Constitutional Review Under the UK Human Rights Act

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Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge, Cambridge University Press 2009) 455 p., ISBN 978-0-521-76100-0

In his seminal article, Stephen Gardbaum spoke of the emergence since the 1960s of a new model of constitutionalism.[1] According to this model, the legislature and the judiciary are no longer conceived of as two opposing poles, but as two communicating poles instead. This shift in their traditional relationship is expressed through a number of constitutional constructs, such as for instance allowing the legislature a formal opportunity to respond to judgments that strike down unconstitutional legislation. As one of the best, and probably most hotly debated, examples of this new model of constitutionalism one can mention the British Human Rights Act of 1998 (the HRA).

The HRA is noteworthy as it attempts to preserve parliamentary sovereignty as the cornerstone of British constitutionalism, while also enjoining the courts to interpret legislation in the light of a selection of the rights guaranteed by the European Convention on Human Rights. This the Act achieves by incorporating a number of rights from the Convention into British law, therefore enabling domestic judges to apply such rights in cases before them, as long as they do so in accordance with the HRA's dictates. Such rights are referred to as 'Convention rights'. Not surprisingly, the HRA has generated a wealth of literature and opinions, expressed both judicially and extra-judicially, in tracing the contours of the courts' new powers of review.

Aileen Kavanagh's book, adds to this body of scholarship through a particularly skilful analysis of the methodology that underlies judicial decision-making in terms of the HRA. Its aim is not to give an exhaustive account of all the case-law on the Act, as has been done by many other authors, but focuses instead on critiquing the Act's use and understanding.[2] In pursuing this aim, her work probably

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[1] Stephen Gardbaum, 'The new Commonwealth model of constitutionalism', 49 *American Journal of Comparative Law* (2001) p. 707.

[2] E.g., Helen Fenwick, *Civil Liberties and Human Rights* (Oxford, Routledge-Cavendish 2007).

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qualifies as the most comprehensive of its kind to date. For this admirable feat the author deserves praise.

Central to Kavanagh's study is the relationship between sections 3 and 4 of the HRA. Section 3 requires of the courts to read and give effect to legislation in a way which is compatible with the Convention rights, as far as it is possible to do so. Section 4 allows a number of senior courts to issue a 'declaration of incompatibility' where legislation is at odds with a Convention right, however such a declaration does not effect the continuing operation or validity of the legislation in question. It rests to the government to evaluate a declaration to decide whether a piece of legislation ought to be amended or not. In other words, a declaration amounts to a judicial statement to which political organs may attach real consequence if they so wish. This has given rise to the question on whether and how a court should choose between sections 3 and 4 in a given case.

In answering this question, Kavanagh's approach attests of pragmatism and is based on extensive treatment of case-law and literature. In Chapter 4 she distils a strong interpretative duty from section 3, which means that a particularly heavy duty rests on the courts to read legislation in conformity with Convention rights. As to declarations under section 4, such declarations are not in themselves a remedy to a litigant in whose case one is issued, as any declaration only amounts to signalling a problem with a piece of legislation and not an effective remedy. On comparing sections 3 and 4, Gavin Phillipson comes to the conclusion that courts should make maximum use of their interpretative powers in section 3 instead of issuing declarations in terms of section 4. He argues that section 4 minimises people's real protection against the legislature, whereas the HRA has to be understood as maximising protection instead, something which is to be achieved by reading legislation in a way so that it virtually always compliant with applicable Convention rights.[3] Kavanagh takes issue with this view. She argues that different situations may call for different solutions, which means that it is not prudent to opt for a particular remedy over another as a matter of course (p. 127). Instead the best way of maximising protection should be decided on a case-by-case basis given the possibilities presented a court in sections 3 and 4. In assessing a case's context Kavanagh favours an approach that sees judges taking note of the legal, political and economic consequences of their decisions and not act as if they were in an institutional vacuum (p. 135). This context-sensitive approach implies scepticism not only of weighing the scales in favour of judicial solutions to human rights problems, but also of views that inherently favour the legislature over the judiciary. For example, to the end of her book Kavanagh criticises Conor Gearty who argues that 'there is no greater enemy of strategic thinking than adversarial litiga-

[3] Gavin Phillipson, '(Mis)-reading section 3 of the Human Rights Act', 119 *Law Quarterly Review* (2003) p. 183.

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tion' (p. 355).[4] She argues that legislators and judges do not share the same duties, especially as judges may not create legislative schemes or regulate Convention rights. This does not mean to say that courts are at a disadvantage though, as their judicial independence and detachment from the pressures of everyday political life encourage them to focus squarely on the individual in relation to the law in discharging their constitutional duties. Kavanagh sees this narrow focus of the courts as an argument in favour of constitutional review, and not against it, as one might come to deduce from the views of Gearty.

All in all, the author adopts a very measured approach to the HRA by taking care to emphasise the complex interaction between principle and context in applying Convention rights to legislation. This is also evident from the fact that she prefers to speak of the 'constitutional division of labour between the three branches of government' and not of a *separation* of powers as this might dilute the idea of interaction somewhat (p. 9-10). This choice of words reveals two things about the book and its premise. First, it affirms the traditional reluctance in the United Kingdom to embrace the idea of a separation of powers as many continental jurisdictions have done. Secondly it positions itself as a keen defender of the orthodox position on the HRA by emphasising the Act as the product of compromise and not division in striking a balance between the idea of a sovereign parliament and a judiciary invited to review its legislation. This is exactly where the need for a case-by-case approach becomes evident – an approach which also ties in well with the traditional trait of British legal thought and practice of favouring inductive over deductive reasoning. However, one would be wrong to conclude that Kavanagh seeks quick refuge in the perceived comforts of orthodoxy, because under the HRA this entails defending the middle ground between those favouring either the legislature or the judiciary over the other, which is never an easy position to hold in the field of constitutional review. Yet, Kavanagh's attempt undoubtedly deserves respect although it runs thin on a few counts. Her appetite for orthodoxy becomes questionable when she, in an attempt to reconcile the Act with the traditional foundations of judicial review in administrative law, in effect downplays the magnitude of the change wrought by the HRA in the relationship between the legislature and the judiciary (p. 267, 275). Kavanagh takes this position, while the majority of opinion, arguably correctly, stresses the importance of change over continuity.[5]

[4] Conor Gearty, 'Tort law and the Human Rights Act', in Tom Campbell et al. (eds.), *Sceptical Essays on Human Rights* (Oxford, Oxford University Press 2001), p. 243, 259.

[5] E.g., Lord Steyn, '2000-2005: Laying the foundations of human rights law in the United Kingdom', 4 *European Human Rights Law Review* (2005) p. 349; Conor Gearty, *Principles of Human Rights Adjudication* (Oxford, Oxford University Press 2005), p. 121.

Central to the idea of compromise in the HRA is that of institutional dialogue. Declarations of incompatibility are a striking example of where the judiciary engages the legislature and confirms the point that the Act is not to be viewed with a strict separation of powers in mind. Interestingly, Kavanagh argues that section 3 is also to be viewed as an instrument of dialogue, as it enables the courts to engage a piece of legislation by either filling in gaps in a provision or determining its meaning, while the legislature is left to acquiesce or change the interpretation as it deems fit (p. 129). Dialogue, of course, cannot carry on indefinitely as a firm decision must be arrived at sooner or later. This is where the important topic of 'deference' becomes apparent, and to which the author gives extensive consideration in Chapter 7. By deference, she means the respect which the court pay the elected branches of government when it is uncertain about what the correct conclusion should be, or where they disagree with them 'but nonetheless consider it appropriate to attach weight to their judgment' (p. 169-170). Not surprisingly this topic opens up a vast field, and one which Kavanagh addresses with confidence by examining various arguments that lead the courts to show deference, such as the argument from 'democratic legitimacy'. In other words, the argument that the courts are not democratically elected and should therefore not be too strident in taking legislation to task. About this argument, Kavanagh reaches the worthy conclusion that democratic legitimacy is but one ground for justifying deference, and a very subordinate one at that (p. 196). She also investigates whether courts in the United Kingdom should adopt a margin of appreciation similar to that of the European Court of Human Rights, after which she studies deference in particular contexts and its relationship to the device of proportionality (p. 208, Ch. 8-9). This is not the forum to dissect the author's views on these topics, suffice it to remark that she proves herself a more than capable scholar in this regard.

On a more critical note though, Kavanagh's work analyses these topics without casting them in a format that can be readily relayed to the European Convention on Human Rights, especially where it relates to rights with express limitation clauses such as those in Articles 8 to 11. Would it not have wise to discuss the domestic courts' case-law on constitutional review against the familiar analytical framework of 'prescribed by law', 'legitimate aim' and 'necessary in a democratic society'? The first two categories are largely absent from the book, while the components of the last category could have been treated in a more structured fashion. This remark pertains not only to the work being discussed, but can be made as a comment on HRA discourse in the United Kingdom in general. One could argue that a blinding focus on the requirements issuing from sections 3 and 4 of the HRA has led to a number of structural features issuing from the Convention receiving less than adequate treatment. Following a matrix based more clearly on the European Court of Human Rights' jurisprudence might not only help to better struc-

ture thought on the HRA, but will undoubtedly be worthwhile for comparative purposes as well. These comments aside, one can confidently predict that *Constitutional Review under the UK Human Rights Act* will in years to come be looked on as a piece of classic scholarship.

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