

**PROTECTING RIGHTS IN PRACTICE:
THE HUMAN RIGHTS ACT AND THE
COMMON LAW**

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- Does the common law give the same rights and protections as the HRA so we don't need to worry too much if the HRA is repealed ?
- My answer – major difficulties with relying on the common law alone if the HRA goes
- Don't know what would replace HRA



Current conventional wisdom

- ECHR was largely a product of the common law
- Convention rights can be protected by the common law
- First port of call should be common law, including case law from other common law jurisdictions





Lord Reed in Osborn v Parole Board 2013 UKSC 64

The submissions on behalf of the appellants focused on article 5.4 , and paid comparatively little attention to domestic administrative law. As I shall explain, that approach does not properly reflect the relationship between domestic law (considered apart from the Human Rights Act 1998) and Convention rights.

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. That is true in the United Kingdom as in other contracting states. For example, the guarantee of a fair trial, under article 6 , is fulfilled primarily through detailed rules and principles to be found in several areas of domestic law, including the law of evidence and procedure, administrative law, and the law relating to legal aid. The guarantee of a right to respect for private and family life, under article 8 , is fulfilled primarily through rules and principles found in such areas of domestic law as the law of tort, family law and constitutional law. Many other examples could be given. Article 5, in particular, is implemented through several areas of the law...,

Mirrored by Lords Mance and Toulson in *Kennedy v Charity Commission* UKSC 2014 20

“But the Convention rights represent a threshold protection; and, especially in view of the contribution which common lawyers made to the Convention's inception, they may be expected, at least generally even if not always, to reflect and to find their homologue in the common or domestic statute law.”



But...

What does a common law constitutional or fundamental right consist of ?

De Smith (7th ed)

- Access to a judicial remedy
- Right to life
- Liberty of the person
- Doing of justice in public
- Right to a fair hearing
- Prohibition of retrospective criminal penalty
- Freedom of expression
- Access to legal advice and legal confidentiality
- Limitation on search powers
- Prohibition of use of evidence obtained by torture
- Right to live or return to UK for British citizen
- Non-deprivation of property without compensation
- Privilege against self incrimination
- Subsistence for asylum seekers
- Freedom of movement in UK

Problems (1)

- Some rights strongly protected in common law
 - Procedural/access to justice rights
 - Osborn – concerned right to oral hearing
 - Kennedy – right to disclosure, albeit in context of art 10
 - Liberty – habeas corpus
 - Rejection of torture evidence
- Others potentially much less easy to characterise as common law rights
 - Right to privacy and family life
 - Scope of right to life
 - Cruel and inhuman treatment
 - education

Problems (2)

- Many substantive rights either less powerful
 - Article 8 rights – family life, privacy
 - Article 3 – cruel and inhuman treatment
 - Article 14 – non discrimination
 - Fine on the statutory categories
 - What about “other status”?
- Less clearly defined
 - Article 2 –
 - investigatory duty
 - “right to die” Nicklinson very difficult to articulate in domestic law
- Very difficult to extract positive obligations out of common law rights

Problems (3)

- ECHR rights are embedded in statute and therefore approved by parliament
- Common law rights are judge made
 - Judges more likely to say “contrary to the will of Parliament”
 - Parliament would find much easier to overturn



The Result



- The common law is a fine starting point
- But doesn't protect rights to anything like same extent as HRA
- Really important to preserve the HRA, or a closely similar statute

