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COMMON LAW RIGHTS

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Introduction

1. The Human Rights Act 1998, which came into force in October 2000, was a wonderful achievement for the protection of human rights in United Kingdom law. It allowed domestic judges directly to appraise, apply and enforce the content of the prescribed rights found within the European Convention on Human Rights. It allowed practical and effective ECHR-shaped remedies to be given in domestic courts. It supplied strong standards for public authority accountability, and a powerful tool of radical statutory interpretation to secure compatibility. And it enabled the Courts to say that they had a mandate to act in these ways, given to them by Parliament as the supreme legislator. For this was Parliament's human rights solution, and the Courts were merely playing the part given to them by Parliament.

2. It is no surprise that domestic human rights law became fixated, after October 2000, with the HRA and the ECHR which it mirrors. There would be no harm in that, if the content and reach of the ECHR rights were properly to be seen as the final word on the protection of rights under the rule of law. And provided, of course, that the HRA is not repealed.

3. The HRA is, however, emphatically not the 'be all and end all' for domestic human rights protection under United Kingdom law. It is appropriate to examine the common law's pre-existing underlay, and to identify the scope for invocation of rights beyond the HRA:ECHR. Organic growth needs light, and perhaps there are dangers in the shadows cast by the HRA, which stand to inhibit the progressive development of the common law in the context of the protection of rights.

Principles

4. Two key and complementary principles of common law human rights protection had been developed in the years before the HRA. The first common law principle was the doctrine of *"anxious scrutiny"* which had grown out of the basic common law standard of reasonableness applicable to all public authorities. By the 1990s, the Courts were embracing a principle for protection against 'unjustified' rights-interferences, framed as follows: *"The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable"* (*R v Ministry of Defence, ex p Smith* [1996] QB 517 (CA), 554E-G per Sir Thomas Bingham MR).

5. The second common law principle was the *"principle of legality"* which had grown out of the basic common law standard of ultra vires applicable to all public authorities wielding statutory powers. By the 1990s the Courts were embracing this as another route to protection against unjustified rights-interferences, in the following terms: *"the right in question cannot be abrogated by the state save by specific provision by an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate"* (*R v Lord Chancellor, ex p Witham* [1998] QB 575 (DC), 581E-F per Laws J).

6. These two principles could properly be seen as the common law's analogues of the statutory duties enacted in section 6 and section 3 of the HRA. The parallel between the common law and the imminent HRA was famously drawn by Lord Hoffmann in *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 at 131D-132C. Anxious scrutiny, like the section 6 duty, is in the nature of an external prohibition on the use of powers. The principle of legality, like the section 3 duty, is in the nature of an internal inhibition. They each protect against the use of public powers to violate basic rights. They are human rights law's belt and braces.

Autonomy

7. The common law protection of basic rights had two main advantages. They have not disappeared, even if to some extent they may need to be rediscovered. The first advantage is that the common law is not limited to, but rather liberated from, the incidence and scope of those rights which happen to be found within the ECHR. Certainly, as Lord Hoffmann explained: *"much of the Convention reflects the common law"* (*Simms* at 131H, referring to *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 551). But common law rights are delineated by an autonomous common law. The limits on the ECHR rights are no fetter on the application of the common law principles of rights-protection.

8. So, it was not necessary to see the fundamental common law right of access to the courts in *Witham* through the prism of ECHR Article 6. Nor would the basic right of procedural fairness articulated in *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, 560 (an individual's right to be informed of the gist of the case against them) be circumscribed by Article 6 limitations. That is why Strasbourg's restrictions on the application of Article 6 to immigration cases would not prevent the *"highest standards of fairness"* being required at common law (*R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481 [2005] 1 WLR 2219 at §8; applying *R v Secretary of State for the Home Department, ex p Thirukumar* [1989] Imm AR 402, 414).

9. This means that the common law can draw both on its own values and on sources beyond the ECHR as a rights instrument. Take the environment. In principle, domestic judges are not restricted to a search for standards of environmental protection in the fragments of Strasbourg jurisprudence, applying rights which do not address the environment. Take deprivation of liberty. Again, in principle, domestic courts are not required to apply the template of Article 5 standards as exhaustive. Especially when the first requirement of Article 5 is that detention be *"lawful"*, at which point it is for the domestic courts to identify any domestic legal standards.

10. To take an example inspired by English law's own values, there is the subject's freedom from exile, described by reference to Magna Carta and *Blackstone's Commentaries* in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2008] UKHL 61 [2009] 1 AC 453 (see for example Lord Hoffmann at §§42-44; Lord Rodger at §89; Lord Carswell §§123-124). The HRA had no application in that case (see §§64-65). But that did not prevent the common law principle of legality applying, for: *"the right of abode, the right not to be expelled from one's country or even one's home, is an important right. General or ambiguous words in legislation will not readily be construed as intended to remove such a right"* (Lord Hoffmann at §45, citing *Simms*).

11. To take an example inspired by sources beyond the ECHR, in the case of asylum, the Courts have explained that there is a fundamental *"right to seek asylum, which is not only the subject of a separate international convention but is expressly recognised by Article 14 of the Universal Declaration of Human Rights"* (*R (Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364 [2004] QB 36 (CA) at §115). That right was held to be protected by the common law principle of anxious scrutiny which, said the Court, *"we do not regard ... as confined to rights set out in the European Convention on Human Rights"* (§115).

Cross-fertilisation

12. There is room here for an educational relationship between the content and scope of the ECHR rights, and basic protections at common law. The common law can embrace the rigours of ECHR practical and effective protection. Such a process was seen in action in the context of bias and independence. The cases on common law apparent bias developed, by reference to comparative case-law and Strasbourg jurisprudence, to the point at which there was a unified test at common law and under Article 6 (see eg. *Magill v Porter* [2001] UKHL 67 [2002] 2 AC 357). In that way, domestic law was able to apply an Article 6 standard more expansively than under Article 6 itself, the latter being restricted to cases of 'determinatio[n] of civil rights and obligations'.

13. The argument for such an approach is very clear in the context of the core minimum standard of procedural fairness (disclosure of the gist of the case against the individual). Recently, that basic standard has been located in the Strasbourg case of *A v United Kingdom*, applied in *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28 [2009] 3 WLR 74. But, as Lord Hope and Lord Carswell pointed out in that case, the basic standard is a principled one which should have come as no surprise to a domestic public lawyer. In fact, it was the standard seen in *Doody*; and articulated by Lord Bingham in *Roberts v Parole Board* and *MB v Secretary of State for the Home Department* (discussed in *AF (No.3)*). In the recent SIAC national security deportation case of *W (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 898 the Court of Appeal therefore proceeded on the basis that it was unfair at common law not to disclose the gist of the national security case. The problem was not as to the content of the right, in a case to which ECHR Article 6 did not apply, but rather as to the power to imply it into the statutory regime armed only with the principle of legality and not HRA s.3.

14. Incidentally, this point illustrates the expansion of rights-protection which is now available in a case governed by EU law, by invoking the *EU Charter of Fundamental Rights* (2007/C 303/01). Article 47 of the Charter guarantees a *"fair and public hearing within a reasonable time by an independent and impartial tribunal"*, but is not restricted to *"determinations of civil rights and obligations"* like ECHR Article 6. This is deliberate: correspondence with ECHR-guaranteed rights does not preclude *"more extensive protection"*: see Article 52(3) of the Charter. The official *"explanations"* which, under the Preamble to the Charter, are an aid to its construction, state in clear terms that it is the purpose and function of Article 47 to confer a procedural fairness right which *"corresponds to Article 6(1) of the ECHR"* but which *"is not confined to disputes relating to civil rights and obligations"* (see 2007/C 303/02: *Explanation on Article 47*). Similarly, the Secretary of State can now properly be said to be bound to act in accordance with the EU fundamental rights protected by the Charter when acting within the scope of EU law: see *R (NS) v Secretary of State for the Home Department* [2010] EWCA Civ 990 at §§6-7 (Lord Neuberger MR). This illustrates the power and potency of human rights protection through EU law.

Dynamism

15. The second advantage of the common law as a means of protecting rights is that it adapts and can be developed at the hands of the Courts themselves. It is perfectly obvious that human rights protection at common law was in a state of development prior to the HRA. The Courts were grappling with questions as to the source and content of relevant rights and principles; the principled approach to their protection; and the extent of the power of remedial response. There were progressive trends in the law. International law instruments were being invoked, and customary international law being explored. Fresh understanding was emerging as to human rights and human dignity, against the backcloth of harsh, cruel and destructive human interaction. The stage was set. And the common law, with its essence of incremental contextual development, was sharpening its edge.

16. It is impossible to accept that the development of the common law ought properly to be seen as blocked or inhibited by the enactment by Parliament of the HRA. We can say that the rigours of ECHR proportionality propelled domestic human rights law forward from anxious scrutiny, being *"more precise and more sophisticated"* (*R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26 [2001] 2 AC 532 at §27 per Lord Steyn). We can also say that the power of HRA s.3 propelled human rights protection forward from the weaker conventional principle of legality. But the critical question remains: could not the common law have developed along these lines? Has it been precluded from doing so? If the common law remains weaker in these respects, that must surely be a chosen, rather than a given.

17. Parliament has given its answer, in the HRA, together with its limits. Parliament could repeal that Act. But Parliament's model, and Parliament's choices, should not dictate the position at common law. The common law is a work in progress. The inhibitors on the development and power of common law rights protection are matters of historical and considered judicial self-restraint. They are always open to re-evaluation.

Inhibition?

18. At this point it is necessary to confront an idea which emerged in 2004, in the case of *In Re McKerr* [2004] UKHL 12 [2004] 1 WLR 807. There, the Article 2 investigative duty into an RUC shooting was held to be inapplicable, because the HRA was not retrospective and the death had pre-dated it. The claimant relied, in response to this, on a common law duty said to run in parallel with the content of Article 2. That argument failed because there was no room for a common law positive obligation, when domestic law was settled as a result of Parliament having legislated, in clear terms, in the field of inquests (see Lord Nicholls at §§30-31; Lord Hoffmann §72; Lord Brown §91). That was a special answer to a special problem, concerning non-retrospectivity and a suggested radical change in the domestic law position.

19. Alongside that, however, there was the further inhibition expressed by Lord Nicholls (at §32). He described his conclusion as confirmed by *"another feature"*, namely Parliament's intention in enacting the HRA itself: a parallel common law right would *"accord ill with [the] legislative intention"* of the HRA whereby Parliament had *"created domestic law rights corresponding to rights arising under the Convention"* and *"chose not to give the legislation retroactive effect"*, intending therefore *"not to create an investigating right in respect of deaths occurring before the Act came into force"*.

20. It might be said that, taken to its logical conclusion, this idea would inhibit the invocation of any common law rights which extend beyond the reach and mechanisms of the HRA, Parliament having intended to cater for human rights solely by that instrument, with its in-build restrictions. That, however, would be a very corrosive restriction. It ought, surely, to be met with the answer that *McKerr* was dealing with a special problem of retrospectivity, in the context of a positive obligation intimately associated with ECHR Article 2, and where, in any event, the principal objection was the problem with fitting such a radical extension of the common law into the already settled and clear statutory framework relating to inquests.

21. Thus, the mere enactment of the HRA cannot be relied on to prevent common law rights-protection flourishing beyond the scope of the ECHR, provided that this is otherwise something which is within the proper development of the common law. That conclusion is reinforced by section 11 of the HRA, which preserves the ability to rely on other rights and freedoms conferred by or under any law having effect in the UK.

Questions

22. What are the practical implications of all this? It is possible to test the position as to common law rights, by posing the following questions.

23. A first question is whether the common law could allow rights-protection to be invoked by a non-victim. Here, Parliament's solution under the HRA is that a person relying on section 6 of the HRA must be a victim (s.7(1)), which includes where that person is bringing judicial review as a person with a sufficient interest (s.7(4)). The answer, in principle, should be that the victim test does not constitute a fatal objection. It did not do so in *R (Amicus – MSF Section) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin) [2004] ELR 311 at §201, where the Secretary of State did not rely on the victim restriction to shut out the claim. Nor did it do so in *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin), where a non-victim peace campaigner was able to invite the Court to apply Article 3 standards to prisoner handovers in Afghanistan, the problem there being solved because the Secretary of State's own policy mirrored Article 3 standards. But the true answer is surely to be found in the case of *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275. In that case, a responsible non-governmental organisation was able to obtain judicial review of regulations as ultra vires on the basis of the principle of legality and the basic right of freedom from destitution. On no principled basis ought it to be said that judicial review has lost its ability to protect human rights in this way. If that is right, the *Limbuela* case could, in principle, have been a judicial review brought by the JCWI.

24. A second question is whether common law rights could apply beyond the territorial reach of the HRA. The answer, in principle, is that they could. If the source of the right is said to be the United Kingdom's international obligations under the ECHR, then the common law will not assist, for the HRA's territorial reach is said to mirror that of the ECHR. But there is certainly room for common law rights having a different source or reference-point. If the right to asylum had rendered unlawful the turning away of Czech Roma under the pre-clearance operation at Prague Airport, then judicial review would have been granted in *R (ERRC) v Immigration Officer at Prague Airport*. It was not necessary for the HRA to be in play, and indeed Lord Bingham commented that it was not. Insofar as Iraqi civilians were tortured outside a British detention facility, there is an open question as to whether UK common law rights could apply, perhaps by reference to the Torture Convention. As has

been seen in *Bancoult*, a justiciable fundamental right was in play even though the HRA, for reasons of territorial application, was not.

25. A third question is whether common law could delineate a fundamental right more protective than the equivalent Convention right under the ECHR, as applied in the Strasbourg jurisprudence. In principle it could. This can be tested as follows: Suppose Parliament in 1998 had enacted legislation to mirror the Refugee Convention, including the duty of non-refoulement. Suppose, however, the HRA had not been enacted and standards of ECHR Article 3 remained a matter of international law obligation and common law protection (as under the *JCWI* case through the principle of legality). In such a situation, the common law could perfectly soundly have applied the more protective standards of Article 3 beyond the limitations of non-refoulement (eg. where the harm is for a non-Refugee Convention reason or by a non-state agent). If that logic is right, there is no reason why human rights cannot be protected more extensively than under the closest corresponding Convention right. A non-discrimination instrument might be more protective than ECHR Article 14, or a right of the child more protective than under the ECHR. Again, if the sole source of the right is the ECHR, then its scope will dictate: even if, for example, it has been qualified in alarming fashion by a UN Security Council resolution (see *R (Al-Jedda) v Secretary of State for Defence*). But the real question is whether the ECHR is the sole identifiable source for the fundamental right. The HRA is important, but it is a floor and not a ceiling, for human rights protection.

26. So, if the Courts took the view (as they should) that Strasbourg principles of human rights protection were shamefully inadequate (as they are), in the context of the right to die with dignity (*R (Pretty) v Director of Public Prosecutions* [2001] UKHL 61 [2002] 1 AC 800; *Pretty v United Kingdom* (2002) 35 EHRR 1; *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45 [2010] 1 AC 345), or the right to respect for clothing conscientiously-worn as a matter of perceived religious obligation, that ought not to be the end of the inquiry for a rights-orientated rigorous domestic scrutiny. Or if a Court took the view that detention for administrative convenience ought to be seen as contrary to fundamental values of the law, the fixation with Article 5(1)(f) as permitting such a course, ought not, of itself, to provide the answer (cf. *R (Saadi) v Secretary of State for the Home Department* [2002] UKHL 41 [2002] 1 WLR 3131 and *Saadi v United Kingdom* (2009) 49 EHRR 30). The ECHR template is not always an adequate one.

27. A fourth question is whether protection of common law rights could be held to measure up to the rigours of HRA-proportionality. In principle, there is absolutely no reason why not. In *Daly*, the point was made that common law anxious scrutiny was less exacting than HRA-proportionality. That is why judicial review did not satisfy the standards of ECHR Article 13 in *Smith & Grady v United Kingdom*. But anxious scrutiny is an emergent principle, whose starting point had been *Wednesbury* irrationality. Its enunciation in *Smith* was a progress report as to the then state of its development. Just as common law bias continued to develop until it reached the stage where it was synonymous with ECHR Article 6 standards, and just as the fair hearing principle can rediscover its force under a nudge from the Strasbourg Court in *A v United Kingdom*, so too can anxious scrutiny develop through to maturity. It must be permitted to do so.

28. A fifth question is whether the common law principle of legality can match the force of section 3 of the HRA. The orthodox view has been that s.3 is a special tool invented by Parliament, allowing strong solutions of reading down and reading in, as are seen through

the duty of compatible interpretation in EU law. It is said that the principle of legality does not permit such creativity. Once again, however, these are observations which arise from historical reasoning and judicial self-restraint. Ultimately, these are questions of legal policy, which again involves a judicial chosen, not an inherited given. True, it is on the anvil of HRA section 3 that we have beaten out the examples of what statutory interpretations are *"possible"*. But if an interpretation is indeed *"possible"*, the principle of legality could operate as a constitutional principle to call for that interpretation to be secured. That would be a shift of gear in the law of common law rights. But it would not be the first, nor the last.

Constitutional clash

29. All of which leaves the final, troubling and yet tantalising, topic. What if Parliament repealed the HRA, removing or curtailing the fundamental rights protected by it?

30. To analyse what the effect of this should be, we can return to Lord Hoffmann's speech in *Simms*. The common law's *"scheme of things"* would remain and would govern, as it did prior to the HRA's enactment, with whatever developments can be attributed to the passage of time since 2000. The *"principle of fundamental human rights which exist at common law"* would no longer be *"supplemented by a specific text"*, but the rights in that text would still be such as *"reflects the common law"*. The repeal would leave intact *"the principle of legality ... as a rule of construction"* but no longer "*expressly enacted"* in section 3. And the special statutory remedy of a declaration of incompatibility would disappear. On this basis, common law rights would remain, and their significance would increase. No longer tempted to see human rights through the prism of the ECHR, nor to fasten themselves to Parliament's human rights model, the Courts would begin a fresh new chapter in the story of the rule of law. And they would not forget the lessons learned nor relinquish the tools deployed. Practical and effective human rights protection would live on.

31. What if Parliament tried to remove those too? Parliament could not remove the protective underlay of the common law by implication. To stand any chance of achieving such an aim, the repealing Act would need to revisit the topic addressed by the HRA section 11: the safeguard for existing rights. Parliament would need to say the opposite of what it said in s.11 when it was allowing direct reliance on the Convention rights: that the removal of that right *"does ... restrict any other right or freedom conferred ... by or under any law having effect in any part of the United Kingdom"* (cf. s.11).

32. That would be an astonishing provision. It would expressly and avowedly remove fundamental, constitutional rights, and the right of access to the Courts by judicial review to vindicate those rights. It would be clear and express, like the statutory ouster in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147; and like the "no certiorari" clause in *R v Cheltenham Commissioners* (1841) 1 QB 467. It would receive the same polite but firm response which those provisions received in those cases. The Courts would choose not to apply it.

33. Ultimately, the principle of Parliamentary supremacy is another judicial choice. The orthodoxy was only ever a question of the common law's choice, the question being whether: *"In the unwritten legal order of the British state ... the common law continues to accord a legislative supremacy to Parliament"* (*Witham* at 581E). So, *"the supremacy of Parliament is ... a construct of the common law. The judges created this principle"* (*R (Jackson) v Attorney General* [2005] UKHL 56 [2006] 1 AC 262 at §102 per Lord Steyn). It *"has been created by the common law"* and is *"built upon the assumption that Parliament represents the people whom it exists to*

serve" (Lord Hope at §126). All of which means that were there *"an attempt to abolish judicial review"* the question for the Supreme Court would be whether judicial review to protect fundamental rights is *"a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish"* (Lord Steyn at §102). As has been said, the *"judicial review jurisdiction"* is one which *"cannot be dispensed with by Parliament"* (*R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin) [2010] 2 WLR 1012 at §38 per Laws LJ).

34. By making any attempt to remove recourse to law in reliance on those fundamental rights, required at common law to be respected by public authorities exercising their powers, Government and Parliament would unwisely have embarked on a constitutional confrontation with the Courts. There would be a constitutional crisis. But human rights and the rule of law would win. Constitutional law would be propelled into a whole new direction of progressive constitutional protection of common law rights, with Courts finding powers not previously recognised as appropriate or necessary, in a human rights world from which there would be no return. An attempted removal by Parliament of human rights would secure and cement their protection by the Courts.

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