

Law Society and IHRC 9th Annual Human Rights

Conference, 22 October 2011

Closing Address

By

Carol Coulter

Legal Editor, Irish Times

First, I would like to ask what do we mean by human rights.

In his seminal collection of Hamlyn Lectures, Conor Gearty writes:

“‘Human rights’ is the phrase that comes to mind when we when we want to capture in words a particular view of the world that we share with others ... That view is one rooted in the simple insight that each one of us counts, that we are each equally worthy of esteem

“Human rights is, in this sense, a visibility project, forcing us to see the people around us, particularly those whom we would otherwise not see at all. At its core, therefore, human rights is concerned with the outsider, the marginalised and the powerless, those who are pushed beyond the community’s field of vision. These need human rights protection the most.”

What, then, do human rights boil down to?

In my view, they are twofold: The defensive right each individual has to be protected from what should not be done to them (torture, discrimination etc), which is now largely uncontroversial; and the positive right to strive for the realisation of the best of our capacities, to

flourish as human beings, and do so as members of families and communities. The “rights” that flow from this are generally described as cultural, social and economic rights and are more contested, but in fact are intimately linked to the first type of rights and flow from the concept of human rights articulated above.

These concepts underlie the international instruments that are at the centre of the discussion today.

The almost universal acceptance, in one form or another, of these documents, however, reveals their limitations. They are necessarily worded in vague terms to permit their formal acceptance by a wide range of societies and cultures, including many who do not practise what we regard as respect for human rights. Indeed, it is hard to suppress a smile when you read the names of some of the states who recommended that Ireland should improve its human rights protections.

We must acknowledge that this has fed a scepticism in some quarters about human rights and especially their embodiment in international instruments, exemplified by the political and journalistic discourse that we “don’t take lectures from Iranians/Saudis/Bulgarians (or whatever) about human rights.”

We must counter that scepticism, but we cannot do so by retreating into the repetition of abstractions. Instead, we must be able to demonstrate with concrete examples how international instruments have a bearing on the ability of Irish citizens to defend their rights.

Of course human rights has long been part of our domestic constitution and laws and indeed, from a legal perspective, had a national expression in various charters and constitutions long before any international one. It was the widespread and legalised denial of human rights to swathes of the population of Europe in the Second World War that gave rise to the attempt to universalise what had previously been seen as entitlements of the citizens of privileged nation states, going back to the Magna Carta. The sceptics, particularly those who counterpose national constitutions to international treaties, cannot easily repudiate the origins of international human rights instruments.

Nonetheless we are faced with a conundrum – if we are seeking to protect and advance the rights of the marginalised and the voiceless, can we rely on legal instruments, both national and international, designed by lawyers and diplomats rather than those people themselves, to do so?

Further, how can we counter the understandable cynicism generated by politicians who trumpet their commitment to human rights on the international stage, while denying their rights to people at home, be they immigrants, asylum seekers, those suspected of terrorist crimes, travellers, children, the poor or any others who lack access to the political levers of power?

How can we bridge the gap between vague and aspirational documents and the real felt needs of those whose rights are being daily violated?

We need to look at history to see how human rights are fought for and realised.

If we reflect on how human rights were advanced in Ireland (not to mention other countries) in recent decades two parallel tracks emerge – mass movements of people demanding rights, and innovative use of the law and the courts.

We see the former across the Middle East at the moment, and earlier it was exemplified in this country by the civil rights movement in the North - though for reasons we cannot go into now this was overtaken by the military conflict which involved very serious human rights violations. Another example is the women's movement, which produced large-scale social, cultural and legislative change.

The parallel, and not unconnected, track was the legal one, where brave individuals and campaigning lawyers, like Josie Airey, David Norris, Mary Robinson, and, more recently, Lydia Foy and Michael Farrell, fought for their rights in the courts, both national and international.

They, however, were not isolated individuals, but expressions of wider and deeper social movements for equal rights. They represented ideas whose time had come, which gave them force and power when brought to the floor of the court-room. The strategic use of litigation must remain a crucial weapon in the arsenal of those fighting for human rights.

The incorporation of human rights instruments into domestic law, and the enactment of statutes committing the state to human rights protection, are key enablers for such a strategy.

But we should be wary of complacency about the incorporation of human rights values into documents, either national or international. The post-

apartheid constitution of South Africa has been understandably lauded as one of the most human rights-friendly in the world. Yet it has not prevented South Africa from being a state with one of the highest rates of violence against women and children, with widespread corruption and a widening gap between rich and poor – denials of human rights on an industrial scale.

Gearty has provocatively described the inscription of human rights in legal instruments as a “Faustian bargain”, with “a price being paid for so speedy a movement from the radical fringe to the established (legal) mainstream.”

Where this produces laws focused on particular problems (housing, health, education) its emancipatory power can be maintained through law, he says.

But he warns that general and abstract human rights are more problematic, giving rise to a “crisis of legalism”. Large-scale human rights instruments may look like tremendous successes but they narrow the radical power of human rights and set the law in false opposition to the political.

“At a time when progressives have lost confidence in their ability to persuade voters to embrace social and political reform, the short-cut via judicially enforceable social and economic rights are obvious and very difficult for many to resist,” he wrote.

The price can be the abandonment of radical political activity to bring about meaningful change in favour of focusing on the apparent victory of

bringing about states' formal attachment to human rights principles and adherence to human rights conventions.

Nor can we see international human rights instruments as invariably a weapon for the poor and the marginalised. Any time spent in the Commercial Court would reveal the extent to which the European Convention on Human Rights has been invoked by bankers and developers there (which is not to say that they are not as entitled to have their human rights vindicated as anyone else!)

In the US and the UK controls on election spending – which were an attempt to protect the political rights of those not enormously wealthy - have been struck down in the name of another right, freedom of speech.

Further, an over-reliance on the courts as the vehicle for the realisation of rights can lead to an increased politisation of the judiciary: consider the calls for Ireland to have a system of interrogation of potential judges similar to that in the US, so that their views on various topics can be ascertained, with the implied corollary that, if they fail to reflect popular opinion, they should be rejected as judges.

To summarise, the embodiment of human rights in constitutions, law and international conventions, therefore, is useful, but it is not a panacea.

Where does the Universal Periodic Review fit into this?

It is clear from the discussion that has taken place this morning shows that the UPR process has been positive on two fronts: it has brought together a very broad spectrum of NGOs in pursuit of a common purpose;

it provided a very important framework for engagement with the Government on a range of issues within a human rights framework.

Many speakers have stressed that the review was not the end of a process, and what is important is what happens next. Many interesting suggestions have been made in this context, which can be seen in the rapporteurs' reports, and Anastasia Crickley has made the important suggestion that the process receives oversight from an Oireachtas committee.

So, can we expect a real transformation of the human rights landscape in this country as a result of the UPR?

My answer is – that depends. It depends on how we connect what was achieved with the concrete problems arising now.

To return to my opening remarks, we must keep in sight how the struggle for human rights is advanced – through campaigns involving large numbers of people, and through strategic litigation involving those whose rights have been violated.

It goes without saying that such cases are normally taken against organs of the State.

It is hardly necessary to say that there is an enormous power imbalance between those whose rights have been violated and the State. They need support and somewhere to go to seek redress. This requires the existence of bodies with the remit and resources to support people taking cases against the State, to conduct inquiries into State violation of rights and broadly to hold the State to account.

It is understandable, if not excusable, that States may not be enthusiastic about creating and resourcing such bodies. Yet doing so is now part of our international human rights obligations, and that leverage is very important.

It is no accident, however, that the body which was most successful in challenging organs of the State through strategic litigation, the Equality Authority, suffered the most extreme cuts to its budget, destroying its capacity to carry out this work. The IHRC suffered cuts almost as severe, inhibiting its work in many areas.

It was through the Equality Authority taking cases which highlighted breaches of equality legislation that the meaning of that legislation seeped into popular consciousness, and made people aware that they had the right to be free from discrimination. Equally, it warned those inclined to discriminate that they could face serious consequences for doing so.

From the point of view of the media, the fact that these were concrete examples of the enforcement of human rights in practice was enormously useful in writing about human rights and equality in an accessible fashion.

Any new Equality and Human Rights body must be able to resume this work and mechanisms must exist to ensure that there is access to justice for those denied their rights. Also, people also need ready access to legal aid, available to deal with the full range of problems they encounter, whether human rights are directly engaged or not.

This raises the absolute need for an independent legal system, including an independent judiciary and a legal profession that is free from fear of the Executive.

It is very concerning to me that the Irish State, while defending its human rights record in international arenas, has been strengthening the hand of the Executive at home and restricting the rights and opportunities of citizens to challenge it. While stating that it will enhance the access of those of limited means to justice, it has been cutting both civil and criminal legal aid.

Three very important and specific issues involving fundamental human rights have arisen in recent weeks, ironically at the same time as Ireland was defending its human rights record in Geneva.

One concerns the need for a robustly independent judiciary, another a totally independent legal profession and the third the fundamental right to fair procedure of every citizen.

They are in danger of being compromised by the forthcoming referendums on judges' pay and inquiries and by the Legal Services Regulation Bill.

As others have pointed out, the referendum on judges' pay – which is necessary - puts the reduction of judicial salaries directly in the hands of the Executive, a move seen as dangerous to the independence of the judiciary in virtually every democratic country in the world. A modest suggestion that this task should be given to an independent commission – personally I would suggest one including the Comptroller and Auditor

General and the Ombudsman – was dismissively brushed aside by the Minister for Justice when it was raised in the Dail and has not been pressed since.

The proposal to amend the Constitution to permit Oireachtas inquiries – which I support in principle - contains a provision that will leave the decision on the rights of those appearing before them in the hands of the politicians who set them up, in response to their perception of what constitutes the “public interest”. It is not too fanciful to think that this could ultimately include inquiries into perceived acquittals of unpopular defendants in criminal trials “on technicalities”, or journalistic inquiries into areas politicians might prefer were left alone. Should this happen the rights of those being examined would be decided by the very people who decided on the need for inquiry, with no separation between the “prosecution” and “trial” elements of the proceedings.

The Legal Services Regulation Bill contains many necessary measures, for example, those bringing transparency to legal costs, which are long overdue. But the regulatory authority for the legal professions, charged with the drawing up of their codes of conduct, will be, in the majority, directly appointed by the Government and will report to the Minister for Justice. Again, there is no buffer between the Executive and the profession, one of whose principle tasks is to defend the rights of citizens against the State.

These institutional checks and balances are of central importance in ensuring human rights can be fought for in an effective and meaningful way.

It is unfortunate that, due to the interregnum between the ending of the mandate of the Human Rights Commission and the creation of a new body, there could be no examination by the HRC of the human rights dimensions of these proposals.

Here I also have to voice a concern that the recent focus of most human rights NGOs in the area of the UPR has meant less attention has been given to the practical effect these measures may have on fundamental rights to fair procedure and on access to justice for those whose rights are most in danger of violation.

In recent days the ICCL, the Law Society and the Bar Council have made welcome interventions in relation to the inquiries referendum in particular. These interventions, unfortunately, have come very late indeed. These measures, therefore, are likely to be enacted largely unexamined and unopposed.

To conclude, the UPR process has been very useful in enabling those working in the area of human rights to link specific issues to international human rights instruments, and remind the State of its obligations under them. This provides a powerful argument for use in discussions with various State organs charged with specific tasks.

But there is no equality of arms between State organs and NGOs or other bodies seeking change, and arguments with the State will not be won just on their merits. They will have to be backed up with some kind of force.

That can take two forms – political and legal. In the absence of any substantial political or social movement challenging the current direction

of Government policy, NGOs will have to muster the best forces they can and focus on a number of central issues in campaigns seeking specific changes to Government policy to improve the human rights environment.

Legally, we must have the forces available to defend, through the courts if necessary, those whose rights are in danger of being violated. This includes, of course, adequate legal aid for those accused of crimes and civil legal aid for those who need it. It includes support for FLAC and the community law centres who do very valuable work and take more strategic cases.

But above all it means having a robust and truly independent Equality and Human Rights Commission, with the resources to take cases against human rights violations where necessary.

The Minister has set up an advisory group on the new body. That should not limit the discussion on what is necessary. There is time to generate a public discussion on the kind of commission needed, an accountable method of appointing it and the mechanisms necessary to ensure that, when it is formed, it contains people with the qualifications and experience to fulfil its remit, is truly representative of society (not of political parties!) and truly independent.

But most urgently, it is incumbent on all of us who are concerned about human rights to use the few days left to alert people to the dangers represented by the two referendums on Thursday, and not to be lulled into complacency by the verbal commitments the Government made to human rights in Geneva.

END/