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René Cassin 'Human Writes' Essay Competition 2018 – shortlisted

Competition judge Joshua Rozenberg comments:

"She selects a key article in the UDHR and rightly draws attention to the declaration's main weakness: the lack of a direct enforcement mechanism.

She is perhaps over-generous in crediting the UDHR with having prevented a humanitarian disaster in Europe on the scale of the Second World War -- surely the EU and its predecessors had something to do with that -- but she is right to conclude that the declaration is neither a total failure nor an unalloyed success."

Towering Monument or Crumbling Relic?

At 70, is the Universal Declaration of Human Rights still fit for purpose?

The divisive nature of the statement exposes a weakness in its conceptualisation of the Universal Declaration of Human Rights. While the 'Crumbling Relic' approach is unfairly pejorative, the 'Towering Monument' approach is also an unrealistic standard against which to judge the achievements of the Declaration. It is submitted that the failure of this dichotomy is due to the interaction between international human rights law and geopolitics, through which a human element is introduced to the discussion. This interface will be explored via a comparative approach, focusing on the differing levels of protection afforded to rights under the Declaration in the US and the UK. This in turn will be illustrated by the interplay between the Declaration and its 'sister' document, the ECHR. The conclusion is thus that the Declaration is still fit for purpose as a means of mitigating conflict but is inefficient on its own as a safeguard of human rights.

While the US was one of the first modern nations to safeguard rights via the Bill of Rights 1791¹, its protection of rights under the Declaration departs radically from the libertarian spirit seen in the Bill. One of the aims of the Declaration, articulated in the preamble, was to promote rights as "essential, if man is not to be compelled...to rebellion against tyranny or

¹ 'Bill of Rights of the United States of America' (Bill of Rights Institute 2018) <<https://billofrightsinstitute.org/founding-documents/bill-of-rights/>> accessed 23 March 2018

oppression².” Article 5 – “No one shall be subjected to torture or cruel, inhuman or degrading treatment”³ – exemplifies the aim of protecting individual dignity from overbearing state power. While the UK and the US are both adherents to the Declaration, Article 5 is far better protected in the UK than in the US, where the torture and abuses of inmates in Guantanamo Bay⁴ prompted the (then) President Elect Barack Obama to state that, “It’s time to tell the world that America rejects torture⁵”. That the US has repeatedly violated numerous rights under the Declaration thus is not in real dispute, but the inconsistency in the protection afforded to Article 5 in particular suggests a weakness in implementation. Article 5 is reflected in Article 3 of the ECHR, to which the UK is a signatory and which is legally binding; hence there is an additional layer of rights protection. In *Chahal v UK*⁶, the general position was that Article 3 (and thus Article 5 of the Declaration) was an absolute right which applied “irrespective of a victim’s conduct⁷”. This contrasts with the attitude in the Supreme Court case of *Sosa v Alvarez-Machain*, in which it was stated that the Declaration does not “of its own force impose obligations [on the US] as a matter of international law⁸” (albeit this case did not concern Article 5 or an equivalent). This is technically correct, since unlike the ECHR the Declaration has no direct enforcement mechanism; victims whose states have ratified the Declaration can only complain to the UN Human Rights Committee⁹, which can ‘name and shame’ offending nations. Lord Hoffman characterises the Declaration as a “purely aspirational document¹⁰”, distinguishing it from the ECHR and ICCP. This hinders the Declaration’s effectiveness as a safeguard of human rights since the lack of a legal enforcement mechanism leaves the degree of adherence to the Declaration dependant on political factors.

It is to this dependence the discussion now turns. The correspondence between politics and rights protection has even impacted the application of Declaration rights, as reflected in the ECHR, with regards to the UK, complicating the picture. In *Abu Qatada v UK*¹¹, there was said to be no breach of the applicant’s rights under Art. 3 of the ECHR – he was to be deported to Jordan where there was a risk he would be tortured – due to a Memorandum of Understanding (MOU) ratified by the UK and Jordan. The court’s reasons for reaching its

² United Nations Universal Declaration of Human Rights 1948

³ Ibid, Article 5

⁴ ‘Guantanamo by the Numbers’ (*American Civil Liberties Union*, Jan 2018) <<https://www.aclu.org/issues/national-security/detention/guantanamo-numbers>> accessed 23 March 2018

⁵ Francesca Klug, ‘The Universal Declaration of Human Rights: 60 Years On’ (2009) PL 205-217

⁶ *Chahal v United Kingdom* (1997) 23 EHRR 413

⁷ Ibid

⁸ *Sosa v Alvarez-Machain* 542 US 692 (2004)

⁹ n.5

¹⁰ Lord Hoffman, ‘The Universality of Human Rights’ (2009) 125 LQR 416-432

¹¹ *Abu Qatada v United Kingdom* (2012) 55 EHRR 1

decision centred around the superior formality and quality of the MOU and the strong bilateral relations between the UK and Jordan. Furthermore, the court stated that it would only be in very rare cases that the general situation in a country would mean that no weight could be attached to its assurances that it would not torture a deportee¹². These are political criteria. The difference in approach between *Chahal* and *Othman* can perhaps be attributed to a willingness to lend greater deference to the wishes of Member States in relation to terrorism suspects in a post 9-11 world. As E. Nanopolous makes clear, current human rights law, including the Declaration, is thus liable to be used as an enabling mechanism for the political decisions of Member States, rather than an entirely neutral safeguard: “the degree of protection is conceptually relative...the definition of fairness does not have an independent life of its own but is bound up to the pursuit of other goals¹³.”

It is thus clear that the Declaration has fallen somewhat short of its aim of preserving the “rights of men and women”¹⁴, since its lack of enforceability makes even the rights reflected in directly enforceable treaties such as the ECHR subject to differing levels of protection. However, it must be asked whether it is realistic for an international treaty of this nature to be entirely separated from politics. It is submitted that it is not, however desirable such a separation may be. J.A.G. Griffiths articulated this reality: “...political philosophers have sought that society in which government is by laws and not by men. It is an unattainable ideal¹⁵.” This is reflected in the UN website’s own description of the drafting of the Declaration; a “colossal task¹⁶”, undertaken “when the world was divided into Eastern and Western blocks¹⁷.” The underlying rhetoric of politics supports Griffiths’ statement; the fact that he was referring to the constitution of the UK is irrelevant. Hence the Declaration’s protection of human rights is and will be, as long as it remains in its current format, incomplete, although efforts to achieve its ideals are admirable.

It must be emphasised that the Declaration’s failure to create a Utopia does not mean that it has entirely failed in its purpose. One of its aims was to “promote the development of friendly relations between nations¹⁸”, and in this it can be said to have succeeded, particularly in Europe; despite flare-ups of conflicts (e.g. the Bosnian War) there has yet to be a humanitarian disaster on the scale seen in the Second World War. F. Klug acknowledges

¹² Ibid.

¹³ E. Nanopoulos, ‘European Human Rights Law and the Normalisation of the Closed Material Procedure: Limit or Source?’ (2015) 78 MLR 913, [107]

¹⁴ n.2

¹⁵ J.A.G. Griffiths, ‘The Political Constitution’ (1979) MLR 42:1, 1-21, p.16

¹⁶ ‘History of the Document’ (*United Nations, Universal Declaration of Human Rights*) <<http://www.un.org/en/sections/universal-declaration/history-document/index.html>> accessed 22 March 2018

¹⁷ Ibid.

¹⁸ n.2

this, stating: “there is some evidence that allegiance to a common standard of democracy and human rights...has helped secure peace in formerly turbulent Western Europe¹⁹.”

To conclude, the discussion should not be seen as a value judgment of the validity or desirability of the rights contained within the Declaration. However, it is important that analyses of the Declaration’s success contain a grain of *realpolitik*, which cannot be done when the Declaration is conceptualised through extremes of either reverence or contempt. This results in a caricature of the real document. The role of politics in the effective workings of the Declaration must be recognised, as it is only then that its place on the international stage as a guardian of human rights can be accurately reviewed. To re-iterate Lord Hoffman, the “aspirational²⁰” status of the Declaration as a “mission statement²¹” ultimately means its lack of legal enforceability leaves gaps in rights protection, particularly in areas dominated by policy considerations such terrorism. However, it is wrong to dismiss the Declaration as a failure in light of its positive contribution to peace in Europe and the jurisprudence of international human rights law.

¹⁹ n.5

²⁰ n.10

²¹ *ibid*

Table of Cases

European Cases

- *Abu Qatada v United Kingdom* (2012) 55 EHRR 1
- *Chahal v United Kingdom* (1997) 23 EHRR 413

Table of Legislation: Other Jurisdictions

- *Sosa v Alvarez-Machain* 542 US 692 (2004)

Table of Legislation: Other Jurisdictions

- United Nations Universal Declaration of Human Rights 1948, Preamble, Article 5
- United States Bill of Rights 1791

Bibliography

- ‘Bill of Rights of the United States of America’ (Bill of Rights Institute 2018)
<<https://billofrightsinstitute.org/founding-documents/bill-of-rights/>> accessed 23 March 2018
- Griffith, J.A.G, ‘The Political Constitution’ (1979) MLR 42:1, 1-21, p.16
- ‘Guantanamo by the Numbers’ (American Civil Liberties Union, Jan 2018)
<<https://www.aclu.org/issues/national-security/detention/guantanamo-numbers>> accessed 23 March 2018
- ‘History of the Document’ (United Nations, Universal Declaration of Human Rights)
<<http://www.un.org/en/sections/universal-declaration/history-document/index.html>> accessed 22 March 2018
- Hoffman, Lord, ‘The Universality of Human Rights’ (2009) 125 LQR 416-432
- Klug, Francesca, ‘The Universal Declaration of Human Rights: 60 Years On’ (2009) PL 205-217
- Nanopoulos, E, ‘European Human Rights Law and the Normalisation of the Closed Material Procedure: Limit or Source?’ (2015) 78 MLR 913, [107]