A COMMON LAW RESURGENCE IN RIGHTS PROTECTION?

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Following a period of relative dormancy, the United Kingdom Supreme Court has revitalised the notion that the common law might provide effective protection for human rights. In *Osborn v Parole Board*, *Kennedy v Information Commissioner* and *A v British Broadcasting Corporation* the Supreme Court has provided support for the suggestion that the common law – and not the jurisprudence of the European Court of Human Rights – should be the primary source of legal authority for a domestic court considering an issue of individual rights. This piece traces this resurgence of common law rights reasoning, and assesses the nature of the primacy it seeks to accord to the common law.

Keywords: common law; constitutional rights; *Kennedy v Information Commissioner*; Human Rights Act

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I. INTRODUCTION

The notion of rights recognised at common law as being constitutional had begun to gain a foothold in judicial reasoning prior to the enactment of the Human Rights Act 1998.[1] Judicial statements made early in the life of the Act highlighted 'the common law's acceptance of constitutional rights'[2] and described a harmonious, symbiotic, relationship between the common law and the rights prescribed under the European Convention on Human Rights. Influential senior judges championed the latent ability of the common law to protect rights within and without the courtroom.[3] Overtime, however, this dynamic shifted and the development of the common law's abilities to defend rights appeared to have been stymied in the face of the Convention's incoming tide. Reliance on the Human Rights Act and, by extension, the ECHR became the norm for both judges and advocates alike, and the common law began to fade into the background; 'the attitude of many lawyers and judges in the UK to the Convention

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[1] See: *R. v Secretary of State for the Home Department, ex parte Leech (No 2)* [1994] Q.B. 198; *R. v Lord Chancellor, ex parte Witham* [1998] Q.B. 575; *R. v Secretary of State for the Home Department, ex parte Simms* [2000] 2 A.C. 115.

[2] *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] Q.B. 728, [71] (Laws LJ).

[3] See: Lord Cooke of Thorndon 'The Road Ahead for the Common Law' (2004) 53 I.C.L.Q. 273; Lord Steyn, 'Dynamic Interpretation amidst an orgy of statutes' [2004] E.H.R.L.R. 245.

was not unlike that of a child to a new toy. As we became fascinated with the new toy, the old toy, the common law, was left in the cupboard.'[4]

Recently, however, members of the senior judiciary have lamented the myopia provoked by the 1998 Act: '[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.'[5] The realisation of this tendency appears to underlie a number of United Kingdom Supreme Court decisions that have served to re-emphasise the utility of the common law, and the rights inherent in it, as tools of constitutional adjudication. After a period of relative dormancy, the common law is being reasserted as an important source of rights protection and the Supreme Court has issued a series of strong reminders that recourse to the Convention rights via the Human Rights Act is not the only, or even the primary, means of securing and enforcing rights within the UK.

The recent resurgence of the common law as a source of rights protection invites us to consider the reasons that the common law fell from grace after early indications of its strength, the causes of its re-emergence, and the continuing potential for the common law to play a role in safeguarding rights in the HRA (and perhaps post-HRA) era.

II. THE DISPLACEMENT OF THE COMMON LAW

The enactment of the Human Rights Act 1998 raised a series of questions regarding the interrelationship between domestic and European sources of authority relating to the legal protection of human rights. Initial signals pointed to the potential for complementarity. In *Rights Brought Home* it was suggested that the new regime would see a careful weaving of the two distinct, but in many ways complementary,[6] sources of law.[7] Lord Hoffmann noted in *Simms* that the 'principles of fundamental rights which exist at common law will be *supplemented* by a specific text',[8] whilst in

[4] Lord Neuberger, 'The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK Experience' (8 August 2014), at [29].

[5] *Kennedy v Information Commissioner* [2014] UKSC 20, at [46]. See also: *A v British Broadcasting Corporation* [2014] UKSC 25; *Osborn v Parole Board* [2013] UKSC 61.

[6] *Attorney-General v Guardian Newspapers (No.2)* [1990] 1 A.C. 109, 283-284.

[7] *Rights Brought Home* (1997), Cm.3782, at [1.14].

[8] *R. v Secretary of State for the Home Department, ex parte Simms* [2000] 2 A.C. 115, 131.

2003 Laws LJ stated in *International Transport Roth* that the enactment of the Human Rights Act gave democratic impetus to the common law's rights jurisprudence.[9]

Yet, common law inertia, rather than the consolidation of this symbiotic potential, was the consequence of the enactment of the Human Rights Act.[10] By 2006 the House of Lords decision in *Watkins v Secretary of State for the Home Department* had appeared to confine common law rights to the realms of statutory interpretation.[11] As Lord Rodger noted of attempts to attach the 'constitutional' label to rights existing at common law:

> Most of the references to 'constitutional rights' are to be found in cases dealing with situations before the 1998 Act brought Convention rights into our law. 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. Now that the Human Rights Act is in place, such heroic efforts are unnecessary: the Convention rights form part of our law and provide a rough equivalent of a written code of constitutional rights, albeit one not tailor-made for this country.[12]

As Brice Dickson observes, the House of Lords' decision in *Watkins* saw 'the coffin lid of constitutional rights … well and truly screwed down.'[13]

This apparent shift can be seen to reflect the impact of a confluence of practical and constitutional factors. From a pragmatic point of view, while the protection of rights and interests through the common law had the benefits of vintage and domesticity on its side, it also lacked force and precision. Even Laws LJ –

[9] *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] Q.B. 728, [71].

[10] A point also reflected in the judges' (lack of) reliance on broader common law principles (B. Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford: Oxford University Press, 2013), p.34).

[11] *Watkins v Secretary of State for the Home* Department [2006] UKHL 17; [2006] 2 A.C. 395, at [61] - [62].

[12] *Watkins v Secretary of State for the Home* Department [2006] UKHL 17; [2006] 2 A.C. 395, at [64].

[13] B. Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford: Oxford University Press, 2013), p.28.

perhaps the most forthright judicial advocate of the capabilities of the common law in this regard[14] – pointed to the definitional and normative uncertainty surrounding the development of common law constitutional rights, noting that while access to courts has been characterised as a constitutional right, 'the cases do not explain what that means.'[15] Constitutional common law rights remained embryonic at the point at which the Human Rights Act came into force – the categorisation 'constitutional rights' was 'not one that [was] well supported by precedent at the highest level'.[16] By contrast the catalogue of rights protected through the Human Rights Act enjoyed the benefit of relative convenience and clarity.

Moreover, there was – and remains – no complete list of rights which the common law ranks as constitutional,[17] and no clear, definitive, guide to determine how a right would be categorised as such. By contrast, while there is an inherent level of vagueness in the textual guarantees of human rights, including the Human Rights Act and ECHR,[18] those documents at least provide a codified statement of what those rights are, as well as mechanisms for their enforcement. There is no comparable definitive statement of common law rights or of the means by which the common law can generate its defence of rights. In the light of this, the appeal to the catalogue of enforceable rights, (semi-) structured tests of necessity and proportionality, and remedial provisions provided by the Convention rights via the Human Rights Act appears obvious.

Operating within the background are two traditional features of the common law that reveal its weakness in the legal defence of human rights. The first is the embedded understanding that traditional common law permits certain freedoms to individuals, and is a negative assignment of liberties. The orthodox common law

[14] J. Laws, 'Is the High Court the guardian of fundamental constitutional rights?' [1993] P.L. 59; J. Laws, *The Common Law Constitution* (Cambridge: Cambridge University Press, 2014).

[15] *R. v Lord Chancellor Ex p Witham* [1998] Q.B. 575 , 585G.

[16] B. Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford: Oxford University Press, 2013), p.26.

[17] Though – extra-judicially – Lord Cooke included among their number the right of access to a court and to confidential legal advice, the right to a fair trial, the right to equal treatment, and the freedoms of expression and religion (Lord Cooke of Thorndon 'The Road Ahead for the Common Law' (2004) 53 I.C.L.Q. 273).

[18] Aileen Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24 OJLS 259, 264; *Brown v Stott* [2003] 1 A.C. 681, 703.

understanding that liberty is residual and liable to legislative encroachment without effective reply appears feeble in comparison to the European Convention's more affirmative statement of rights that must be guaranteed to persons within the member states[19] and the Human Rights Act's imposition of duties on public authorities to comply to with those rights guarantees.[20] Even in Lord Hoffmann's seminal articulation of the principle of legality in *Simms* the common law ultimately capitulates to clear legislative intent.[21]

Secondly, the traditional focus of scrutiny in judicial review was on the process by which an administrative decision had been taken. As Tom Poole has noted, the 'conceptual matrix' of administrative law,

> allowed little room for substantive review – that is, for the (more or less) direct examination of the reasonableness of the impugned decision or action. Within this framework, rights specifically and substantive review more generally were not so much outlawed as repressed.[22]

Administrative law's conceptual preferences for review rather than appeal and examination of process rather than merits combined to ensure that the vindication of liberties was not the central concern of pre-Human Rights Act judicial review. And despite the availability of 'anxious scrutiny' in cases where fundamental rights or constitutional principles were at issue, domestic judicial review still fell short of the expectation of review on the basis of the Convention rights.[23] In the eyes of the Strasbourg court, even the heightened 'anxious scrutiny' approach was unable to provide an effective remedy for potential infringements of the Convention rights for the reason that:

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[19] Article 1, Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

[20] Human Rights Act 1998, s.6.

[21] *R. v Secretary of State for the Home Department, ex parte Simms* [2000] 2 A.C. 115, 131.

[22] T. Poole, 'The Reformation of English Administrative Law' (2009) 68 C.L.J. 142, 143.

[23] *Kennedy v Information Commissioner* [2014] UKSC 20, at [245]-[247] (Lord Carnworth).

> it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicant's rights answered a pressing social need or was proportionate to the … aims pursued.[24]

The potency of the common law as an instrument of rights protection was therefore in considerable doubt prior to the enactment of the 1998 Act, and Human Rights Act review was speedily embraced as a panacea. But, over a decade on, the very perception that the common law is not up to the task of rights protection is being challenged and a number of recent Supreme Court decisions have served as forceful reminders of the continuing utility of the common law to human rights adjudication in the United Kingdom.

III. THE RESURGENCE OF THE COMMON LAW

In the 2013 decision in *Osborn v Parole Board* – concerning the circumstances under which a convicted prisoner would be entitled to an oral hearing before a parole board – Lord Reed took the opportunity to highlight what he saw to be an error in the argument of the appellants (and in advocacy more broadly), namely to assume that 'because an issue falls within the ambit of a Convention guarantee, it follows that the legal analysis of the problem should begin and end with the Strasbourg case law.'[25] Lord Reed, with whom each of the remaining Justices of the Supreme Court agreed, noted that the presumption in favour of the precedence of Convention case-law was questionable for both substantive and structural reasons. First, for the reason that the Convention rights themselves are expressed at a 'very high level of generality'[26] that is 'too unspecific to provide the guidance which is necessary in a state governed by the rule of law.'[27] It follows, and is an expectation of the Convention organs[28], that the Convention rights 'have to be fulfilled at national level through a substantial body of much more specific domestic law.'[29] Lord Reed continued by noting that the Human Rights Act 1998 – though of unquestionable importance – does not

[24] *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493, at [138].

[25] *Osborn*, at [63].

[26] *Osborn*, at [55].

[27] *Osborn*, at [56].

[28] *Osborn*, at [56].

[29] *Osborn*, at [55].

necessarily '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'[30] for the reason that the Convention rights were intended to permeate our legal system.[31] Citing the Court of Appeal decision in *R. (Guardian News and Media Ltd) v City of Westminster Magistrates' Court*,[32] Lord Reed observed that 'the development of the common law did not come to an end on the passing of the Human Rights Act 1998.'[33]

Lord Mance took up the baton in *Kennedy v Information Commissioner* – in which the Supreme Court issued a forceful statement of the capacity of domestic law in general, and the common law in particular, to secure access to information – noting that the 'natural starting point in any dispute is to start with the domestic law, and it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene.'[34] Lord Toulson added that the common law, by way of its incremental development, had evolved over time in order to respond to new demands and challenges[35] but noted that the passing of the Human Rights Act had, however, given rise to a 'baleful and unnecessary tendency to overlook the common law.'[36] As a result, Lord Toulson felt that it should be emphasised that 'it was not the purpose of the Human Rights Act that the common law should become an ossuary.'[37]

The 'importance of the continuing development of the common law in areas falling within the scope of the Convention guarantees' was also subsequently addressed in *A v British Broadcasting Corporation*.[38] In *A*, Lord Reed took the opportunity to reiterate that the existing common law principles – in this decision relating to open justice – should provide a court's starting point. He expressed confidence – 'given the extent to which the Convention and our domestic law … walk

[30] *Osborn*, at [57].

[31] *Osborn*, at [55].

[32] [2013] Q.B. 618.

[33] *Osborn*, at [61].

[34] *Kennedy v Information Commissioner* [2014] UKSC 20, at [46].

[35] *Kennedy*, at [133].

[36] *Kennedy*, at [133].

[37] *Kennedy*, at [133].

[38] *A* v *British Broadcasting Corporation* [2014] UKSC 25.

in step, and bearing in mind the capacity of the common law to develop'[39] – that the common law and Convention would be in harmony, but took care to note the more exacting requirements of proportionality analysis:

> … although the Convention and our domestic law give expression to common values, the balance between those values, when they conflict, may not always be struck in the same place under the Convention as it might once have been under our domestic law. In that event, effect must be given to the Convention rights in accordance with the Human Rights Act.[40]

So though the common law should provide the foundation from which a rights claim might proceed, Lord Reed recognised that updating may be required in order to achieve the same result as would be achieved via application of the Convention rights and that the 'balance' struck through application of the tests for necessity and proportionality may need to prevail in order to make good the commitment embodied in the Human Rights Act.

Judicial recognition that the Convention rights and common law have the potential to coexist – to intertwine without the common law necessarily subjecting itself to the overriding demands of the Convention rights – has been apparent throughout the life of the Human Rights Act.[41] The importance of recent Supreme Court statements on the ongoing relevance of the common law can be found in the explicit steer given to lower courts (and to advocates) considering rights questions to which domestic law may already provide answers and in their implicit attempts to offer a partial retort to one of the outstanding political controversies surrounding Human Rights Act adjudication.

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[39] *A*, at [57].

[40] *A*, at [57].

[41] *R. (on the application of Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36; [2004] 1 A.C. 604, at [27] (Lord Steyn); *JD v East Berkshire NHS Trust* [2005] UKHL 23; [2005] 2 A.C. 373, at [50] (Lord Bingham); *R. (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 A.C. 1312, at [53] (Baroness Hale). See also: Sir Jack Beatson, 'Human Rights and Judicial Technique' in R. Masterman and I. Leigh (eds), *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (183 *Proceedings of the British Academy*) (Oxford: Oxford University Press, 2013).

IV. RE-EMPHASISING THE 'NATIONAL'

The common law resurgence occurs within a larger context of political and legal discourse on the merits of domestic rights protection in preference to European sources of rights fulfilment,[42] with responses to the perceived loss of national sovereignty over human rights questions likely to figure prominently in debates surrounding the 2015 UK General Election. The judicial reiteration of the value of the common law to the protection of human rights places emphasis on the 'national' in the face of the 'non-national' qualities of the Convention rights and – in so doing – seeks to undercut perceptions that the Convention is a dominant 'alien' appendage which will necessarily override pre-existing domestic norms.[43]

In this vein, recent judicial pronouncements on the issue of common law rights have gone beyond the resolution of the dispute in the case at hand towards bare assertions of the relevance of common law rights. Judges are contributing to generative discourse and the development of common law rights jurisprudence by admonishing lawyers to refrain from reflexive and automatic reliance on the Convention; the Supreme Court has repeatedly urged that the 'starting point' is to survey 'the common law scene'.[44] This perspective encourages us to treat the common law as the primary tool for rights protection and is analogous to a domestically-developed presumption in favour of subsidiarity, which allocates decision-making first to the local level and only moves to more centralised decision-making as a secondary step. Usually, subsidiarity is applied as a preference for local, lower level authorities as the first stage of decision-making and administration. In the current context, it is the substantive *law*, rather than the institution that takes centre stage but the motivations are similar. The emphasis of the courts on the mechanism of rights protection through the common law evinces preference for domestic

[42] See: M. Pinto-Duschinsky, Brining Rights Back Home: *Making Human Rights Compatible with Parliamentary Democracy in the United Kingdom* (London: Policy Exchange, 2011); Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (December 2012).

[43] *Begum v Tower Hamlets LBC* [2002] EWCA 239; [2002] 1 W.L.R. 2491, at [17].

[44] *Kennedy*, at [46] (Lord Mance); *Av BBC*, at [57] (Lord Reed).

mechanisms and domestic legal sources over law with a more European heritage.[45] Indeed, this approach is consistent with both the ethos of the Convention and the European Court of Human Rights' jurisprudence on the relationship between domestic law and authorities and the Convention law and Convention organs. Certainly, several articles in the Convention, including Article 1 on the obligation of states to secure Convention rights, indicate that primary responsibility for securing rights resides as the domestic level. This sentiment is echoed in the article 13 right to an effective remedy and the requirement of exhaustion of domestic remedies in article 35. This position was recently put beyond doubt through the amendment introduced by Article 1 of Protocol 15: 'the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto'. The primary function of domestic law is further supported by the European Court's reiterations of 'the fundamentally subsidiary role of the Convention'.[46]

Yet the UK courts have not resolved the inconsistency in treating the rights protected in Schedule 1 of the HRA as distinct from 'domestic law'. If the subsidiarity principle is applicable, as recent decisions suggest, then the HRA (which protects the Convention rights in the Schedule), exists as part of the bundle of national legal protections, alongside other statutes and common law. However, in urging that domestic law, including the common law scene, ought to be the first step, the potential exists for the Human Rights Act to be sidelined. The court frames the issue as a question of 'the relationship between domestic law (considered *apart from the Human Rights Act*) and Convention rights.'[47] This suggests that the tension between embracing the Human Rights Act as a domestic bill of rights and treating it as a tool for national courts to enforce the European Convention remains unresolved and that judicial (and political) assessment of the Act continues to tend strongly towards the latter. This 'internationalist'[48] vision of the Human Rights Act has two consequences

[45] H. Petzold, "The Convention and the Principle of Subsidiarity" in R.St.J. Macdonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights* (Dordrecht/Boston/London: Martinus Nijhoff, 1993), pp.41-62.

[46] *Hatton v United Kingdom* (2003) 37 E.H.R.R. 611, at [97], cited in *Osborn*, at [56].

[47] *Osborn*, at [54] (emphasis added).

[48] B. Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford: Oxford University Press, 2013), p.00.

that are of relevance to this debate. First, in a perpetuation of the dualist tradition, it treats the Convention rights as being distinct from – rather than as being complementary to – pre-existing common law sources of rights. Secondly, it assumes the superiority of the Convention case law to the extent that principles of domestic common law have been effectively trumped in order to give effect to decisions of the European Court of Human Rights. The combination of these factors – the adoption or mirroring of the Strasbourg position in the domestic context – had already been highlighted as exercising an excessively restrictive influence over domestic judicial decision making by a number of Supreme Court Justices.[49] The reiteration of the relevance of the common law to the ongoing protection of rights in the United Kingdom further highlights the inadequacy of the mirror metaphor.[50]

In truth, there is no proper accounting for consideration of the Human Rights Act as 'apart from' other domestic laws. As Laws LJ noted in 2002,

> … the court's task under the Human Rights Act 1998, in this context as in many others, is not simply to add on the Strasbourg learning to the corpus of English law, as if it were a compulsory adjunct taken from an alien source, but to develop a municipal law of human rights by the incremental method of the common law, case by case, taking account of the Strasbourg jurisprudence as section 2 of the 1998 Act enjoins us to do.[51]

Lord Reed is also therefore correct to note – as he did in *A v British Broadcasting Corporation* – that the Human Rights Act envisages interplay between the domestic and the international and that the common law may be in need of refinement in order to satisfy the (potentially) more exacting requirements of the Convention rights.

The court's reassertion of domestic law in rights protection speaks not only to a domestic audience wary of Strasbourg overreach, but also a second audience: the

[49] See for instance: *Ambrose v Harris* [2011] UKSC 3; [2011] 1 W.L.R. 2435, at [126]-[130]; Lord Kerr, 'The UK Supreme Court – the Modest Underworker of Strasbourg?', Clifford Chance Lecture, 25 January 2012.

[50] See: R. Masterman, 'Deconstructing the Mirror Principle' in R. Masterman and I. Leigh (eds), *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (183 *Proceedings of the British Academy*) (Oxford: Oxford University Press, 2013).

[51] *Begum v Tower Hamlets LBC* [2002] EWCA 239; [2002] 1 W.L.R. 2491, at [17].

European Court of Human Rights itself. The armour of Strasbourg has been pierced in a sense within the past decade. In relation to the UK, the fallibility of Strasbourg and the potential for assertiveness on the part of national courts was highlighted in the series of cases related to the fairness of convictions based solely or decisively on witness statements. The Chamber initially ruled that convictions secured in those circumstances were inconsistent with Article 6. The statement of the Supreme Court in *Horncastle* that the Strasbourg Court had failed to sufficiently appreciate UK domestic law relating to hearsay was a pivotal moment in the interaction between Strasbourg and domestic courts. Subsequent to the *Horncastle* judgment, the Grand Chamber accepted some of the Supreme Court's criticisms in a ruling in the *Al-Khawaja* case which raised similar issues to those confronted in *Horncastle*.[52] The Strasbourg Court thereby indicated a willingness to engage with and listen to domestic courts on the consistency of domestic law with the ECHR.

As the *Horncastle* episode demonstrates, when the Strasbourg Court's jurisprudence is unsettled or unclear, the dialogue between national courts and the European Court provides conceptual space for the continuing operation of common law rights and principles. In *Kennedy*, where Strasbourg authorities were 'neither clear nor easy to reconcile'[53] on the question whether article 10 imposed an obligation on the state to disclose information, the Supreme Court confidently permitted the common law to lead on the right to access documents related to inquiries conducted by the Charity Commission. Assertion of the role of common law in such circumstances is supported by the terms of the Human Rights Act, section 11 of which makes it clear that a person's reliance on Convention rights does not restrict other rights or freedoms to which he or she may be entitled under domestic law.

V. CONCEPTUALISING THE RELATIONSHIP BETWEEN THE COMMON LAW AND THE CONVENTION

Looking back at the ebb and flow of the case law, at least three ways of conceptualising the dynamic between common law rights and Convention rights are revealed. First, there is the perception that the Human Rights Act (and associated Convention rights) should be treated as a primary means of rights protection, with

[52] *Al-Khawaja v United Kingdom* (2012) 54 E.H.R.R. 23 [130]-[151].

[53] *Kennedy*, at [59]

common law rights viewed as simply supplementary or secondary. Given that the ability of the common law to protect human rights had been dealt a serious blow by the Strasbourg decision in *Smith and Grady* and the statutory direction provided by the Human Rights Act towards enforcing a defined catalogue of rights, it is no surprise that this approach has tended to dominate. As typified by the *Osborn* case, in which the submissions focused on Article 5 of the Convention but were largely inattentive to common law, human rights practice and discourse came to centre around the Human Rights Act and Convention rights, a tendency which is now bemoaned by senior members of the judiciary and the bar.[54]

A second approach is to perceive the common law as a conduit for the fulfilment of rights guaranteed by the Convention. On this reading, the common law becomes the vehicle through which the Convention rights may be realised, and may be susceptible to change prompted by the requirements of the Convention. This approach has been embraced, for instance, in the development of the breach of confidence doctrine since the enactment of the Human Rights Act. The extent however to which that doctrine has been transformed – with Articles 8 and 10 of the Convention in effect now forming 'the very content of the domestic tort'[55] – demonstrates that there may be only a fine conceptual distinction between this approach and the direct application of the Convention rights. This understanding is empowering insofar as the common law is viewed as possessing (and being able to deliver upon) rights protecting properties. However, in this approach, the value of the common law in the rights sphere appears to be limited to its instrumentality to the ends of the Convention.

Third, the common law may be treated as the primary vessel for rights protection, supplemented – where necessary – by Convention rights. On this final approach, the maintenance of the integrity of the common law, and (perhaps) of its distinctive national characteristics, is paramount. It is this third conception, which

[54] Dinah Rose QC, 'Beef and Liberty: Fundamental Rights and the Common Law' (Atkin Memorial Lecture 2011); Michael Fordham QC, 'Common Law Rights' (Public Law Project 2010) <http://www.publiclawproject.org.uk/resources/76/common-law-rights>; Master Reed, 'The Common Law and the ECHR' (11 November 2013); Lady Hale, 'UK Constitutionalism on the March?' (12 July 2014).

[55] *McKennitt v Ash* [2006] EWCA Civ 1714; [2008] Q.B. 73, at [11]. See also: *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777; [2008] E.M.L.R. 20, at [9].

perceives the Convention rights as being supplementary to the common law, that is reflected in the most recent cases from the Supreme Court. Judicial admonitions to survey the common law scene before having recourse to Convention rights, transmit a belief in the priority of common law over international law (including its application via the Human Rights Act). Recent Supreme Court decisions illustrate that the first point of inquiry in rights adjudication must be domestic law and that within the domestic framework common law principles are of particular value in conditioning the interpretation of statutes and providing substantive principles of '[w]hat we now term human rights law and public law.'[56] Yet, the implications of this turn must not be overstated. First, the primacy of the common law encouraged by this conception is not a hierarchical primacy; it is a sequential primacy. It conveys the notion that the common law ought to be engaged before turning to the Convention, but not that the common law is the sole or dominant source of rights. Indeed, the Supreme Court has indicated that where there is conflict between the domestic law (including common law) and the Convention rights, effect must be given to the Convention in accordance with the HRA.[57] Secondly, without providing an explanation as to why the Human Rights Act – and the attendant Convention rights – should continue to be considered as 'apart'[58] from the remaining corpus of domestic law this view cannot fully account for the interplay between sources of rights protection currently operable in the United Kingdom. Without a more complete articulation of the circumstances in which the common law should take apparent precedence over rights given force by virtue of primary legislation, there is currently insufficient evidence to conclude that this third view will emerge as the overall dominant conception of the relationship between Convention rights and the common law.

VI. CONCLUSION

The common law rights resurgence takes place within an apparently broader reaffirmation of the relevance of the common law to constitutional adjudication in the United Kingdom. This wider trend can also be seen in two of the most notable decisions in the, to date, short life of the United Kingdom Supreme Court. In *AXA*

[56] *Kennedy*, at [133].

[57] *A v BBC*, at [57].

[58] *Osborn*, at [54] (emphasis added).

General Insurance v Lord Advocate the Supreme Court found that devolved institutions were (in addition to review on the grounds specified in the devolution statutes) additionally subject to review on common law grounds.[59] More recently still, in the *HS2* decision the common law recognition of principles integral to the realisation of the rule of law was highlighted with some force.[60] While the precise effect of these principles was left open by the Supreme Court in *HS2*, their existence was agreed upon explicitly by all seven of the deciding justices.[61] In the face of calls for revision of the current statutory scheme for the protection of human rights, and in the light of a nascent movement towards documenting the United Kingdom's constitution,[62] the common law is showing signs not only of resilience but also of its continuing ability to recalibrate itself in the face of new challenges and current needs. The recent case law encourages the conceptualisation of the common law as an autonomous track of rights protection; one that is not insulated from the Convention but which operates as an independent source of rights, and may, as it develops, be influenced by the ECHR.

In the ongoing debates over the perceptions of supremacy of national and international sources of law, the reiteration of the common law's vitality in the face of the Convention rights amounts to a partial rejoinder to calls for a United Kingdom Bill of Rights based on the dilution of domestic authority over rights. More broadly assessed, the above cases also contribute to the incremental development of the common law constitution. The potential of neither should be lightly dismissed; this 'gradual adaptation', to use Lord Toulson's phrase, 'has always been the way of the common law'.[63] Thus, while the HRA sought to 'bring rights home' from Strasbourg,

[59] *AXA General Insurance Ltd v The Lord Advocate* [2011] UKSC 46.

[60] *R. (on the application of Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 W.L.R. 324 (SC) [207].

[61] *R. (on the application of Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 W.L.R. 324 (SC) [207]. On which see: P. Craig, 'Constitutionalising Constitutional Law: *HS2*' [2014] P.L. 373.

[62] House of Commons Political and Constitutional Reform Committee, *A New Magna Carta?* (HC463), July 2014.

[63] *Kennedy*, at [133].

the common law's resurgence, fuelled by its unique adaptability, protests that rights were already and continue to be a part of the British 'national inheritance.'[64]

[64] Dinah Rose, 'Beef and Liberty: Fundamental Rights and the Common Law' (Atkin Memorial Lecture 2011), at [37].