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Editor's Note

Raja Aziz Addruse enjoyed an enviable reputation as one of Malaysia's most gifted lawyers. In a career which spanned over four decades, he participated in many of the country's landmark legal battles which, deservedly, brought him lavish praise from his peers and from ordinary Malaysians. But, more remarkably, Aziz stood out as a lawyer of unimpeachable integrity and high principles, which made him one of a small number of Malaysian lawyers to be genuinely respected at home and abroad. Not one to be tempted by blandishments or browbeaten by threats, he consistently set his face against official honours and spoke truth to power.

Sadly, this pillar of rectitude and professionalism was felled by cancer last July. His demise threw a pall of gloom over the legal fraternity in Malaysia. The tributes were not long in coming. In October the Malaysian Bar organised a moving function at which the main auditorium in the Bar's headquarters was named after Aziz, and a lecture series in his memory was launched. We are pleased to carry some of the tributes paid to this great lawyer (including an edited version of the memorial lecture delivered by a former Chief Justice of India, Mr J S Verma) in this issue.

An important development in the fight against corruption is also the subject of comment in this issue. Colin Nicholls QC (of this parish, and an acknowledged expert on corruption and the misuse of public office) explains the implications of a recent judgment of the Caribbean Court of Justice which held that it was within the rights of the Attorney-General of Belize to sue two former government ministers in tort over misfeasance of public office. The case is noteworthy not only on the issue of whether such suits are maintainable at the instance of the State, but also for a number of other, wider, reasons which Nicholls describes with characteristic clarity and perspicacity.

We return as well to another topical issue that continues to be debated with vigour within the United Kingdom, viz the desirability of an indigenous Bill of Rights to replace the controversial Human Rights Act (which incorporated the European Convention on Human Rights into domestic law under the last Labour government more than a decade ago). Austen Morgan, a practising barrister and a member of the independent commission established by the present Conservative government to go into this issue, presents six major arguments in favour of change. The dissatisfaction with the Human Rights Act, he avers, is widely and genuinely felt, and cannot be dismissed as the handiwork of a few reactionaries or of certain newspapers.

Support for change has gathered significant momentum in recent months. The voices of dissent against the *status quo* have begun to include some distinguished figures. Sample this view from Lord Hoffman:

> What has gone wrong? The brief list of human rights in the 1950 European Convention, which now forms part of our own law, is, in general terms, admirable. Who could object to the government having to respect the rights of its people not to be tortured or inhumanly treated, not to have their privacy invaded, to have a fair trial, or to be free to speak their minds and practice their religions. These freedoms are the badge of a civilized society. The devil is in the detail: in the interpretation by the courts of the high-minded generalities of the written instrument. It is these interpretations, which often appear to people to bear little relation to the values that they think really important in the way our country is governed. Since 9/11 there have been enough real and serious invasions of traditional English freedoms to make it tragic that the very concept of human rights is being trivialized by silly interpretations of grand ideas.

Whether or not the government will heed the call for reform remains to be seen. To some extent the outcome will depend on the parliamentary arithmetic which at the moment does not appear to be favourable to those seeking change.

Merry Christmas, and a happy new year!

– Dr Venkat Iyer

Arguments for a UK Bill of Rights and Responsibilities

Austen Morgan

Introduction

The coalition government's independent commission on a bill of rights,[1] due to report by the end of 2012, is evidence – despite attempts to defend the Human Rights Act 1998 – of the growing need for law reform in the UK.

There is an inspirational canon of recent commonwealth bills – from Canada, New Zealand, South Africa, Australia and Victoria (plus the overlooked dependency, Gibraltar) – that British advisers and officials could draw upon.

There are six main arguments for reconstituting human rights protection in the UK, given the failure of 'human rights' to acquire legitimacy in civil society in the past decade.

Argument One: English tradition

The year 2015 will be the 800th anniversary of Magna Carta, in England and Wales (the great charter also applying in Ireland). Scotland took the road to liberty later, with its claim of right of 1688-89.

The Stuart, James II (and VII), was replaced, during the so-called glorious revolution, by William and Mary, as joint constitutional monarchs. This was codified in the more famous 1688-89 bill of rights, in England and Wales (and again, Ireland).

The liberties of the subject – essentially negative freedoms – were expressed through institutional reform, by the parliaments of England and Wales, Scotland and Ireland at war with absolute monarchy.

But this first in history was disfigured – see the resonance of the 1690 battle of the Boyne in Ulster today – by religious sectarianism (after the reformation) and, following the death of Mary, by sexism: meaning, the related 1700-01 Act of Settlement belatedly needs amending.

The former issue (sectarianism) is now before the Commonwealth, in whole or in part (and would be a good theme for a future conference of lawyers). The latter issue (sexism), despite Elizabeth I, Victoria and Elizabeth II, and the queue of kings to succeed the present Queen, may eclipse the former, if the Duke and Duchess of Cambridge produce a first-born girl.

Royal soap opera aside, the first bill of rights tradition is not an ignoble one, to be wiped out by European integration or dissolved in the UN. Nelson Mandela remains a fan of Westminster, and the Queen as a person (even if South Africa, following *apartheid*, remains a republic).

Great Britain was a constitutional beacon in the late eighteenth-century world. The 1688-89 bill of rights inspired the anti-federalists, in the new United States of America, following the republican constitution of 1787, to add amendments One to Ten (others came later) in 1791 – the so-called US bill of rights.

But revolutionary France, with its Déclaration des Droits de L'homme et du Citoyen of 1789, had already drawn upon the Anglo-Saxon model. There followed a constitution for the first republic of 1792 to 1804, and a 1793 Déclaration less critical of state power.

The rush of empire (with a sovereign parliament) in the nineteenth century, explains the antipathy in the UK to a written constitution, but the end of empire (leading to the commonwealth) in the twentieth century saw London draft many state constitutions for others, including bills of rights.

What is appropriate for new states and dependencies (including the colony of Gibraltar in 2006), has yet to be conclusively applied within the UK. A written constitution, I submit, which has no practical prospects at the moment, could, nevertheless, be an – acknowledged or unconscious – incremental process. And a UK bill of rights and responsibilities could be a freestanding cornerstone.

Conclusion on Argument One

Ultimately, Magna Carta and the subsequent milestones in these islands are significant for two reasons: one, it is where we come from legally, with a long continuity from the Norman conquest in 1066; and two, it infuses our democracy, and even popular life (despite some regional difficulties with British identity).

[1] See, *www.justice.gov.uk/about/cbr*.

We should continue from this point, or - if necessary - return to it in order to legitimise human rights.

Argument Two: International human rights standards

The story of human rights resumes in 1945, and is both global and regional (Europe).

The United Nations

We begin with the charter of the UN, now the leading text of customary international law (but not the constitution of a world government). The 1948 Universal Declaration of Human Rights remains non binding, though it led to the two 1966 international covenants (one dealing with civil and political rights and the other, given the cold war and decolonisation, with economic, social and cultural rights).

There is also a raft of other UN human rights instruments, most with treaty machinery, the product of the international democracy of states (and officials from national capitals exiled to UN bodies), dealing *inter alia* with race (1965), women (1979) and disabilities (2006).

Geoffrey Robertson QC has written of this UN process: 'Many overoptimistic international lawyers argue that everything in the Universal Declaration is by now part of international law, but this is the sort of wishful thinking that has made international human rights law such a fatuous academic exercise. If human rights are to have the force of law in the twenty-first century, we must abandon these norms of the imagination (which guarantee sophisticated rights to hundreds of millions of women and children who have no hope of possessing them) and concentrate on consolidating, and above all enforcing, the elemental rules which have already ripened into rules of international law.'[2]

There is now an ideology of human rights, with multinational impact on liberal democracies, with many of the characteristics of an organised religion. It is no defence to state that this new morality – widely perceived as moralistic – is deployed selflessly (and not for collective self-advancement) in the service of good governance globally. Human rights academics appoint each other to national bodies (having peer reviewed their work), and States then exile them, in relative comfort, to New York or Geneva. There have always been preachers and believers in human history, but true liberty thrives on scepticism and aversion to statism, even (especially?) the 47-strong UN human rights council (2006 -).

'Europe'

There are two Europes, that of the 1949 Council of Europe (CoE), with 47 member states, and the European Union ('EU'), created in 1957, now with 27 member states.

Council of Europe

This was conceived as a region of the UN, but principally as a frontline body in the cold war. It agreed the human rights convention in 1950. The targets were fascism and communism. The UK led with the drafting of the international agreement, drawing on the unenumerated rights of the (British) subject. The European Court of Human Rights was not established, at Strasbourg, until 1959. It was in part a state versus state court. But the convention also provided for the person versus any state (voluntary) jurisdiction. And, in 1965, Harold Wilson – with no idea of the consequences – granted the right of individual petition from the UK.

Strasbourg may be contrasted with the UN: there is one human rights court (not a multiplicity of charter and treaty bodies); and only the human rights convention is justiciable. Paradoxically, the human rights court took off in the 1970s, and again in the 1990s, and this in spite of the doctrine of subsidiarity implied by the convention (whereby member states should take primary responsibility for human rights).

European Union

The EU has a project of economic integration, with centralised governmental functions (now called competencies). There is a court of justice of the EU ('ECJ') in Luxembourg, which developed a doctrine of the supremacy of EU law. And the 2000 charter of fundamental rights now has legal effect through the EU treaties.

This is altogether more formidable than the Council of Europe. The EU's accession to the human rights convention may become a reverse takeover of the Strasbourg court. The 27 member states constitute a majority of the 47, including a number of aspiring EU members. While the charter of fundamental rights applies only to EU competencies, member states and others could deploy it to help answer a wider range of legal questions (rooting human rights in social and political development).

Conclusion on Argument Two

The legacy of empire has seen the UK try to maintain global diplomatic reach, as a permanent member of the UN Security Council. Neo-colonialist thinking in the Foreign Office has lulled it into believing that the culture of 'human rights' at the

[2] *Crimes Against Humanity: the Struggle for Global Justice*, London, 2000, pp 81-2.

centre leads to peripheral civilising. This state has complacently relied upon its legal dualism – whereby international law does not infuse domestic law unless incorporated by parliament; human rights, as practised in the UN and Europe, are principally for other peoples.

The consequence has been non-governmental organisations (international and national) irritating the UK body politic, with so-called international human rights standards used to justify the creation of a fourth branch of government (and promote radical politics), alongside, and even over, the executive, legislature and judiciary.

The culture war of the human rights academics deserves to be brought to an end, with a peace process led by elected representatives.

Argument Three: Strasbourg in crisis

The Strasbourg human rights court is now a victim of its own success, even if the term 'crisis' is not yet uttered widely.

The demise of the European Commission of Human Rights in 1998 means there is less and less fact finding worthy of the name. There is a growing body of case law, with judgments – drafted by staffers cutting and pasting – with less and less legal reasoning. Strasbourg is not a supreme court of the Council of Europe, but a human rights tribunal with a specialist jurisprudence increasingly out of touch with society, in all its diversity, across the continent.

Strasbourg has been preoccupied with itself for nearly a decade now. The calibre of its judges was called into question in 2003. Lord Woolf published a report in 2005. A wise persons' group followed in 2006. By 2007, a majority of the cases was coming from Turkey and four post-communist new members. The resistance of Russia to new control machinery had to be overcome.

The 2010 Interlaken Declaration (followed by the 2011 Izmir one) articulates the problem. But the UK is unlikely to find the solution (with the EU in the background), during its six months' Chairmanship of the Council of Europe. The backlog, in 2011, stands at a staggering 160 thousand cases.

The argument about institutions has spread to Strasbourg's jurisprudence and, I believe, is infecting this form of international co-operation; is the Council of Europe, in its original form, any longer necessary?

Leading elements of the UK judiciary, anticipating politicians, have perhaps decisively challenged the court. I refer to five events in 2009-10 (during the dying months of the Labour government):

1. Lord Hoffman's Judicial Studies Board annual lecture, in March 2009;[3]
2. the enlarged Court of Appeal decision in *R v Horncastle* (the hearsay case), in May 2009;[4]
3. Arden LJ's Sir Thomas More lecture, 'Peaceful or Problematic?: the relationship between national supreme courts and supranational courts in Europe', November 2009;
4. the enlarged UK Supreme Court's upholding of the *Horncastle* decision[5], in December 2009; and
5. Lord Judge CJ's Judicial Studies Board annual lecture, in March 2010.[6]

Conclusion on Argument Three

So far, Strasbourg has failed to publish its Grand Chamber decision of 19 May 2010, relating to *Horncastle.*[7] I suspect it will uphold the breach of Article 6(3)(d) (cross-examination) decision, but it could just follow the UK Supreme Court in *Horncastle.*

If it does the former, Strasbourg (with Sir Nicholas Bratza becoming President in November 2011) will be disagreeing expressly with the UK judiciary; if the latter, it will be seen to have backed down, through a civil law margin of appreciation (if it does not duck the issues) for common law criminal jurisprudence.

That is a crisis, less for the UK's top judges, and more for the 47 multinational human rights judges of the Council of Europe.

Argument Four: the idea of two stages

The fourth argument covers a great deal less time and space than the first two. But it becomes, nonetheless, significant given the reactive rally in favour of the Human Rights Act ('HRA') 1998.

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3 'The Universality of Human Rights', JSB annual lecture, 19 Mar 2009 (original typescript). Plus his foreward to a Policy Exchange document: Michael Pinto-Duschinsky's *Bringing Rights Back Home* (7 Feb 2011).

4 *R v Horncastle* [2009] EWCA Crim 964 [2010] 2 WLR 50.

5 *R v Horncastle* [2009] UKSC 14 [2010] 2 WLR 47.

6 Transcript lecture, 17 Mar 2010, Judicial Communications Office. Plus comments to the House of Lords' Constitution Committee on 19 Oct 2011: *The Times,* 20 Oct 2011.

7 *Al-Khawaja and Tahery v UK,* ECtHR, 20 Jan 2009.

It was the Labour Party, in opposition, in 1992, which developed a human rights policy for the UK. Stage one was to be the incorporation of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms. This became the HRA 1998, which entered into force on 2 October 2000.

The legislative architects envisaged a stage two: a full domestic bill of rights. And, in 1999, the London constitutional law professor, Robert Blackburn, published his fat volume, *Towards a Constitutional Bill of Rights for the United Kingdom.*

So, when David Cameron, as new conservative leader, gave his seminal speech on 'Balancing Freedom and Security' in June 2006, he was drawing – unwittingly? – on the original policy of the then Labour government!

Conclusion on Argument Four

The Labour opposition was correct in 1992 and afterwards, and so was David Cameron, when Leader of the Opposition. But neither can have envisaged the hammering the HRA 1998 would take in the 2000s: yes, this had been the work of selected national newspapers; but no, the attack has not been fabricated – ordinary people, who read fewer and fewer broadsheets and tabloids, reached the same conclusions independently and often earlier (and they are not all reactionaries).

Argument Five: devolution in the UK

In 1998, Westminster legislated for devolution to Wales, Scotland and Northern Ireland. Unfortunately, this has been used opportunistically by the 'defend-the-HRA 1998' lobby.

Westminster's HRA 1998 applies throughout the UK. In the three regional administrations, based in Cardiff, Edinburgh and Belfast, human rights have effect as follows: one, the idea of legislative competence; two, entrenched enactments, including the HRA 1998 and the European Communities Act 1972; three, incompatible executive actions; four, jurisdiction and devolution (legal) issues; and five, statutory human rights (including equality) bodies.

And, in the background, is the statutory assertion of Westminster's ultimate sovereignty, overriding the need for so-called Sewel motions.

It is a complete travesty to say that human rights as a subject was devolved throughout the UK, becoming the property of these lesser governments. On the contrary, Westminster circumscribed their actions; they must be within the HRA 1998.

That did not stop a Scottish administrative law professor, relying upon Schedule 2 of the Northern Ireland Act 1998 (dealing with excepted matters), asserting that Cardiff, Edinburgh and Belfast could, separately or collectively, veto Westminster repealing the HRA 1998.[8] This argument was deployed to considerable political effect, by Justice, the respected rule of law body.[9]

Conclusion on Argument Five

Westminster made the HRA 1998 (and brought it into force after devolution), and it can unmake that statute. That is a legal argument. It is distinct from a political assertion that the devolved administrations are powers in the land which must be consulted politically.

Argument Six: configuring a UK Bill of Rights and Responsibilities

Virtually no thought has been given to fashioning a UK bill, a project which will have to wrestle with major constitutional issues and the drafting aesthetic of the HRA 1998. My initial thoughts comprise:

1. the form: simply, a new act of parliament, with partial entrenchments;
2. re-enactment of the first bill of rights (following the amendment of the 1700-01 Act of Settlement?);
3. a preamble, with interpretative effect (of which more below);
4. the rights: drawing on the Strasbourg convention, the charter of fundamental human rights and the Commonwealth bills of rights (mentioned above). Articles 3, 8 and 10 need developing, and a genuine equality provision is necessary;
5. (a personal view), the need to develop indirect horizontal effect (if A kills B, why do the former's relatives have to pursue the state for possible inadequate protection?);
6. mechanisms: Sections 2, 3, 4 and 10 of the HRA 1998 all require modification;
7. responsibilities: I favour a general rule of law obligation, and development of the article 17 Strasbourg jurisprudence: no human rights damages – as in *McCann v UK* (1995) 21 EHRR 97 – could also be enacted for selected cases.

Conclusion on Argument Six

Architects frequently enter competitions, at home or abroad, either to advertise their skills or simply to get work.

[8] Christopher Himsworth, 'Greater than the Sum of its Parts: the growing impact of devolution on the processes of constitutional reform in the UK', 77 *Amicus Curiae*, 2, 5-7.

[9] Justice, *Devolution and Human Rights*, Feb 2010, paras 71-83.

A great number of people have entered the lists for and against a UK bill of rights. Why does the independent commission – which is consulting on a number of issues – not run a preamble-drafting competition? It need not offer a prize, for 800 or 1,500 word essays. But it would test interlocutors, either of the unenumerated rights of the subject school or the international human rights standards comprehensive.

I would be prepared as a working barrister to try, fully cognisant of the immense challenge such a project entails.

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