

A resurgence of common law constitutionalism?

Why?

Paul Bowen QC

Brick Court Chambers

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Introduction

- Common law rights are ‘on the march’

- *Osborn*, Lord Reed

The importance of the [HRA] is unquestionable. It does not however supersede the protection of human rights under the common law or statute, or create a discrete body of law based upon the judgments of the European court. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate.

- *Kennedy v Information Commissioner*, Lord Toulson

... it was not the purpose of the Human Rights Act that the common law should become an ossuary.

Why are common law rights ‘on the march’?

- Judges don’t like Strasbourg judgments and prefer rigour of common law?
- Desire to escape *Ullah* to extend rights beyond those in Convention?
- Home-grown rights given more respect by ECtHR?
- Common law reflects more closely the history, traditions and culture of the UK?
- Concern at imminent repeal of the HRA?
- But is it because of a consensus that the common law now covers the same ground as the ECHR/ HRA? **No**

How do we measure the protection of human rights?

- Normative reach, protective rigour and constitutional resilience (Prof. Mark Elliott)
- Normative reach
 - Rights vs. liberties
 - Positive obligations
- Protective rigour: Tom Bingham, ‘The rule of law’
 - Equal protection of law
 - Quality of the law: knowable, understandable, predictable
 - Public authorities must act lawfully
 - Effective remedies for breach of rights

The protection of rights under the ECHR

- Normative reach
 - The Convention rights
 - Dynamic interpretation: ‘living instrument’, ‘practical and effective’, Art 1
 - Positive obligations
- Mechanisms for protection of rights
 - The structure of rights adjudication
 - Categories of rights
 - ‘Lawfulness’
 - Legitimate aim
 - Fair balance and proportionality
 - Margin of appreciation
 - ECtHR: Art 33, 34, 46; Protocol 11
 - Statute of Council of Europe, Arts 3 and 8

The protection of rights under the HRA

- Normative reach
 - S. 1 and Sch. 1 - the Convention rights
 - S 2: *Pinnock, Horncastle, Ullah, Rabone, Nicklinson*
- Mechanisms for protection of rights
 - Ss 6, 7 and 8: unlawful acts, procedures and remedies
 - S 3 : statutory interpretation, *Ghaidan*
 - Ss 4 and 10: declarations of incompatibility
 - Fair balance and proportionality, *Bank Mellat*
 - The discretionary area of judgment

The domestic protection of human rights

- Normative reach
 - The Unwritten Constitution
 - Magna Carta and constitutional statutes, other statutes
 - Common law
 - International law
- Mechanisms for protection of rights
 - Public law principles and common law principle of equality
 - Protection of fundamental rights:
 - Principle of legality, *Simms*
 - Ultra vires and subordinate legislation
 - *Wednesbury* unreasonableness and anxious scrutiny
 - Common law and statutory remedies

Do common law rights occupy the same ground as the ECHR and HRA? (1) Normative reach

- Advantages of common law
 - (1) Rights and remedies are enforceable against private individuals and corporations
 - (2) Statutory rights usually go beyond those guaranteed by the Convention
 - (3) Common law trumps ECHR: legal privilege?
- Advantages of ECHR/ HRA
 - (1) Dynamic interpretation
 - (2) Positive obligations
 - (3) Rights vs. privileges

Do common law rights occupy the same ground as the ECHR and HRA? (2) Protective rigour

- ECHR/ HRA trumps common law
 - (1) Interpretative obligation: s 3 HRA vs. principle of legality
 - (2) The Strasbourg concept of ‘lawfulness’
 - (3) Legitimate aim
 - (4) Unreasonableness vs. proportionality
 - (5) Remedies for breach
 - (6) Declarations of incompatibility
 - (7) Availability of legal aid to vindicate breaches of rights
 - (8) The jurisdiction of the European Court of Human Rights

Do common law rights occupy the same ground as the ECHR and HRA? (3) Constitutional resilience

- ECHR/ HRA shades common law
 - Common law:
 - Parliamentary sovereignty, Dicey
 - Could courts overturn primary legislation as unconstitutional?
 - Yes: Lord Cooke; *Jackson & Axa* (Hope & Hale), *Moohan* (Hodge),
 - No: Bingham and Neuberger
 - In any event only in most exceptional circumstances
 - ECHR/ HRA:
 - HRA is not entrenched so can be repealed, although not by implication
 - ECHR rights are more resilient, however, if only because of political pressure

Conclusion and Questions

- What about a British Bill of Rights?
 - Normative reach:
 - Likely to be reduced reach compared to HRA e.g. more limited jurisdiction over acts of military in overseas operations
 - Courts may feel emboldened to go further than under HRA: contrast, e.g., *Nicklinson* with *Carter v Canada* and *Stransham-Ford* (SA)
 - Protective rigour: Will have to wait and see
 - Constitutional resilience: Entrenched?
- Questions?

Thank you

Paul Bowen QC

www.brickcourt.co.uk

brickcourt.co.uk
+44 (0)20 7379 3550

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