

Promoting and Protecting Human Rights in the UK

Francesca Klug, LSE

Delivered at the University of Westminster Law School on International Human Rights Day, 10 December 2009

To avoid duplication between all the speakers I thought in the 30 mins allotted to me, before discussing human rights in UK today I would take you on a bit of time travel.

61st birthdays are not necessarily very auspicious events. 2009 marks the 61st Anniversary of North Korea's Communist Government, the Philippine air force and the Montgomery Cultural Agricultural Fair.

It also happens to be the 61st birthday of the Universal Declaration of Human Rights (or UDHR).

After all the many celebrations and commemorations of the UDHR's 60th throughout the world last year, the University of Westminster International Law and Theory Centre and Student Law Society are to be congratulated on keeping the flame going and not forgetting this year's anniversary.

This is all the more important as we survey the state of human rights here and around the globe.

Just in the last month we learnt about the plight of up to 300,000 child slave water carriers in Haiti, about the prospect that sex between HIV positive men might become a capital offence in Uganda, and about increasing evidence of the collusion of Western security services, including our own, in the torture of terrorist suspects post 9/11. It often feels as if we are *losing* wisdom with age.

It was "barbarous acts which *outraged* the conscience of mankind," - as the preamble to the UDHR puts it - that drove NGOs like the NAACP¹, the Federal Council of Churches and the American-Jewish Committee to lobby for a Charter of universal rights and ethical standards for all humankind, at the end of WWII.

They were determined that the sacrifice of a generation - and the near genocide of a people - would not be in vain. An international bill of rights would become as iconic of what it means to be human, as the US bill of rights was symbolic of what it meant to be American.

It is easy to forget that until the UDHR was adopted, virtually *any* criticism - let alone interference - by one government with the treatment of the citizens of another, was considered a breach of the principle of national sovereignty.

Human rights abuses were perfectly lawful if they complied with a country's domestic law. However *morally* repugnant, Nazi Germany's racial purity policies were all in accordance with the law.

¹ National Association for the Advancement of Coloured People

The essential message of the UDHR is often assumed or taken for granted, with little interrogation of its precise terms.

Critics and supporters alike generally presume it is fundamentally a creature of the 18th century western Enlightenment, repackaged for the mid 20th century, with pretensions – substantiated or otherwise - to universality.

Yet this is to miss the *distinguishing features* of the Declaration, reflecting the circumstances and era in which it was drawn up and the diverse philosophies and backgrounds of the drafters who represented most parts of the world (with the notable and disturbing exception of still-colonised sub-Saharan Africa).

Notwithstanding the triumph of the defeat of fascism in WWII, the Western democratic model had taken a battering by the events of the 1930s and 40s which had taken root on European soil.

So-called Enlightenment values of liberty and justice had been reviled and betrayed by Hitler's Germany and Stalin's Russia alike – apparently two ends of a political spectrum, uniting in their disdain of individual rights and freedoms.

But it was the *specific* nature of the persecution and suffering which gave birth to the UDHR that demonstrated, if any demonstration were needed, that tyranny cannot be conquered by restraints on governments alone.

This is especially the case when majorities collude with governments to turn on minorities, as the Nazi Holocaust which preceded the drafting of the Declaration had so amply demonstrated, with its industrial methods of extermination to which so many private businesses and public officials had contributed. Across Europe Jews, Gypsies, homosexuals, disabled people, trade unionists and political opponents had been dehumanised and massacred in their millions, with the active collaboration, or passive acquiescence, of thousands of their fellow citizens.

The 1948 UDHR is generally understood as a restatement of the fundamental rights which are necessary to protect individuals against such tyranny; deservedly so. It is beyond argument that many of the basic assumptions, of the 'natural rights movement' which had heralded the French and American revolutions in the late 18th century were reproduced in the UDHR, most notably this statement in the Declaration's preamble that:

"it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

But the vision that drove the UDHR *differed* in certain key respects from that which led to the earlier national bills of rights.

One of the Prime authors of the Declaration, the French lawyer and resistance activist Renee Cassin, was keen to establish that the UDHR was *more* than an "offshoot of the eighteenth century tree of rights"² as he put it.

² Johannes Morsink, *The UDHR, origins, drafting and intent*, University of Pennsylvania Press, 1999, p245.

In essence, the drafters of the UDHR concluded that freedom from unnecessary restraint was not a sufficient ideal on which to stake the future of humanity. Freedom had to be capable of being realised, not just formally granted.

There are three distinctive features of the UDHR which bears this out. First, the preamble was not just addressed to states, or to the citizens of particular countries, as in the French and American bills of rights. "All human beings ...should act towards one another in a spirit of brotherhood" Article 1 thunders.

For the first time this was a document aimed at *all* "the peoples" of the world, not just to protect them from abuse of power by the state, but to encourage them to take responsibility for justice and peace *themselves*.

The second departure from a classical enlightenment frame was the emphasis on the *social* nature of human beings and the responsibilities they owe to each other and the wider community, on whose flourishing – the UDHR drafters concluded – individual rights depend.

The Declaration implicitly, if not explicitly, addressed critics as diverse as Edmund Burke, Karl Marx and Jeremy Bentham who had dismissed the idea of 'inalienable rights', not just as "nonsense upon stilts",³ but as fostering a society of isolated individuals, pursuing their selfish wants and needs.

You could be forgiven for thinking you've stumbled on a debate between Jack Straw, David Cameron, the Archbishop of Canterbury and Shami Chakrabarti if you immersed yourself too deeply, as I have, in the range of passionately held views on the interrelationship between rights and responsibilities expressed six decades ago at the UN Human Rights Commission which drafted the Declaration.

The drafters disdained the idea that they were creating a new philosophy. Yet a fusion of liberal and socialist principles, with deeply held tenants from the Abrahamic faiths (Christianity, Judaism and Islam) combined with Confucian philosophy, produced an alchemy best summed up by the Chinese delegate P. C. Chang as "not [a project] to ensure the selfish gains of the individual ,but to try and increase man's *moral stature*".⁴

Before some of our political leaders get too excited, it is important to understand that the drafters explicitly ruled out producing a catalogue of individual duties or constructing a framework in which individuals forfeited all their rights if they failed to act responsibility.

Instead they affirmed, in article 29,⁵ the interrelatedness of human beings, and the consequential duties individuals owe to the *community* – a term carefully chosen

³ Jeremy Waldon (ed) *Nonsense Upon Stilts- Bentham, Burke and Marx on the Rights of Man* (Menthuen, 1987).

⁴ Ninety-fifth meeting of the Third Committee of the UN General Assembly, 6 October 1948, e/800 p87.

⁵ Article 29 (1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the

instead of state – without which none of us could hope to flourish or develop our full personality.

This was the context in which proportionate *limitations* on individual rights were given legitimacy (also in article 29) to “respect the rights of others and ...the general welfare in a democratic society.” Translated, this means human rights are there to protect us from threats to our safety by other individuals, or private sources of power, as well as by governments and states.

This affirmation of the *social* aspect of human beings was part of a deeper exploration of what it is to be human; the third and, to my mind, most interesting distinguishing feature of the UDHR.

In contrast to their Enlightenment forbearers, the drafters refrained from declaring the *source* of human rights, whether in god or nature.⁶

But drawing on traditions of faith, as much as eastern and western secular philosophies, they developed a *framework* in Article 1 from which the justification of all the subsequent rights was deemed to flow.

This framework is usually described as affirming the essential dignity of every human being; both as a fundamental *value* in itself and as *right* to respectful and dignified treatment.

There was no reference to ‘human dignity’ in the ‘Enlightenment’ bills of rights, whilst it is expressed five times in the Declaration.

This impacted on the Declaration in three ways:

- A) It provided a justification for the path breaking catalogue of social, economic and cultural rights in the UDHR, to further “an existence worthy of human dignity” as the text said.⁷
An individual who is free to starve is not free at all, and is certainly not dignified.⁸
- B) The reference to dignity fleshed out what is meant by equality. Dignity tells us that equal treatment does not take us very far if we are all treated equally badly. The UDHR contains the first modern anti-discrimination clause but equality was to mean *more* than non-discrimination and *less* than equality of outcome. To experience a life of dignity is to have your individual needs appreciated and differences catered for. This is the root to the various Conventions that have flowed from the UDHR on race, gender, children and most recently disability, all of which address the dignity of difference.
- C) The importance attached to dignity provided fuel to the proposition, reflected in the UDHR and all subsequent human rights treaties, that no individual should

rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

⁶ See M.Glen Johnson and Janusz Simonides, *The Universal Declaration of Human Rights, a history of its creation and implementation, 1948-1998*, UNESCO, 1998, pp42-48.

⁷ Article 23(3)

⁸ Articles 22

fall so far that they are denied *all* human rights, but only those rights that are necessary to protect others and the common good.

It is this approach that gets human rights into hot water – of course – with people who believe that those who commit crimes or anti-social behaviour are undeserving of any human rights.

But the more I study the debates on the UDHR, the more I conclude that the concept of dignity is *not* a sufficient way to understand the *justification* for the human rights it proclaims.⁹

The references to dignity in the Declaration are linked to another important insight.

Human beings, the first Article declares, are endowed with “reason and conscience” which is both *why* - and *how* - we should all treat each other well.

Our essential nature as human beings is rooted in two elements, it is proposed. Our ability to think and reason in the classical Enlightenment mould, but also our capacity to care, to feel empathy – ‘to suffer with,’ in the Ancient Greek conceptualisation of the term.

This insight into the human condition, I would suggest, underlines the whole enterprise of the Declaration. If we were only capable of rational thought but couldn’t feel empathy for others the project to create a fairer and more just world would have been doomed from the outset – or should I say even more doomed than it has proven to be.

Over the decades since the UDHR was adopted, there have been many testimonies to the capacity of it to inspire and inform.

Nelson Mandela has written movingly about the impact of the its adoption in South Africa, where Apartheid was formally introduced in the very same year:
"for all the opponents of this pernicious regime, the simple and noble words of the Universal Declaration were a sudden ray of hope at one of our darkest moments ...this document....served as a shining beacon and an inspiration to many millions of South Africans."¹⁰

But if the UDHR ghosts of drafters past were to return to earth this Christmas to judge the effectiveness of their work by the quality of the current debate on human rights in the UK, they would probably wish to haunt us for the rest of their days.

In summary this debate appears to boil down to three propositions:

- 1) That human rights encourage selfishness and what we need are more responsibilities, not rights.
- 2) That bad people get too many rights and should forfeit them.
- 3) That British liberties are in our DNA, whereas human rights are either something foreigners lack or something that has been imposed on us from abroad.

⁹ Francesca Klug, *Values for a Godless Age, the story of the United Kingdom's new Bill of Rights*, Penguin, (2000).

¹⁰ See Francesca Klug, *Values for a Godless Age: the story of the United Kingdom's new Bill of Rights*, Penguin, (2000), p.110.

It is hard not to conclude that some political leaders are now playing with human rights like a kitten with a ball of wool.

Whilst the idea that human beings are deserving of fundamental rights simply because of their common humanity should be as open to criticism and challenge as any other idea, myths and misinformation are scattered about like confetti, as Michael Wills has described.

It has become fashionable to contrast something called traditional British liberties with more modern universal human rights as if they have no link.

The roots of the UDHR, as I have argued, are many, but there is little doubt that what is sometimes described as the British tradition of liberty, is one of them.

Eleanor Roosevelt - the formidable wife of the US President (it was she who said, a woman is like a teabag - you only know how strong she is when she gets in hot water) drove the UDHR drafting process, proclaiming it as "the international Magna Carta of all men everywhere."¹¹

The term Bill of Rights was of course coined on these shores in the 1689 Bill - whose prohibition against torture is reflected in the UDHR - although its target was quite unique – being largely a bill of rights for MPs!

As ground breaking and enduring as these early documents and the rights within them were, the Magna Carta also disparaged women and Jews and the 1689 Bill of Rights discriminated against Catholics.

There is no right to free expression, association, privacy or family life and no anti-discrimination protection in these older charters; nor, given the era in which they were drafted, would you expect there to be.

As the Conservative author and journalist, Peter Osborne, explores in his recent pamphlet *The Conservative Case for the HRA*, it was Winston Churchill who, after the war, called for a new charter of rights for the whole of Europe.

What is even less appreciated is that the European Convention on Human Rights and Fundamental Freedoms (to give the treaty its *full* title), also owes its genesis to the Universal Declaration which was as it sounds, a non-enforceable *Declaration*. This link is acknowledged in the ECHR's preamble. The civil and political rights the European Convention protects are largely drawn from the UDHR, refined and adapted by British lawyers to move beyond aspirations to enforceable standards.

This ancestry is evident from the philosophy of rights reflected in the ECHR which has been encapsulated by the European Court of Human Rights as a search for a fair

¹¹ Eleanor Roosevelt, Address to the United Nations General Assembly on the Adoption of the Universal Declaration of Human Rights, December 1948, published by the Department of State in "Human Rights and Genocide: Selected Statements; United Nations Resolution Declaration and Conventions," 1949.

balance between the demands of the general interests of the community and the protection of the individual's fundamental rights.

The ECHR was, of course, only incorporated into our law by the UK's 1998 Human Rights Act.

Although the purpose of the HRA was described by the Government at the time as "bringing rights home", to allow domestic courts to rule on ECHR rights and spare individuals the long and expensive trip to Strasbourg, in reality it was drafted to be much more than an incorporated human rights treaty.

Like now, there was a lively, if elite, discussion about the introduction of a bill of rights in the 1980s and '90s, largely because of disenchantment with the capacity of politics and politicians to protect individual rights during 18 years of Conservative rule.

This followed a previous period of disillusionment with the democratic process under successive *Labour* governments when the phrase the 'elective dictatorship' was coined by the former Tory Lord Chancellor, Lord Hailsham. If all this sounds familiar, it is because it is.

In the absence of a written constitution, a bill of rights was seen as a means of ensuring greater accountability by governments between elections and an opportunity to introduce stronger checks and balances into the UK's constitutional framework.

I was part of the lobby for a bill of rights in the late 1980s for those reasons.

I was also part of a group that was concerned that bills of rights can close down healthy political debate by effectively removing the power to legislate from elected politicians who can be lobbied, to unelected judges who can't.

It was in this context that the Labour Party committed to incorporating the ECHR into UK law. Labour, which was then still in Opposition, knew there was no consensus on what rights should be in a bill of rights.

As the state was already bound by the rights in the ECHR, these were chosen as the basis for – what Labour policy papers described at the time – a first stage bill of rights for the UK.

When the then Home Secretary, Jack Straw, introduced the HRA in 1998 he described it as "the first written bill of rights this country has seen for three centuries."

Mindful that there was no mandate to overturn Britain's constitutional tradition of parliamentary sovereignty, the HRA was drafted to explicitly *prevent* courts from striking down statutes. Highlighting the contrast with classical bills of rights – the government used to call this the British model.

As is well known, the higher courts can only declare Acts of Parliament to be incompatible with the rights in the HRA. Parliament, or more realistically Government, is free to ignore such Declarations, although to date it has responded positively to each of the eighteen Declarations of Incompatibility that have been made (and not overturned on appeal).

But the approach adopted, which I was involved in developing at Kings College law school, was not just aimed at allowing parliament to have the final say for traditional constitutional reasons. The model, sometimes described as a dialogue model in the academic literature - in which all the organs of the state have a role in protecting rights - was aimed at addressing the concerns that I shared that a bill of rights would close down political debate on fundamental rights and liberties.

You could say that the model has been rather *too* successful in encouraging debate – if that is the right word for it – on the HRA.

If you would believe the tabloids, only terrorists suspects, asylum seekers and Gypsies and Travellers have benefited from the HRA. Even a cursory analysis of the case law suggests otherwise with landmark rulings giving same-sex partners "nearest relative" status, changing cell-sharing policies following a racist murder in prison, ensuring lifting policies consider the dignity of disabled people as well as the health and safety of care workers, naming deceased fathers on birth certificates, requiring independent investigations of deaths in custody, and enhancing the freedom of assembly for protestors.

This is in addition to cases in which the HRA has protected British soldiers serving in Iraq, banned evidence procured by torture from being admitted in our courts, held that "control orders" and indefinite detention breach fundamental rights, reduced the destitution of asylum seekers and enhanced due process safeguards for mental health detainees.

The impact of the HRA has not just been felt in the courts. Last year I sat as the lead commissioner on the EHRC human rights inquiry panel where we heard and received evidence from more than 500 individuals and groups that human rights can impact on public services and change lives: Here is a flavour of some of this testimony of the impact of the HRA outside the court room:

- The National Policing Improvement Agency said :*"if human rights are done right... They are a key part of effectiveness in policing."*
- Stephen Otter, Head of Race and Diversity at the Association of Chief Police Officers claimed that : *"human rights are part of [our] professional bit of kit."*
- Dr Lepping, Consultant Psychiatrist, North Wales NHS Trust: SAID *"the HRA ... MADE sure that we are now as institutions actively thinking about what we do to people much more than we did before and that is really, really positive."*

And I'll never forget the Merseyside NHS patient, now advocate, who told us that a human rights approach to service delivery: *"has meant I've stayed out of hospital...this has helped me in my recovery...this has given me a life"*.

Nevertheless some commentators fairly say that the HRA has not prevented incursions into liberties in the wake of 9/11. On this they are self-evidently correct.

But to some extent this is based on a fundamental misunderstanding.

Bills of rights cannot stop governments from passing laws that breach human rights - if they did, critics would rightly say this is an affront to democracy. This is in the nature of bills of rights with post-legislative judicial review.

Yet the HRA has compared favourably with its American equivalent. Think of Guantanamo Bay, the Patriot Act, the Homeland Security Act, the Detainee Treatment Act and the removal of habeas corpus from so-called unlawful enemy combatants.

The erosion of rights and freedoms in the US and UK since the terrorist attacks on 11 September 2001, demonstrates that if the political will exists to pass draconian legislation, a bill of rights alone cannot stop it.

As we have heard from Michael Wills, at the next general election there are again likely to be calls for a new bill of rights.

Those of us with the long view know these commitments don't always materialise. Margaret Thatcher's 1979 manifesto promised all-party discussions on a bill of rights. The next time we heard anything more was 30 years later – i.e. now – though 'all-party' would not be my description of the current polarisation.

Labour's White Paper on rights and responsibilities, published earlier this year, proposes a bill of rights and responsibilities which builds on the HRA to include some of the social and economic rights recognised by the UDHR but not included in the HRA, albeit one which has no guarantee of new legally enforceable entitlements.

The Conservatives argue that the HRA needs to be repealed before they would introduce a bill of rights and they have ruled out the addition of social and economic rights (their list of additional rights proposed is not long - jury trial and administrative justice are the rights they most consistently cite).

They have not produced published proposals but from speeches and blogs it is possible to sketch out their plans.

A British bill of rights and responsibilities would:

- i) 're-balance' and 're-calibrate' power from the courts to parliament (or more honestly the government), probably by weakening the interpretative clauses in the HRA. This is a perfectly proper goal but reducing the power of the courts is usually given as the reason to *oppose* bills of rights not to *propose* one.
- ii) de-incorporate the ECHR from our law, by altering the requirement on our courts to "take into account" Strasbourg jurisprudence (a fairly weak requirement at that)
- iii) perhaps tie remedies to 'responsible behaviour' through "interpretation clauses to provide for the better balancing of rights where the assertion of a right undermines the rights of others" to quote Shadow Justice Minister, Dominic Grieve, in a speech he gave last week.¹²

¹² *Speech*, Middle Temple Hall, 30 November 2009.

It is of course always possible to conjure a more effective and strongly enforced Bill of Rights than the HRA.

But no bill of rights in the democratic world has been introduced on the back of repealing one already on the statute book, let alone de-incorporating a human rights treaty from domestic law.

Conclusion

All over the world since 9/11 governments have maintained that times have changed, the ideas of 1948 may have run their course, security needs require local solutions to local problems.

But the conversation we are having here in the UK about introducing a domestic bill of rights - on the back of denigrating and distorting universal human rights - is unprecedented in the modern era and from my inbox is making human rights defenders and institutions jittery all over the world.

At an earlier UDHR birthday celebration, President Obama, when he was plain Senator Obama, remarked:

“The declaration .. wove together a remarkable variety of political, religious and cultural perspectives and traditions. The US and the UK championed civil liberties. The French...helped devise the structure of the declaration. India added the prohibition on discrimination. China stressed the importance of family”

He concluded “today should be a day of celebration, a day when we hail the universality of these core principles, which are both beacons to guide us and the foundations for building a more just and stable world.”¹³

These are words that are worth reflecting on as we enter 2010 and discuss the next stage in our country’s journey on promoting and protecting human rights in the UK, and beyond.

Thank you.

¹³ Statement by Senator Barack Obama on International Human Rights Day, 10 December 2007.