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Appointment of New Supreme Court Justice – A Missed Opportunity

After an inordinately long selection process, the appointment of Sir John Dyson to the vacant position on the Supreme Court was finally announced on 23 March 2010. While there is no doubt that he is eminently qualified for the position, this was nevertheless a missed opportunity to appoint a second woman to the Supreme Court. Lady Hale remains the only woman ever to have been appointed to the Court and to its predecessor, the House of Lords. Despite all the energy devoted and the lip service paid in recent years to the perceived need for a more diverse judiciary for England and Wales – from the establishment of the Judicial Appointments Commission to, most recently, the report of the Lord Chancellor's Advisory Panel on Judicial Diversity chaired by Baroness Neuberger – there remains little to show for it in the way of concrete change.

Rosemary Hunter
Professor of Law at the University of Kent

In comparison with other common law

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Law Society questions viability of new criminal legal aid proposals

In April the government announced yet another round of new criminal legal aid proposals. The Ministry of Justice said it plans to introduce a much smaller number of large contracts, which would reduce the number of firms to around a quarter of the current number. The MoJ proposal suggests that new contracts could be in place as early as summer 2011.

The market model proposed by the Ministry bears little resemblance to the market as it is currently structured. It is not clear how, nor how quickly any move to such a model could be implemented without causing serious disruption to service provision. It will not be easy for firms to make the necessary investment to expand as much as would be required, let alone to do so within a year. There are only around 20 firms in the country that are within 50% of the size required; and the plans need 500 firms of that size. With the Government a monopoly purchaser, few firms can afford to increase in size on spec. Failure to get a contract would lead to certain bankruptcy. Given the difficulty of carrying the volume of work in progress such expansion would entail, succeeding

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Configuring a UK Bill of Rights and Responsibilities

By Austen Morgan, barrister, 3 Temple Gardens

Introduction

The question of a UK bill of rights and responsibilities promises to dominate constitutional debate in the new parliament. David Cameron promised the repeal of the Human Rights Act ('HRA') 1998 in his June 2006 speech. The liberal democrats - who will be guided by Lord Lester of Herne Hill – might agree a new human rights corner of a future written constitution (though this remains to be determined).

Form

The issue of form is not controversial. A UK bill would be a new act of parliament. And partial entrenchments are not inimical to the doctrine of parliamentary sovereignty.

The (first) bill of rights of 1688-89 could be re-enacted, with or without further amendment.

Preamble

A preamble (having interpretative effect) should distinguish such a bill. This state's long history has been globally inspirational. The preamble could embody a statement of modern values for the four countries. And the thorny matter of rights and responsibilities needs to be explained. Why not a national drafting competition (like architects for new buildings), to inspire a new justice secretary?

Content

The Rights

The issue of content is more complicated. First, the rights. These could be taken over simply from the 1950 European Convention on Human Rights ('ECHR'), through the HRA 1998. I favour modernization, and possibly the adaptation of the 2000 charter of fundamental rights (for non-EU competencies). But a civilized democracy needs to grow its own rights. There is an inspirational canon of recent commonwealth bills – Canada, New Zealand, South Africa, Australia and Victoria - , plus the overlooked dependency, Gibraltar.

The shaping of individual rights would be political: why not the EU charter's absolute right to life?; article 3 remains problematic, within EU law; should article 8 not be unpacked?; how can it be better reconciled with article 10?; why not protocol no. 12, and a genuine equality provision?

Personally, I regret that UK courts have not developed the indirect horizontal effect, perceived by some in section 6(1) & (3)(a) of the HRA 1998. If A kills B, why do the latter's loved ones have to pursue 'the state' for violating article 2 through inadequate protection (though Morgan J's Northern Ireland judgment, in the Omagh relatives' action against the Real IRA, is an important private-law precedent[1]).

The Mechanisms

Second, the mechanisms. These could be taken over from the HRA 1998, and improved.

The section 2 duty to 'take into account' Strasbourg jurisprudence, has been blown apart by the Horncastle decision on article 6 in the supreme court[2]. The section 3 duty to read down legislation permits the striking down of delegated legislation. The section 4 declaration of incompatibility could be amended to permit the staying of proceedings, thereby reducing UK cases going to Strasbourg. And remedial orders under section 10 should be less ministerial and more parliamentary.

The Responsibilities

Third, the responsibilities. Human rights have always implied responsibilities. The principal, or only, responsibility should be support for the rule of law, and this could be made express. I personally regret that the jurisprudence on article 17 stopped developing. Responsibilities could sound in no human rights damages, as they did in the Gibraltar IRA case: McCann v UK (1995) 21 EHRR 97.

The European Courts

European Court of Human Rights

The ECtHR will either have to accede to Horncastle, or confront the UK. It is now a sickly body. A recent press release referred to the court facing 'a desperate situation', with its backlog of over a hundred thousand (100,000!) cases.

The latest solution, the Interlaken declaration of 19 February 2010, reaffirms the principle of subsidiarity in the court's constitution. David Cameron will be going with the Strasbourg grain (and not against), if he seeks to properly domesticate human rights in the UK.

European Court of Justice

Astute lawyers look to the ECJ in Luxembourg for human rights developments. At Interlaken, the EU proclaimed a European area of fundamental rights. While the man from Brussels talked about acceding to the ECHR, this would be more a reverse takeover by the 27-strong EU of the council of Europe's 47 member states.

The Debate about a UK Bill

The debate about a UK bill has become polarized, unfortunately. The merit, I submit, is with the pros and less with the antis, who want to simply keep the HRA 1998.

The Antis

Labour (and the liberal democrats?) dominate this camp. But it also comprises the organizations, Liberty and Justice. And other key figures in the human rights community.

There is, of course, always a good (small 'c') conservative reason for leaving things alone: parliament enacted the HRA 1998, and the courts have taken possession of it; any problems will be dealt with incrementally.

But the fear of this camp is misplaced. If

the hated tories wanted to take away our (the people's) rights, then those locked out of UK domestic courts would simply join the Strasbourg queue, and jump it. Dominic Grieve, the shadow justice secretary, has been clear about the UK not denouncing the ECHR (and, if he gets this department, hopefully he will speak some legal truth to the foreign office about international standards etc).

Few appreciate that David Cameron stole labour's clothes. In 1993, when it first proposed the incorporation of the ECHR, labour envisaged a stage two – a domestic bill of rights.

The senior judiciary should not be included in this 'anti' camp. One, they don't do politics: statutes are for parliament. Two, international relations (from which too much human rights law emanates) are a matter for the executive. And three, there is no common law issue, as there was with new labour's attempts to oust judicial review.

The Pros

The leading proponent is, of course, the conservative party. But it has the support of constitutionalists, including myself.

Lord Irvine of Lairg took 18 months to get his HRA 1998. A UK bill will be more complicated, and require more negotiation, at home and abroad, but a Cameron government should not take until 2015 (the 800th anniversary of magna carta).

Trevor Phillips's equality and human rights commission has, quite properly, decided to eschew party politics, though it has declared for the human rights act plus.

Plus or Minus?

The conservatives cannot, on their recent record, be aiming for minus, even though they are not enamoured of some human rights gurus: those who want to incorporate some, or all, international instruments; and those who want treaty-monitoring bodies to set the pace for UK courts.

The big plus would be the following. In 1998, William Hague's tories opposed the HRA 1998. Thus began the rash of human rights stories: which were generally wrong about the courts; but often right about some people who staff our public authorities. The Cameron project, as I see it, is to legitimize human rights, for middle England, the smaller countries, and all of us, and not just for the victims dear to the activists' hearts.

Austen Morgan was an independent member of David Cameron's commission on a UK bill of rights and responsibilities (2007-10), and writes here in a personal capacity.

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1 Breslin v McKenna [2009] NIQB 50.
2 R v Horncastle [2009] UKSC 14 [2010] 2 WLR 47.