, now and in the past, God or religious values provide an element of consistency and comfort in a world that is both forever changing and forever racked by fears. But for those of us who have never been certain that we can rely on the supernatural to guide us – and even for many of us who do not harbour such doubts – human rights provide an attractive refuge from the vicissitudes of our world.

It was this take on human rights that I sought to capture with the title of my book, *Values for a godless age*, that I wrote three years ago on the introduction of the 1998 Human Rights Act (HRA). I suppose that title will go down as one of the worst predictions of the future ever. Post September 11 the world feels anything but godless and those human rights values whose time had come – or so I argued at the time – are actually facing greater challenges than ever. The point of the title of my book was to suggest that there is a degree to which belief in human rights is coming to substitute for religious belief. The title was a kind of plea not to turn human rights into a talisman against uncertain times but to recognise the dynamism that has catapulted this idea from the margins to the mainstream. A momentum which, in my view, flows from the ultimately contingent nature of human rights as values 'for the people, by the people and of the people'.

When governments toss aside hard-won rights and freedoms, as the British government can fairly be accused of doing at the moment, it is very difficult to argue that such a seductive idea as the legal certainty of human rights standards should be passed over for a more contingent world view. For just as laws which allegedly protect national security or moral certainty provide a bulwark against disorder and chaos for many governments and their supporters, so human rights laws which are said to obtain their authority from outside the democratic political process can equally provide some reassurance in uncertain times.

This, I believe, is what the learned Judge Sir John Laws was driving at when he wrote that inalienable rights are:

> "... values which no democratic politician could honestly contest; values which, therefore, may be described as *apolitical* since they stand altogether *above* the rancorous but vital dissensions of party politicians." (Laws, 1995: 93; my emphasis)

It is also what I understand the former General Secretary of Amnesty International, Pierre Sane, to have meant when he said:

> "A true democracy has to be founded on a consensus about the duty of all to respect, protect and fulfil all fundamental rights and existential needs. *A consensus which places human rights above politics and above class divisions*." (Sane, 2000; my emphasis)

It is worth pausing to try to unpack what is being suggested here. Is what is being proposed that human rights *should* be above politics for instrumental purposes? In other words, that a functioning democracy is so reliant on there being laws which protect individual freedoms and promote political participation that human rights law, although a product of the democratic process itself and therefore ultimately subject to change, should receive some degree of special protection? Should human rights be constitutionally protected so that politicians cannot bend fundamental rights to respond to the popular will? Or is what is being suggested that human rights values are so fundamental and enduring that by their *nature* they cannot be, nor should be, subject to democratic or popular engagement?

The first proposition has long been the subject of dispute. The issue of whether we should go the American way, and have a Supreme Court that could overturn legislation which breaches fundamental rights, drove the debate on whether the UK should have its own bill of rights on and off for twenty years.

The model adopted in the Human Rights Act (HRA) does not allow the courts to overturn Acts of Parliament but to 'declare' that legislation is breached instead. It is then for Parliament (or more realistically the government) to determine how to proceed. (For a full explanation of this model, see Wadham et al, 2003.) The rationale for this approach – very crudely put – was to try to *reconcile* the need for mechanisms to stop the government of the day from overturning fundamental rights without judicial scrutiny, with the democratic principle that political decisions should ultimately rest in the hands of elected politicians rather than unelected judges. It was a deliberate attempt to maintain political engagement with fundamental rights whilst preventing ministerial meddling with those rights at will.

The contrary argument is that human rights can only be protected if human rights law is "above the reach of statute and state" (Lester, 2001: 694). Translated into policy, this argument holds that the courts must be constitutionally empowered to strike down laws which breach fundamental rights.

The American experience, however – from the post-war McCarthy era to the *Patriot Act*[1] and allied anti-terrorist legislation of the current day – does not bear out the hypothesis that making the courts the ultimate arbiter of human rights or civil liberties law *necessarily* makes either inviolable. There are a number of reasons why the American Supreme Court, with all its powers, has failed to act to protect fundamental rights and freedoms when they are most at risk – whether now or four decades ago. One factor that is difficult to dismiss is that judges themselves are influenced by the perceived or real crises of their era.[2]

Lord Scarman famously called for a bill of rights in 1974 to protect the law from the "will of Parliament" when fear "is stalking the land" (Scarman, 1974). Current developments appear to bear out his point. What this perspective overlooks, however, is that it may be precisely when judges are most required to fend off the excesses of the executive that they may *themselves* be most susceptible to arguments that national security or public order trump other concerns. But whatever the merits or otherwise of this argument about the constitution, this is distinguishable from the common proposition that the *nature* of fundamental rights is such that they themselves are essentially "above politics" (see Laws, 1995). This is a claim often made, quite casually, by human rights lawyers and advocates.

The search for a special justification for rights which takes them outside the realm of ordinary dispute and disagreement can be traced back to the birth of the modern rights movement in the late 17th century and the 'natural law' theories of Thomas Hobbes and John Locke. Locke (1689) claimed to have "proved" that "man" was "born … with a title to perfect freedom". The exercise of power by rulers was legitimate only as long as citizens' 'natural rights' to property and liberty etc were respected. Tom Paine, the eighteenth-century British radical, who set Locke's ideas alight in his best-selling pamphlet *Rights of man* (Paine, [1791] 1984) went on to influence the American revolution with these ideas, having been present at the French.

The direct lineage between Locke's writings, Paine's popularisation of them and the preamble to the American Declaration of Independence is as self-evident as the rights that are proclaimed:

> "We hold these truths to be *self-evident*, that all men are created equal, that they are endowed by their *Creato*r with certain *inalienable* Rights; to secure [these] rights, governments are instituted among men, deriving their just powers from the consent of the governed...." (Preamble, American Declaration of Independence; my emphasis)

Supporters of 'natural rights' maintained that the rights which fuelled upheavals across two continents were not primarily political aspirations seeking legal expression, but a product of 'nature', if not 'god'. This insistence inspired the utilitarian philosopher Jeremy Bentham to famously remark that natural rights were "simple nonsense" and "natural and imprescriptible rights" were "nonsense upon stilts" (quoted in Bowring, 1843: 501). Rights not created by specific laws or by governments were illusory, according to Bentham. To say that 'men' had an unbounded right to liberty was rubbish, he maintained, and to say they had a right to both property and equality was self-contradictory.

The debate between 'foundationalists' and 'non-foundationalists' over whether or not there are '*essential*' features that justify human rights and take them outside political discourse into the realms of the supernatural, resurfaced as recently as 1948 during the drafting process of the Universal Declaration of Human Rights (UDHR) (see Freeman, 1994). An attempt was made by some of the drafters to tie human rights to 'nature' in the preamble of the UDHR and bring 'god' into the text. In the end this was specifically rejected. No longer was a higher being or pre-

existing state of nature cited as the source of fundamental rights as in the American Declaration of Independence. According to the UDHR, rights accrue to all human beings, without distinction, because of their essential *dignity*.

However, the search to find an objective 'foundation' for human rights continues. Constructionists like John Rawls and Ronald Dworkin are taken to task by communitarians like Michael Sandel or Alasdair MacIntyre over their quest to construct an *objective justification* of human rights from basic principles (see Nino, 1991). Denuded of *celestial* support for the 'special' place for human rights, it has become necessary for 'foundationalists' or their successors, to rely on so-called 'objective principles' of justice or dignity[3]. The classification of rights as 'objective', and 'external' to political engagements leaves largely unexplained the important question of *how* or *why* rights have taken the pre-eminent place they have as a motor for change at particular points in history, or a means of expressing individual and collective *aspirations* as well as legal entitlements.

The evolution of what constitutes fundamental rights over time – from the right to bare arms to the right of transsexuals to have their birth certificates altered – and the influence of different beliefs and cultures on the way they have evolved, is almost entirely lost by an attempt to cast them outside the realm of politics. I want to try to offer an alternative narrative to one which places rights outside the political realm. One which traces the now commonplace acceptance of some aspirations as so important that they can be classified as rights, and given legal protection, to the grubby world of political conflict and struggle.

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. Although the changing conception of rights over time is commonly described in terms of 'three generations of rights', in my view the dynamism involved in the evolution of rights is more aptly captured by the phrase 'three waves of rights'[4]. Implicit in the term 'wave' is the recognition that there have been distinct periods when the idea of rights has come to prominence, and others where its influence has waned. 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 ideas helped to fuel the French and American uprisings at the end of the 18th century and eventually inspired widespread democratic reform across Western Europe.

Although the philosophical basis of the movement for 'inalienable rights' has roots which go back much further, it was only in the Enlightenment that the idea became sufficiently popular to bring about widespread change. While liberty, autonomy and justice were not the only values driving the first wave of rights, they were certainly the predominant ones. Phrases from this time – like "the natural, inalienable and sacred rights of man"[5] and "men are born and remain free and equal in rights" (drawn from the 1789 French Declaration of the Rights of Man and Citizen) – have echoed down the generations.

Every bill of rights and international or regional human rights treaty that has been drafted in the ensuing years owes something to these original texts. The basic idea that all human beings without distinction are endowed from the moment of their birth with inalienable rights and are entitled to justice and equality before the law remains the founding principle of what we now call human rights. Such ideas have been evoked to challenge authority for 200 years. Principles like 'liberty' and 'equality,' for example, were widely appealed to during the 19th-century anti-

slavery struggles in Europe and America. Particularly in the United States, these values went on to fuel a 'rights consciousness' which in turn helped to shape the civil rights and women's movements of the last century[6]. It is very hard indeed to see them as 'above politics' in any sense.

The 'second wave of rights' developed in a very different context but hardly one that could be described as apolitical either. It was 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 UDHR 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. Both waves were aimed at protecting individuals from tyranny but the vision of how to achieve that goal had shifted. In the earlier era the main target was to set people free; in the later period it was to create a sense of moral purpose for all humankind.

The drafters of the plethora of international human rights treaties which the UDHR has spawned[7], have sought to establish a framework of ethical values driven not just by the Enlightenment ideals of liberty, autonomy and justice but also by the three defining values of modern human rights treaties: dignity, equality and community. The entry of these new values into human rights discourse in turn reflected the preoccupations not only of the drafters of the UDHR, but of the changed world they were seeking to improve. The UDHR is peppered with the term dignity. It appears to denote a recognition that human beings have more complex needs than to be free from restraint, which was uppermost in the minds of the 'first wavers'. To quote from the Universal Declaration, all human beings, endowed with "reason" and "conscience", have a "personality" whose "free and full development" are essential elements of human dignity.

In a sense the adoption of the term *dignity* can be understood as the UN delegates' 'answer' to the 'natural rights' debate. The concept of dignity 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. The drafters of the UDHR drew from the ethical principles of *all* the major religions as well as from socialist, liberal and other secular thinking. The concept of inherent dignity illuminated the obvious point that the freedom to choose your own path in life is pretty hollow if in reality you have few choices.

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 ensure that the basic requisites of human dignity are provided for. *This* was the route into so-called second-generation economic, social and cultural rights which are fused with civil and political in the UDHR[8]. It is also the route to the interpretation of the European Court of Human Rights that states have 'positive obligations' to protect individuals from the abuse of rights by others, widening the protection of fundamental rights instruments to encompass the prevention and investigation of crime, and indeed terrorism[9].

Turning to what I have identified 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 in the way we understand it now. By equality they meant equality before the law (that is, that no one is *above* the law, not that states should outlaw discrimination).

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 original American constitution, slaves were shockingly enumerated in the constitution as three fifths of a man. 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 surprising. The Nazi holocaust against the Jews, gypsies, homosexuals, disabled people and other minorities influenced every aspect of the deliberations of the drafters of the UDHR, leading to a new emphasis on the value of equality. This was no longer to mean only formal equality but a requirement that states take actions to route out racial hatred and discrimination of all kinds, including between private individuals.

This approach was to change the way human rights defenders viewed the principle of liberty. 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. But perhaps the most striking feature of second-wave rights 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 Second World War, was that the same individuals who require protection from tyranny can also contribute to it.

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.

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" (Morsink, 1999: 245).

> "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 [sic] 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. UN Special Rapporteur on discrimination and minorities, Erica-Irene Daes, maintains that the 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 (Daes, 1990).

These communitarian themes – despite the overturns, there is probably no better word to describe them – partly reflected the political, philosophical and religious backgrounds of the drafters of the UDHR, which included Islam and Confucianism. But they mainly stemmed from the same precipitating factors that 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 as they surveyed the devastation that beset the world at the end of the Second World War. 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.

The main difficulty with the second wave of rights, however, was the developing context of the Cold War in which it took route. The rights that had been developed by state delegates, standard setters and jurists postwar became frozen in a battle between two world views, for which neither was human rights a central concern. Both used and abused the idea to a wider end. The capitalist West declared the Soviet East, its satellites and proxy states to be major human rights abusers – using 'rights' and 'freedom' as interchangeable terms. The Soviet East accused the West of ignoring the centrality of economic, social and cultural rights without which, they argued, formal rights to liberty and free speech were of little consequence.

When the Berlin Wall tumbled down in 1989, this stand-off ended. Human rights discourse was liberated from this stifling polarity. Coinciding as it did with the combination of factors we now describe as globalisation, human rights could be said from this time to have entered a third wave in the evolution of rights discourse.

Whilst there was 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 was – and is – a growing emphasis on participation or mutuality.

Increasingly, through the use of new technology and as a consequence of the powerful effect of viewing atrocities as they happen from the living-room chair, more and more people worldwide have started relating to the great debates about fundamental rights. This product of globalisation has begun to wrest control from the well-intentioned international standard setters and jurists who have monopolised the endeavour to define what constitutes human rights since the Second World War.

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[10]. 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 (see Klug, 2000, chapter 5).

In essence, the third wave does not so much involve a change in the characterisation of rights as an evolution in the place of rights within society. The enrichment of human rights thinking through the engagement of civil society has never been more marked. The quest to separate

human rights from political currents and political discourse had never seemed more futile. We are all potential rights upholders and rights abusers now and we all have the opportunity to engage in the debate about the nature of fundamental rights.

The central terrain of rights struggles has increasingly moved from the North to the South. Some of the most innovative rights thinking in modern times reflects this change as human rights activists, lawyers and thinkers from South Africa, Zimbabwe, East Timor, Burma, Palestine and India dominate many of the current debates on the nature and defining values of human rights.

But just as this third wave of rights – with its emphasis on mutuality and participation – has taken hold, we are faced with the daunting question of how to maintain its momentum within the new international context which has operated since 11 September 2001. One of the significant characteristics of the third wave was the growing recognition by states and inter-state bodies that international human rights standards and values could act as a benchmark in global affairs (see Clapham, 1999).

Set free from the polarities of the Cold War, it had began to be common for international or inter-state bodies like the UN or EU to use human rights indicators to evaluate and challenge (if not always successfully) the actions of the powerful in the North and West as well as in the South and East[11].

But since the President of the US declared war on terror (not on a state but on a noun), human rights standards are once again at the mercy of the whim – not so much of the great powers – but of the one great power and its cohorts. Western, liberal regimes that quite persuasively cite gross human rights violations as grounds for justifying wars and military interventions, proceed to ignore, or unilaterally reinterpret, international human rights treaties when they allegedly obstruct the successful execution of such wars[12].

It is ironic to note that some of the key factors that spurred on the first wave of rights in the 17th and 18th centuries are apparent again in these first years of the new millennium (see, for example, Ignatieff, 2004). Specifically:

(i) Western governments routinely cite security threats as grounds for suspending rights that had been fought for and won in the Enlightenment period, such as open trials or 'the presumption of innocence'.

(ii) The rule of law has effectively been suspended altogether with regard to the 'new enemy' (currently known as 'illegal combatants') in a manner reminiscent of the pre-Geneva Conventions era.

(iii) The fusion of religious and political ideologies in the East and the West has led to a revival of concepts like 'evil' and 'collective sin' to justify extra-judicial killings of members of a suspect group.

In the midst of these confusing and sometimes frightening times we are now living in, when we feel there is so little we can control, it is tempting to once again reach for an external force to steady us. It is inviting to search for a modern incarnation of the 'natural rights' theories developed in an earlier time of massive instability and powerlessness.

Measures like the Human Rights Act which seek to place human rights outside the *immediate* reach of populist politicians and headline-chasing ministers can provide some protection against abuse of executive power. The proposed new Commission for Equality and Human Rights, provides an opportunity for extra-judicial strategies for enhancing awareness of, and compliance with, human rights values and standards (DTI, 2004). But if such statutes and strategies seek to place human rights outside the reach of political discourse altogether – on the basis that they are a species apart – there is a risk of them ossifying into a code of technical laws, devised by external forces whose origins are no longer clear.

As I have tried to illustrate in this lecture, the idea of human rights derived from people struggling to address abuses of power. The evolution in rights thinking which has taken place over the last two centuries is itself powerful evidence that it is possible to hold on to the fundamental principles behind this idea, whilst allowing it to grow and develop with changing circumstances. Those who maintain that human rights can only survive insulated from politics, need to take account of their 'political origins'. They need to weigh in the balance the proposition that any institutionalised measures to protect human rights must not stifle the dynamism that has kept this enduring idea alive through three waves of rights.

Endnotes

[1] Full title: *Uniting and Strengthening America by providing Appropriate Tools Required to Intercept and Obstruct Terrorism, USA Patriot Act, 2001*.
[2] This thesis is examined by Epp (1998).
[3] Most famously by Rawls (1972).
[4] I develop this argument further in Klug (2000).
[5] The precise terms used depend on the translation. Tom Paine, for example, writing in 1791, used 'imprescriptible' rather than sacred.
[6] See, for example, Epp (1998: 32). Interestingly, there has never been a Socialist movement in America on the scale of Europe.
[7] For example, the International Covenants on Civil and Political and Economic, Social and Cultural Rights (1976) and the UN Convention on the Rights of the Child (1989).
[8] For example, Article 23.3 states:" Everyone who works has the right to just and favourable remuneration ensuring for himself and his family *an existence worth of human dignity*…." (my emphasis).
[9] For a full discussion of the European Court's doctrine of 'positive obligations' on states in relation to crime, see Klug (2004).
[10] There is, for example, a growing awareness of the human rights abuses of care or domicilliary workers to elderly and disabled people in relation to whom the standards in the Human Rights Act apply. See Audit Commission (2003).
[11] See, for example, *Human rights: Quarterly review of the Office Of the United Nationals High Commission for Human Rights*, 1999–2000.
[12] Most notably, of course, in the context of the wars in Iraq and Afghanistan. See Hersh. (2004).

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