Clayton Comments

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THE EMPIRE STRIKES BACK: COMMON LAW RIGHTS AND THE HUMAN RIGHTS ACT

Introduction

Two recent decisions, ***R(Osborne) v Parole Board***[1] and ***Guardian Newspapers v Westminster Magistrates Court***,[2] suggest that common law rights are, again, centre stage. As the future of the HRA becomes more obscure, recourse to the common law will attract many exponents; and some will, no doubt, argue that using domestic law rights can achieve much the same as the HRA.

In ***Osborn*** the Supreme Court recently considered the circumstances in which fairness required an oral hearing for prisoners seeking parole. Lord Reed observed:[3]

> The submissions on behalf of the appellants focused on article 5(4), and paid comparatively little attention to domestic administrative law ….. The guarantees set out in the substantive articles of the Convention, like other guarantees of human rights in international law, are mostly expressed at a very high level of generality. They have to be fulfilled at national level through a substantial body of much more specific domestic law .... The values underlying both the Convention and our own constitution require that Convention rights should be protected primarily by a detailed body of domestic law.

Lord Reed's approach makes it opportune to reflect on the scope for utilising fundamental common law rights, a development which emerged so powerfully in the 1980s and 1990s. To some degree that movement was displaced in the English courts by the enactment of HRA and its focus on Convention rights. However, a number of recent important cases have turned on common law rights. At the very least, these cases demonstrate that the HRA does not solve all rights cases which

1 [2014] 1 All ER 369
2 [2013] QB 618
3 Above, [54]-[56]

are litigated before the courts. But they may also indicate we should give a greater prominence to common law rights, now that the future of the HRA appears to be uncertain.

I shall sketch out the relationship between common law and Convention rights to consider the scope for their further development. I shall argue that there are some unusual features about ***Osborn*** and ***Guardian***; and would therefore express a note of caution about their general effect in domestic jurisprudence. Problems remain about how we identify common law rights and how common law rights will impact in practice, as a result of their traditional limited status in English law. In my view, common law rights cannot on current principles present replicate the positive rights created by the HRA; and it is premature to argue that that 'the force is with us' in developing common law rights, unless and until some underlying principles are modified.

The development of common law rights

English lawyers have traditionally been sceptical about rights. The conventional view was described by Dicey:[4]

> most foreign constitution makers have begun with declarations of rights. For this they have often been in no way to blame . . . On the other hand, there remains through the English constitution that inseparable connection between the means of enforcing a right and the right to be enforced which is the strength of judicial legislation. The law *ubi jus ubi remedium*[5] ,. . . means that the Englishmen whose labours gradually framed the completed set of laws and institutions which we call the Constitution, fixed their minds more intently on providing the remedies for the enforcement of particular rights . . . than upon any declaration of the Rights of Man or of Englishmen.

4 A Dicey, *An Introduction to the Study of The Law and the Constitution* (Macmillan, 1965) 198–199.
5 Where there is a right, there must be a remedy.

Nevertheless, as is well known,[6] the European Convention was drafted by English lawyers, reflecting the fact that many rights protected in constitutional instruments emanate from the common law- in actions brought for tort, in common law protection on the right to life or the influence on freedom of expression on the law of defamation. That traditional approach was epitomised by Lord Camden CJ in ***Entick v Carrington***:[7]

> The great end, for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole.

However, the impetus for constitutional common law rights is rooted in the right of access to the courts. In ***Re Boaler*** Scrutton J stated that one of the valuable rights of every subject of the King is to appeal to the King in his Courts and that, although Parliament is competent to deprive any subject of it, the language of a statute should be jealously watched by the Courts, and should not be extended unless clear words are used to justify such extension.[8] In ***Chester v Bateson*** the Divisional Court held that a regulation was in conflict with primary legislation because only a primary legislation could take away the right of access to the Court.[9] In ***Bremer Vulcan v South India Shipping*** Lord Diplock said that every citizen had a constitutional right of access to the court.[10]

From the 1980s onwards prisoners brought a series of cases complaining that the prison authorities were interfering with their fundamental civil rights: the issue in dispute was whether the power to manage prisoners under section 47 of the Prison Act 1952 was wide enough to entitle the authorities to interfere with fundamental human rights. In ***Raymond v Honey*** Lord Wilberforce stated that a prisoner retained all his civil rights which were not taken away expressly or by necessary implication; the House of Lords went on to hold that section 47 was not sufficient to authorize the restriction on

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6 See eg A Lester, 'Fundamental Rights: The United Kingdom Isolated?' [1984] PL 47; AWB Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2001), chaps 11–15

7 (1765) 2 Wils 275, 19 State Tr 1029, 1066.

8 1915] 1 KB 12 at 36

9 [1920] 1 KB 829

10 [1981] 1 AC 909, 977

a prisoner's fundamental right of access to the courts.[11] In ***R v Secretary of State for the Home Department, ex p Anderson*** the Divisional Court extended the principle by concluding that it was unlawful to impede a prisoner's right to legal advice which was inseparable from his right of access to the courts.[12] That development flourished in the 1990s in cases such as ***R v Secretary of the Home Department, ex p Leech (No 2)*** where the Court of Appeal considered whether the right of access was restricted by necessary implication; and took the view that this depended on showing there was a self evident and pressing need for the interference which was the minimum necessary to ensure that the need was met.[13]

In ***R v Lord Chancellor, ex p Witham*** Laws J described the statutory presumption that general words cannot take away rights as creating constitutional rights.[14] This trend was also reflected in academic literature: in Sir John Laws' seminal article 'Is the High Court the Guardian of Fundamental Constitutional Rights';[15] and in Murray Hunt's innovative book *Using Human Rights Law in the English Courts*, where he argued that the time had come for judicial recognition of an obligation to construe domestic law in conformity with international rights norms.[16]

The recent cases

Since the enactment of the HRA there have also several significant cases which have turned on common law rights. In ***R (West) v Parole Board*** the House of Lords rejected arguments based on Articles 5 and 6, but held that the obligation to grant an oral hearing to prisoners to parole boards was based on common law fairness.[17] In ***R (Daly) v Secretary of State for the Home Department*** the House of Lords held that a policy to search cells in the absence of prisoners was unlawful when it

11 [1983] 1 AC 1, 10.
12 [1984] 1 QB 778.
13 [1994] QB 198
14 [1998] QB 575
15 [1993] PL 59
16 Hart Publishing, 1997
17 [2005] 1 All ER 755

applied to correspondence with solicitors, on the ground that it infringed the prisoner's common law right that the confidentiality of privileged legal correspondence be maintained.[18]

In ***R (Anufrijeva) v Secretary of State for the Home Department*** the House of Lords held that it was a fundamental and constitutional principle of the English legal system and a requirement of the rule of law that notice of a decision was required before it could have the character of a determination with legal effect. Lord Steyn observed that:[19]

> the Convention is not an exhaustive statement of fundamental rights under our system of law. Lord Hoffmann's dictum in ***Simms*** applies to fundamental rights beyond the four corners of the Convention.

In ***A v Secretary of State for the Home Department (No 2)*** the House of Lords' rejection of the admission of evidence obtained by torture was, again, based on the common law.[20] The right of access by the Press to documents discussed in open court was decided on a common law basis in ***R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court;*** and in ***Osborn v Parole Board*** the Supreme Court returned to the question of when fairness required an oral hearing.

The 'common law's emphatic reassertion in recent years of the importance of constitutional rights'[21] has resulted in the very new edition of *De Smith* cataloguing the following common law rights:

- Access to a judicial remedy;
- The right to life;
- The liberty of the person;
- The doing of justice in public;
- The right to a fair hearing;
- The prohibition on the retrospective imposition of criminal penalty;
- Freedom of expression;

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18 [2001] 2 AC 532
19 [2004] 1 AC 604 [27]
20 [2006] 2 AC 221
21 As Brooke LJ put it in D v Secretary of State for the Home Department [2006 1 WLR 1003 at [130]

- The rights of access to legal advice and to communicate confidentially with a legal adviser under the seal of legal professional privilege;
- Limitations on searches of premises and seizure of documents;
- Prohibition on the use of evidence obtained by torture;
- That a British citizen has a fundamental right to live in, or return to, that part of the Queen's territory of which he is a citizen;
- The deprivation of property rights without compensation;
- The privilege against self-incrimination;
- A duty on the State to provide subsistence to asylum-seekers; and
- Freedom of movement within the United Kingdom.

An expansive approach to common law rights has a number of benefits.[22] It permits opportunities for cross fertilisation between Convention rights and common law rights, although this is unlikely to occur until the Supreme Court relaxes the principle that under the HRA the domestic courts should mirror the Strasbourg jurisprudence. It will enable the courts to develop autonomous principles from the HRA, which may be important if the right claimed cannot be grounded in Convention case law, if the claimant cannot prove he is a victim as defined by s 7 of the HRA or if the campaign to abolish the HRA gathers greater force.

But there are a number of practical difficulties which limit the impact of common law. First, the identification of common law rights is not straightforward, and may be ultimately, opened ended. Secondly and more importantly, the status of rights in English law is a powerful break on the reach of common law rights.

Identifying common law rights

[22] See eg M Fordham Common Law Rights [2011] JR 14

Common law rights are often labelled as constitutional or fundamental[23] rights. However, in ***R v Lord Chancellor ex p Lightfoot*** Laws J emphasised that the law should be astute to confine the concept of constitutional right to that special class of rights which, in truth, everyone living in a democracy under the rule of law ought to enjoy. He equated these constitutional rights with those contained in the European Convention.[24]

Nevertheless, it is difficult to define 'constitutional rights', as Lord Rodger demonstrated in ***Watkins v Home Office***, the case where the House of Lords reversed the Court of Appeal's holding that damages for misfeasance in a public office could be awarded breaching constitutional rights.[25] Lord Rodger said there was no magic to the term 'constitutional right'[26] and drew attention[27] to the House of Lords decision in ***Nairn v University of St Andrews*** where female graduates of St Andrews and Edinburgh sought a declaration that they were entitled to vote as a 'person' under the Representation of the People (Scotland) Act 1868. [28] In ***Nairn*** the House of Lords decided that the legislation did not confer a right to vote on women graduates. According to Lord Loreburn LC 'it would require a convincing demonstration to satisfy me that Parliament intended to effect a constitutional change so momentous and far-reaching by so furtive a process.' [29] Similarly, Lord Ashbourne said, 'if it was intended to make a vast constitutional change in favour of women graduates, one would expect to find plain language and express statement.'[30] Lord Rodger accepted that the phrase constitutional rights 'work well enough' for statutory interpretation, but he pointed out that in using the language of 'constitutional rights', the judges were, more or less explicitly, looking for a means of incorporation *avant la lettre*, of having the common law supply the benefits of incorporation without incorporation; and that now that the HRA is in place, such heroic efforts are unnecessary. However, he rejected the concept for the purposes of developing tort law.[31]

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23 As Lord Scarman described the right to privacy in ***Morris v Beardsmore*** [1981] AC 446 at 464
24 [2000] Q.B. 597 609. His decision was affirmed by the Court of Appeal.
25 [2006] 2 AC 395
26 Above, [59]
27 Above [60]
28 [1909] AC 147
29 Above at p 161
30 Above at p 163
31 Above [62]

It is therefore open to question whether the words 'constitutional' or 'fundamental' add anything to the search for common law rights. Sometimes it will be possible to search the international human jurisprudence to arrive at a consensus on broad human rights issues, such as the House of Lords achieved in ***Derbyshire County Council v Times Newspapers*** when deciding whether the right to freedom of expression precluded a public body from brining proceedings for defamation.[32] But this approach ignores the possibility of home grown common law rights, like the constitutional right to a jury trial, as Lord Diplock found in ***Gourier v A-G***.[33] I would argue that in the final analysis, the list of common law rights is inherently contestable, which explains why the textbooks give different lists of common law rights.[34]

The status of common law rights

However, the most serious limitation on common law rights is that their precarious status in English law. Rights enacted by the HRA create positive obligations (whether absolute or qualified) with which a public authority must comply under s 6 of the HRA. By contrast, where statute interferes with common law rights, there is a statutory presumption which Lord Hoffmann described in ***R v Secretary of State for the Home Department, ex p Simms***:[35]

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their

32 [1993] AC 534; and see, in particular, the approach of the Court of Appeal [1992] Q.B. 770

33 [1978] AC 435, 499 The accused has the constitutional right to be tried by jury and his guilt established by reference to the criminal standard of proof.

34 Compare the list of common law rights in De Smith above with those discussed eg in Beatson, Grosz *Human Rights Protection in the United Kingdom* (Sweet & Maxwell, 2008) [1-22]-[1-34] and in Clayton and Tomlinson *The Law of Human Rights* (OUP, 2nd edn, 2009) [1.198].

35 [2000] 2 AC 115, 131

> unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

The principle of legality does not preclude the possibility that the presumption can be rebutted, as Lord Bingham found in the stop and search case, ***Gillan v Metropolitan Police Commissioner***. He decided that the principle of legality did not apply- even if the Terrorism Act infringed a fundamental human right, itself (he said) a debatable proposition, they do not do so by general words but by provisions of a detailed, specific and unambiguous character.[36] That approach was, however, rejected when the case came before the ECtHR which held that the powers of authorisation and confirmation as well as those of stop and search under are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse; and were therefore not 'in accordance with law' under Article 8.[37]

Proving the breach of a common law right can also be contentious. For example, in ***R(Gujra) v Crown Prosecution Service*** the Supreme Court rejected a challenge to the lawfulness of the DPP's policy when taking over a private prosecution; and disagreed whether the policy breached the principle of legality by interfering with the right of access to the Court.[38]

Human rights are also of course protected under general administrative law principles. Thus, in ***R v Ministry of Defence, ex p Smith***, the gays in the military case, the Court of Appeal said that the more substantial the interference with human rights, the more the court would require by way of justification before it was satisfied that the decision was ***Wednesbury*** reasonable. Nevertheless, the

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36 [2006] 2 AC 307 para 15

37 ([2010] ECHR 28 [138]

38 [2013] 1 AC 484; for the majority, only Lord Neuberger referred to the principle of legality in passing [51] whereas Lord Mance regarded the constitutional right of access to the Court as an important issue on the case [107]-[108] ; Lady Hale agreed with Lord Mance's judgment.

limits of ***Wednesbury*** were criticised by the ECtHR in ***Smith and Grady v United Kingdom***; the ECtHR held that the threshold for finding the policy irrational was so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights was proportionate

But there are other profound problems in asserting common law rights in administrative law cases. The application of administrative law principles is often fluid and uncertain, and different outcomes in a case may appear to be equally arguable. The paradigm case of ***R v Cambridge Health Authority ex p B*** is illustrative. A 10 years old girl was diagnosed with non-Hodgkins lymphoma and underwent two courses of chemotherapy but relapsed. Her doctors believed that no further treatment could usefully be administered to her, estimating that she had six to eight weeks to live. Her father then obtained an opinion which estimated her chances of recovery at 10% to 20% and sought funding for that treatment. Laws J held that the fundamental right to life was engaged[39] and that the reasons for refusal of the treatment were not justified, taking the view that the responsible authority must do more than toll the bell of tight resources and explain the priorities which lead them to refuse treatment.[40] The Court of Appeal reversed Laws J's holding. Sir Thomas Bingham MR acknowledged that the life of the young girl dominated consideration of all aspects of the case,[41] but disagreed on the facts when analysing the justification put forward by the health authority. He said that judgments concerning the allocation of budgets were not a matter for the Courts, so it is not a fair criticism that the public body had failed to advance such evidence.[42]

The upshot for the jobbing practitioner is that common law rights will ordinarily have less forensic impact than utilising positive Convention rights under the HRA. Ultimately, the doctrine of parliamentary sovereignty, the principle that rights are residual and the traditional status the common law accords to rights all combine to limit their impact.

39 (1985) 25 BMLR 5 [11]
40 Above, [17].
41 [1995] 2 FCR 485 at 492
42 Above at 493

The recent revival

It is therefore important to appreciate that some of the recent common law rights cases have unusual features which it is critical to indentify.

The two cases on fairness and the obligation to give oral hearings in parole cases, ***West*** and ***Osborn***, apply well established administrative law principles which are very different from invoking Convention rights. As Lord Reed emphasised, whether procedural fairness requires an oral hearing is a question the Court itself must determine. The Court's function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required. Fairness is a hard edged legal question and, in effect, public law fairness gives rise to a positive entitlement that the claimant must enjoy.

There are elements of the ***Guardian News*** case which are, again, striking. ***Guardian News*** concerned the extradition of two British citizens on corruption cases to the United States. Journalists had attended hearings, where counsel referred to documents not read out in detail, including the skeleton arguments, affidavits and witness statements. The District Judge refused to order that the claimants be provided with copies or inspection which was upheld by the Divisional Court, but reversed by the Court of Appeal. The Court of Appeal decided that the requirements of the common law constitutional principle of open justice had to be determined by the Court in the exercise of its inherent jurisdiction, subject to any statutory provision to the contrary. These requirements applied to all tribunals exercising the judicial power of the state, irrespective of whether they were creatures of statute.

As in the fairness cases of ***West*** and ***Osborn***, the Court of Appeal in ***Guardian News*** decided that application of the common law right in issue, open justice, was a hard edged issue of law- which was a matter for the Court to decide and apply. The Court was the master of its own procedure and therefore required to give effect to the constitutional right of open justice. As a result, the Court of Appeal avoided the need to resolve the question whether Article 10 entails a right of access to

information- an issue where Strasbourg courts in flux, but is likely to be decided very soon by the Supreme Court's decision in ***Kennedy v Charity Commission***.[43]

It is therefore submitted that ***West***, ***Osborn*** and ***Guardian New***s are very unusual and unrepresentative common law rights cases; and do not reflect the more general principles which apply to common law rights.

Modifying the principle of legality

However, the position would alter if some fundamental underlying principles were modified. In ***R (Jackson) v A-G*** Lords Steyn,[44] Hope[45] and Hale[46] suggested that, because the principle of parliamentary sovereignty is a common law construct, it would be open to the Supreme Court to decline to give effect to legislation abolishing judicial review.

An idea with more potential impact is the suggestion that the principle of legality could be modified, so that it is interpreted along the lines of section 3 of the HRA. In other words, could the courts adopt a rule of statutory construction that so far as possible, legislation must be interpreted to give effect to common law rights? There is no reason in theory, at any rate, which would prevent the courts developing such a principle. But there are formidable obstacles which need to be addressed. First, there may well be no obvious or compelling rationale for this development, beyond the fact that Parliament abolished the HRA. Secondly, the modified principle has no legal pedigree, unlike

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43 In ***Sugar v BBC*** [2012] 1 WLR 439 the Supreme Court decided that Article 10 did not confer a right of access to information based on a number of older ECtHR cases confirmed by the Grand Chamber decision in ***Roche v United Kingdom*** (2005) 42 EHRR 599 [172] and had not been overtaken by a number of more recent cases which took a different view (***Matky v Czech Republic*** Judgment, 10 July 2006, ***Tarsasag A Szabadsagjogokert v Hungary*** (2009) 53 EHRR 130 and ***Kenedi v Hungary*** Judgment 26 August 2009): see Lord Brown [88-97], Lord Wilson [58] and Lord Mance [113]. In ***Kennedy v Charity Commission*** the Supreme Court have been asked to depart from ***Sugar*** on the basis that a number of ECtHR cases have, again, held that Article 10 confers a right of access to information: see ***Gillberg v Sweden*** (2013) (GC) 34 BHRC 247, ***Youth Initiative for Human Rights v Serbia*** Judgment, June 25, 2013 and ***Österreichische Vereinigung zur Erhaltung, v Austria*** Judgment, 28 November 2013 (which was decided after argument had concluded). Judgment in ***Kennedy*** is awaited.

44 [2006] 1 AC 262.[102]

45 Above, [107]

46 Above, [159]

the long established principle of legality. Thirdly, it is difficult to reconcile the reasoning to justify the modified principle with ***Brind***- where the House of Lords rejected the broad argument that legislation should be interpreted in conformity with the European Convention, but accepted that it might be used to resolve ambiguity or uncertainty in a statutory provision.[47] There are other difficulties of principle to overcome; so that the modification of the principle of legality is not straightforward.

Conclusion

I would argue that weak status the common law accords to rights protection is a fundamental obstacle to their future development. Although some of the recent cases suggest that common law rights must not be overlooked, their general significance should not be overstated.

[47] [1991] 1 A.C. 696