

Fundamental Rights and the Common Law

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An examination of fundamental rights and the common law in detail would fill a book, but I believe that there may be some interest and value in a more general overview. In that spirit, I have three points:

1. Over centuries the common law has developed rights which have come to be regarded as fundamental.
2. The rights set out in the European Convention on Human Rights and Fundamental Freedoms are closely associated with rights well recognisable to common lawyers but which, like all common law rights, are capable of further development.
3. Paradoxically, the enactment of the Human Rights Act has sometimes distracted lawyers from proper attention to the common law. It was not the purpose of that Act to supplant, sideline or freeze development of the common law.

My subject concerns the law as it stands and, in particular, the common law. I shall not be considering arguments or offering opinions about the general merits of Convention or the Act. Nor shall I be considering general questions about the value of codification, about which much depends on the particular form and purpose.

We have this year celebrated the 800th anniversary of Magna Carta, which Lord Bingham took to be the first landmark in the development of Rule of Law in his book on that subject.

Magna Carta was a hotchpotch of provisions, including some which are fundamental to the rule of law. In it King John promised that “We will not appoint Justices except from such as who know the Law of the Kingdom and are willing to keep it well”. However, that promise did not stop kings from dismissing judges who displeased them. Matters came to a head in the 17th century with civil war, resulting in the execution of King Charles I in 1649, followed by a more peaceful revolution in 1688 (known as the Glorious Revolution) in which King James II was forced into exile. In another landmark code, the Bill of Rights 1688, the king accepted that judges should continue to hold office “quamdiu se bene gesserint” (for as long as they behave properly), establishing the principle of the independence of the judiciary which has now been re-stated in the Constitutional Reform Act 2005. Codes can have constitutional value.

When we come to the Human Rights Act the most striking features are not so much the language of the rights in themselves which the Act was intended to protect, but rather its provisions for their application and interpretation. In that respect Parliament took a number of novel steps. It made it a tort for a public body to breach Convention rights. It required the Minister promoting a bill to make a statement to Parliament as to its compliance with the Convention in its considered opinion. It placed an express duty on courts to interpret legislation as far as possible so as to be compatible to the convention. If that was not possible, it provided for the court to make a declaration to that effect, in which case the matter would return to Parliament for its consideration. It required courts to have regard to any decision of the European Court of Human Rights. The words were carefully chosen and mean what they say, no less and no more. Parliament deliberately did not subordinate the courts of the UK to the Strasbourg Court. If after careful consideration the UK court reaches a

different view from that reached by the Strasbourg Court, the domestic court must rule as it believes to be right. None of this was intended to put a stranglehold on the common law. Its capacity for development is one of the strengths of the common law system. In *Michael v Chief Constable of South Wales* [2015] 1 AC 1732, paragraph 102, I put forward this description of the common law method of development in the context of a negligence claim, but the method applies to the common law generally [2015] 2 WLR 253:

The development of the law... has been by an incremental process rather than giant steps. The established method of the court involves examining the decided cases to see how far the law has gone and where it has refrained from going. From that analysis it looks to see whether there is an argument by analogy for extending liability to a new situation, or whether an earlier limitation is no longer logically or socially justifiable. In doing so it pays regard to the need for overall coherence. Often there will be a mixture of policy considerations to take into account.

With those preliminary comments I turn to the first point. First, I must clarify what I mean by fundamental rights. Like so much in the common law, the words express a concept which is well understood but has no precise definition in the case law. The common law is the soil in which our courts work and have nurtured the rights which have come to be regarded as part of the essential framework of the law.

One example is enough. In *Woolmington v DPP* [1935] AC 462, 481, Viscount Sankey, LC famously articulated a fundamental principle of the criminal law:

“Throughout the web of the English Criminal Law, one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner’s guilt.”

Because Parliament is supreme, it can override fundamental rights. Some statutes place the burden of proof on certain issues on the defendant, and in the passage which I have cited Viscount Sankey added “subject to any statutory exception”, although the burden is never placed on the defendant on the primary issue whether he did the act alleged.

Courts will construe legislation in a way which departs from fundamental rights only if compelled to do so after the closest scrutiny. This is not a new principle. In *United States v Fisher* 2 Cranch (6 US) 358,389 (1805), Chief Justice Marshall wrote:

“Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects. But where only a political regulation is made, which is inconvenient, if the intention of the legislature be expressed in terms which are sufficiently intelligible to leave no doubt in the mind when the words are taken in their ordinary sense, it would be going a great way to say that a constrained interpretation must be put upon them, to avoid an inconvenience which ought to have been contemplated when the act was passed, and which, in their opinion, was probably overbalanced by the particular advantages it was calculated to produce.”

More recently this principle has come to be known as the principle of legality. In *R v Secretary of State for the Home Department, ex p Simms* [2002] 2 AC 115 (HL) Lord Hoffmann stated this principle in the following terms:

“[T]he 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 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.”

It is noteworthy that in stating this broad principle Lord Hoffmann did not attempt to define what he meant by fundamental rights.

Since World War II, public law has been the biggest area of development of principles which have come to be regarded as a fundamental part of our system of law and government. It has resulted from the great expansion of statutory powers given to ministers, local authorities, departmental agencies and non-departmental public bodies, which may affect considerably the rights of individuals.

Starting from the principle that powers conferred by statute are intended to be used for the purposes of the statute and in a manner which is fair and rational, the courts have developed a body of public law principles. All this is now part of the common law. This branch of the law is indelibly associated with *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, but it was really the decision of the House of Lords in *Padfield v Ministry of Agriculture* [1968] 997 which ushered in a new era, and Lord Reid,

who gave the leading opinion in that case, has a fair claim to be regarded as its chief architect. The principles of public law built on that foundation may now be described as fundamental.

Moving to my second point, it has often been noted by distinguished jurists that it is not necessary to have a code in order to have effective fundamental rights, and conversely that the enactment of a code of fundamental rights does not necessarily ensure their effective recognition.

Dicey in his *Introduction to the Study of the Law of the Constitution*, (1885, pages 198-199) observed of the French constitution of 1791 that despite its “proclaimed liberty of conscience, liberty of the press, the right of public meeting, the responsibility of government officials, there never was a period in the recorded annals of mankind when each and all of these rights were so insecure, one might almost say so completely nonexistent, as at the height of the French Revolution.” By contrast he considered the common law to have the advantage of enabling the rights which had been developed by the courts to be enforced by them: “there runs 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”.

In similar vein Professor Sir Ivor Jennings commented in *The Approach to Self-government* (1956, page 20) that “[i]n Britain we have no Bill of Rights; we merely have liberty according to the law; and we think ... that we do the job better than any country which has a Bill of Rights or a Declaration of the Rights of Man”. Jennings was no jingoist. The foremost or one of the foremost constitutional lawyers of his time, he was the author of many Commonwealth constitutions.

It was against that intellectual backdrop that British jurists joined continental counterparts in devising a European code of human rights. What did the British government in 1951 think was to be gained by supporting the idea? Britain's role has been well rehearsed but perhaps bears brief repetition.

One of the principal architects was the Home Secretary, David Maxwell-Fyfe QC, acting with the strong support of the Prime Minister, Winston Churchill, and assisted in the drafting by scholars including the All Souls scholar, Eric Beckett. The UK was the first country to ratify the Convention and Lord McNair was the first President of the court.

Maxwell-Fyfe had a common law background, having practised at the bar on the Northern Circuit, and was part of the UK prosecution team at Nuremberg with responsibility for its day to day conduct. That was an influential factor. His purpose and that of others in the British government was to internationalise human rights which British citizens had long enjoyed.

According to a press cutting of 17 May 1951, Maxwell Fyfe noted that “[p]eople in Britain are completely uninterested in human rights, because, of course, they have never seen them go like some of the other fifteen nations who have adopted the Convention”. Eric Beckett had observed in June 1946 that “[h]uman rights are observed in British territory better than almost anywhere but it is not easy to explain. We have no constitution where the right of free speech etc is written down”.

It comes as no surprise that it is easy to relate the language of the Convention to common law principles.

So much for the thoughts of the founders. I turn to the contents of the Convention from a common law perspective.

A full examination of each area would be beyond the scope of this talk, but it is possible from a more cursory look to make observations regarding the operation of the common law and its capacity for adaptation to meet new circumstances and new challenges.

I begin with access to justice (the subject of article 6) and its counterpart open justice, because the rule of law as we know it cannot exist without it.

In 1981 after ratification of the Convention but without reliance on it, Lord Diplock held in *Bremer Vulcan v South India Shipping* [1981] AC 909, 971, that every citizen had a constitutional right of access to the court. Similar assertions are not infrequent. In 1983 in *Raymond v Honey* [1983] 1 AC 1, 10, Lord Wilberforce noted that a prisoner retained all his rights not removed expressly or by necessary implication with the result that section 47 of the Prison Act 1952 was inadequate to restrict a prisoner's "fundamental right of access to the courts". One year later, in *ex p Anderson* [1984] QB 778 the Divisional Court included access to legal advice as an ineluctable constituent of general access to the courts, developing the right without reference to the Convention and prior to any obligations under the Human Rights Act.

There have been times when Parliament has passed legislation seeking to oust the court's ability to consider the legality of a determination by a public body: see *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. In that case the court disposed of the jurisdictional problem by holding

that a purported determination was not a determination in law because the commission had misconstrued its own jurisdiction: a classic common law response. Since then that type of ouster legislation has fallen out of fashion.

Two recent cases concerning the common law principles of open and accessible justice are significant, particularly in relation to my final point.

In *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618, paragraph 88, I commented that “The development of the common law did not come to an end on the passing of the Human Rights Act 1998.”

In *Kennedy v Information Commissioner* [2015] AC 455 Lord Mance said at paragraph 46 that “[s]ince the passing of the Human Rights Act 1998, there has too often been a tendency to see the law in areas touched on by the Convention solely in terms of the Convention rights... the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene.” I added at paragraph 133 that “there has sometimes been a baleful and unnecessary tendency to overlook the common law. It was not the purpose of the Human Rights Act that the common law should become an ossuary.”

Torture (article 2) has long been abhorrent under English law. Lord Bingham said in *A v Home Secretary* [2005] UKHL 71, paragraph 11:

It is, I think, clear that from its very earliest days the common law of England set its face firmly against the use of torture. Its rejection of this practice was indeed hailed as a distinguishing

feature of the common law, the subject of proud claims by English jurists such as Sir John Fortescue... Sir Edward Coke Sir William Blackstoneand Sir James Stephen.

He continued that their received opinion was not weakened by the “doubtful validity” of the sources on which they relied including “chapter 39 of *Magna Carta 1215 and Felton's Case as reported by Rushworth*”.

Professor John Langbein’s study of the subject in *Torture and the Law of Proof* shows Coke in a different light. His book includes a list of 81 cases in which a torture warrant was issued by the Privy Council during the 16th and 17th centuries. The warrants in the case of Guy Fawkes and his fellow conspirators provided for “the gentler tortures first and then by degrees.” In contrast to what Coke said about the unacceptability of torture in his *Third Institute*, written in the 1620s, he was named as Solicitor General or Attorney General in six torture warrants issued between 1593 and 1603. At the time of his writing there is evidence that the manacles and rack were still being used on occasion, although it seems that the practice had by then become rare and there is no evidence of torture in that sense after 1640.

The stocks and pillory continued to be in common use, and the standards of what is permissible treatment of a suspect or an offender have gradually changed. Sadly it remains a topical subject and methods of interrogation have been used in recent memory which would today be contrary both to the common law and to article 6.

In relation to freedom of speech (article 10), Lord Goff in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 282-284, observed “no inconsistency between English law on this subject and article 10 of the European Convention on Human Rights. This is scarcely surprising, since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not

longer than, it has existed in any other country in the world. The only difference is that, whereas article 10 of the Convention, in accordance with its avowed purpose, proceeds to state a fundamental right and then to qualify it, we in this country (where everybody is free to do anything, subject only to the provisions of the law) proceed rather upon an assumption of freedom of speech, and turn to our law to discover the established exceptions to it”.

In *Derbyshire County Council v Times Newspapers* [1993] AC 534, 551, Lord Keith (delivering a unanimous judgment in the House of Lords) reached a conclusion on the extent of a right to freedom of speech having carried out the balancing exercise requisite for the purposes of Article 10 of the Convention. He did so “upon the common law of England without finding any need to rely upon the European Convention.”

Turning to some of the other rights in the Convention, Article 4’s protection against forced labour can find correspondence in Lord Atkin’s statement of the common law principle that “the right to choose for himself whom he would serve constitutes the main difference between a servant and a serf”: *Nokes v Amalgamated Doncaster Collieries* [1940] AC 1014, 1026.

Article 5’s protection of liberty and security subject only to lawful detention had a pre HRA equivalent in the common law requirements for an arrest: *R v Howell (Erroll)* [1982] QB 416, 426. The common law’s willingness to limit the circumstances in which the police could arrest can be seen in the 1966 judgment of *Rice v Connolly* [1966] 2 QB 414, where the Court of Appeal held that a person cannot be arrested for refusal to answer questions (except possibly in extreme circumstances, see James J at 421) and is under no legal duty to accompany police officers per se.

The common law's rules against retroactivity both generally and specifically in the criminal sphere existed in an array of presumptions. Sir Owen Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261,267, held that "The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events". As noted in Maxwell on *The Interpretation of Statutes*, 12th ed, 1969, page 215, this is based "Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation.". This creates some precedent for Article 7's provision on retroactivity of criminal offences (though obviously both are subject to Parliamentary sovereignty.)]

Turning to private and family life, I do not wish to make any general comments about article 8, which is not only politically controversial but far too big a subject to be dealt with in a few passing remarks. But I do want to say something more specific about its impact on the development of the common law regarding privacy. This was an area about which judges said that they considered the law to be defective but that its remedy lay with Parliament. ("This right has been so long disregarded here that it can be recognised now only by the legislature" was Leggatt LJ's judgement in *Kay v Robertson* [1991] FSR 62. This was followed by *Wainwright v Home Office* [2004] 2 AC 46, in which Lord Hoffman distinguished between privacy as a value underlying the existence of some legal right and privacy as a legal right in itself holding that any protection of privacy was for Parliament.) Parliament dealt with the matter in an oblique way by incorporating article 8 into domestic law. The courts responded by incorporating certain aspects of privacy within the law of confidentiality. It has not been a tidy process and it is still being worked out.

Looking at the subject of fundamental rights and the common law more generally, it would be quite wrong to ascribe the development and protection of fundamental rights entirely to the courts. To do so would undervalue the role of Parliament.

Magna Carta was a statute, frequently re-enacted and parts of which remain on statute today. The revolutionary battles of the 17th century fought by Coke and other common law lawyers was fought in Parliament as well as in the courts. The battles for the rights of women to vote were fought in Parliament.

In more recent times it was Parliament which has passed legislation on equality and on protection of personal data and, of course, it was Parliament which passed the Human Rights Act.

The truth is that fundamental rights depend on a combination of factors. These include the willingness and ability of the courts to develop the common law and to defend fundamental rights, while recognizing that in a Parliamentary democracy, Parliament has the final word and the willingness of Parliament to protect the fundamental rights of all people under its sovereignty and to respect the judgment of the courts. Sir John Laws in his Hamlyn Lecture, “An Act of Parliament is words on a page: Only the common law gives it life.” I do not quite subscribe to that view. An Act of Parliament and the common law have the capacity to give life to fundamental rights.

That brings me to my third point, which I have largely anticipated. There was a period after the enactment of the Human Rights Act when some saw the Act a “eclipsing” common law fundamental principles, to repeat a phrase used by Dr Mark Elliott in an article “*Beyond the European Convention:*

Human Rights and the Common Law.” In terms of judicial comments perhaps the high water mark was Lord Rodger’s remark in *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395 at 64, that where a matter is not already covered by the common law but is within the scope of a Convention right, a claimant can be expected to invoke his remedy under the Act rather than seek to fashion a new common law right. But the common law itself develops, and if for a time it was partially eclipsed, I believe that the eclipse has now passed.

More recently Lord Reed said in *Osborn v Parole Board* [2013] UKSC 61, [2014] AC 1115 at 57:

“Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate.”

Common law principles continue to be developed in other parts of the common law world, including countries which have codes of rights. It was sometimes said that the purpose of the Human Rights Act was to bring human rights home, as if they did not exist here. It would be worse than ironic if it led to neglect of our home grown product, which we have exported to other countries where it continues to flourish.

The common law has never been a finished article, and it cannot be while society itself continues to change. It can be untidy, but that is a reflection of the complexity of life. Benjamin Cardozo wrote that the tide ebbs and flows and the sands of error crumble. The tide can also cause sandbanks. But the common law has served us well in its capacity to develop fundamental principles. It retains that capacity. It is no time for a funeral oration.