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 **‘ARGUMENTS FOR A UK BILL OF RIGHTS AND RESPONSIBILITIES’**

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**Introduction**

The coalition government’s independent commission on a bill of rights[[1]](#footnote-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).

We should continue from this point, or - if necessary - return to it in order to legitimize 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 decolonization, 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]](#footnote-2)

There is now an ideology of human rights, with multinational impact on liberal democracies, with many of the characteristics of an organized 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. The human rights professors 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, 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 centralized 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 centre leads to peripheral civilizing. 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 organizations (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 professors 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 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. The calibre of its judges was called into question in 2003. Lord Woolf reported 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’ chairing of the council of Europe. The backlog, in 2011, stands at a staggering 150 thousand cases.

The argument about institutions has spread to Strasbourg’s jurisprudence and, I believe, is infecting this form of international cooperation; 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 four events in 2009-10 (during the dying months of the labour government):

* one, Lord Hoffman’s judicial studies board annual lecture, in March 2009[[3]](#footnote-3);
* two, the enlarged court of appeal decision in R v Horncastle (the hearsay case), in May 2009[[4]](#footnote-4);
* three, the enlarged supreme court’s upholding of the Horncastle decision[[5]](#footnote-5), in December 2009; and
* four, Lord Judge CJ’s judicial studies board annual lecture, in March 2010[[6]](#footnote-6).

*Conclusion on Argument Three*

So far, Strasbourg has failed to publish its grand chamber decision of 19 May 2010, related to Horncastle.[[7]](#footnote-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 Nicolas 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.

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 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]](#footnote-8) This argument was deployed to considerable political effect, by Justice, the respected rule of law body.[[9]](#footnote-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 devolution 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:

* one, the form: simply, a new act of parliament, with partial entrenchments;
* two, re-enactment of the first bill of rights (following amending of the 1700/01 act of settlement?);
* three, a preamble, with interpretative effect (of which more below);
* four, 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;
* five (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?);
* six, mechanisms. Sections 2, 3, 4 and 10 of the HRA 1998 all require modification;
* seven, 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.

A great number of people has entered the lists for and against a UK bill. 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 cognizant of the immense challenge such a project entails.

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1. Website: [www.justice.gov.uk/about/cbr](http://www.justice.gov.uk/about/cbr). [↑](#footnote-ref-1)
2. *Crimes against Humanity: the struggle for global justice,* London 2000, pp. 81-2. [↑](#footnote-ref-2)
3. ‘The Universality of Human Rights’, JSB annual lecture, 19 March 2009 (original typescript). Plus his foreward to a Policy Exchange document: Michael Pinto-Duschinsky’s *Bringing Rights Back Home* (7 February 2011). [↑](#footnote-ref-3)
4. *R v Horncastle* [2009] EWCA Crim 964 [2010] 2 WLR 50. [↑](#footnote-ref-4)
5. *R v Horncastle* [2009] UKSC 14 [2010] 2 WLR 47. [↑](#footnote-ref-5)
6. Transcript lecture, 17 March 2010, judicial communications office. Plus comments to the house of lords’ constitution committee on 19 October 2011: *The Times,* 20 October 2011. [↑](#footnote-ref-6)
7. Al-Khawaja and Tahery v UK, ECtHR, 20 January 2009. [↑](#footnote-ref-7)
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. [↑](#footnote-ref-8)
9. Justice, *Devolution and Human Rights,* February 2010, paras 71-83. [↑](#footnote-ref-9)