Routledge·Cavendish
Taylor & Francis Group

THE POLITICS OF THE COMMON LAW

PERSPECTIVES, RIGHTS, PROCESSES, INSTITUTIONS

ADAM GEAREY, WAYNE MORRISON AND ROBERT JAGO

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Routledge·Cavendish
Taylor & Francis Group
LONDON AND NEW YORK

Published 2009 by Routledge-Cavendish
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

Simultaneously published in the USA and Canada
by Routledge-Cavendish
270 Madison Ave, New York, NY 10016

Reprinted 2009

Routledge-Cavendish is an imprint of the Taylor & Francis Group,
an Informa business

Typeset in Sabon by Keyword Group Ltd
Printed and bound in Great Britain by
CPI Antony Rowe, Chippenham, Wiltshire

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data
A catalog record has been requested

ISBN 13: 978-0-415-48153-3 (pbk)
ISBN 10: 0-415-48153-8 (pbk)

THE POLITICS OF THE COMMON LAW

Perspective, Rights, Processes, Institutions

The Politics of the Common Law is an introduction to the English legal system that places the law in its contemporary context. It is not like other conventional accounts that simply seek to describe institutions and summarise details. The book is a coherent argument, organised around a number of central claims. Can today's common law be characterised as a series of emergent practices that articulate the principles of human rights and due process? The common law is presented as historical experience; the authors present the perspective that we are in the opening of a new chapter.

The argument examines the impact of the European Convention on the structures and ideologies of the common law, and suggests that there is now a general jurisprudence of human rights stemming from the Human Rights Act. The Human Rights Act has also led to more pronounced judicial intervention into politics, and is precipitating a debate on the forms that the rule of law should assume in contemporary British democracy. Equally important is the function of European Union law, and the extent to which it is also committed to due process and the rule of law. These themes are read into civil and criminal procedure, and broader concerns about the tensions between the requirements of economics and the demands of justice. Can a revitalised common law address a plural, post-colonial future?

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'Difficult to know what one means
– to be serious and to know what one means –'

George Oppen, 'Ballad'

AUTHORS' ACKNOWLEDGEMENTS

Mary Gearey – shaping spirit, forger of bodies of prose – my love and thanks. My thanks also to Sally Cartledge, Robert Cartledge, Valerie Kelley, Costas Douzinas, Michelle Everson, Bill Bowring, Peter Goodrich, Peter Finnemore and Paul Virr. For instruction in obligations and rights: thanks to Niamh Gearey and Arthur Gearey.

The Gay Hussar, Soho and the National Liberal Club proved convivial places to discuss this book, argue about its contents and toast its coming into the world.

A.G.

With love and thanks to my parents, my three 'sisters' and the Three Musketeers. You know who you are.

R.J.

With thanks and love to Michele for all her support and to Tzu His for keeping me sane. And respect to all the external students who do their best to drive me insane.

W.J.M

PUBLISHER'S ACKNOWLEDGEMENTS

Routledge-Cavendish and the authors wish to thank the institutions and individuals that have kindly provided photographic material for use in this book. Full caption and source information is listed below. We apologise in advance for any unintentional omissions or errors, and will be pleased to insert the appropriate acknowledgements to any companies or individuals in any subsequent edition of this book.

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THE COMMON LAW: RIGHTS, POLITICS AND PROCEDURES

INTRODUCTION

For us, the contemporary common law is defined by the Human Rights Act 1998, the presence of European Convention rights in English law and the reality of European Union law. Equally important is the political situation of the United Kingdom in a post-colonial world characterised by the globalised flows of capital, commodities and people.

In this introduction, we will argue that the study of the common law can be organised around four main themes: (1) an engagement with the cultures of the post-colonial common law, (2) the notion of judicial practices, (3) an engagement with the notion of procedure or process and (4) human rights. There is also an underpinning concern with the legitimacy of the law that runs through all four areas. This approach allows us to impose a certain form on our understanding of the common law.

Our first theme will take us towards a general understanding of the different versions of the common law that articulate conflictual understandings of its role and purpose. The second theme is an engagement with the common law practices of precedent and statutory interpretation. The third theme allows us to discuss the principles that animate common law civil and criminal procedure. Our fourth theme is focused primarily on Article 6 of the European Convention on Human Rights. Article 6 defines fair trial rights.

Our concern with Article 6 connects together the concern with human rights and procedural law. Our framing of this concern as one of human rights needs to be carefully understood. If one looks at the history of the common law the principles that regulated criminal and civil trials were not framed in the language of human rights. Human rights represents a fairly recent understanding of legal processes. While remaining cognisant of the immanent principles of the common law, we will argue that looking at common law procedures through human rights allows us a focused analysis of the principles of procedural law. Reference to Article 6 also means that we can examine the extent to which the common law measures up to international standards of due process. This is a salutary reminder that the common law cannot be studied in a vacuum.

Our concern with the values or principles of law is not restricted to our analysis of due process. It can be observed at a number of levels throughout the book, from the opening concerns with the narratives of law, through to the politics of the judiciary, the structure of the European Convention and the law of the European Union. Our discussion raises some general questions about the legitimacy of law. This theme is pervasive. It is underpinned by a number of arguments. Law is legitimate to the extent that its authority rests on a concept and practice of due process. This stresses that law's authority rests on reasoned and neutral adjudication of disputes. Parties to a dispute must have had access to an open court, broadly equal resources and the decision that resolves the dispute must have been made by an impartial judge within a reasonable time.

This definition of due process is, to some extent, consistent with a narrow notion of the rule of law, which would hold that even legal decisions which would otherwise be in breach of human rights can be justified provided there was some degree of due process in their resolution. Our notion of law's legitimacy avoids this 'thin' version of due process. This is because Article 6 exists within a context of substantive human rights. A national government committed to the due process guarantees of the Convention, must also be committed to upholding the other rights contained in the document. Thus, due process as an element of the law of human rights is inseparable from a much broader network of rights that go far beyond the internal structure of the law.

We are limited in the extent to which we can develop this theme. In a book of this length, we cannot conduct any real engagement with the broad question of human rights in English law. This takes us to our argument about the 'internal' structure of the law. The Convention and its protocols articulate human rights law through a series of what we call integrity rights that can be seen as attempts to provide a structural form of law that is coherent with a human rights regime. Integrity rights are thus rights that protect and define the legitimate form of law. Does the common law measure up to these international standards?

Our concern with law's legitimacy also runs through our engagement with the politics of the judiciary. We will argue that we need to look at the way that judges are engaged in a 'dialogue' with Parliament. We need to appreciate that present constitutional arrangements in the United Kingdom show a degree of strain. While fundamental constitutional structures remain largely unchanged, the conventional concept of the deference of an unelected judiciary to a sovereign Parliament is being slowly redefined by the impact of the Human Rights Act 1998. Understanding the politics of the judiciary requires a subtle appreciation of the political structures on which the contemporary common law rests, and the part that law plays in a broader culture of democracy and human rights. The relationship between the common law, democracy and human rights is not straightforward. It is not simply a question of tracing 'direct' lines between legal and political concepts. Indeed, we need to see how the common law, the law of the convention, European Union Law and other sources of international law are involved in ongoing struggles to define the nature of the links between these terms.

THE POST-COLONIAL COMMON LAW

The opening chapters of this book are concerned with the post-colonial common law.[1] From the perspective of British history, the common law was central to the production of a 'nation' and an 'English speaking people'. The common law was fundamental to the centralisation of power, and the subtle networks that brought together forms of direct and indirect rule over colonised territories. There are complex and sophisticated links between processes of nation building, the creation of a colonial empire and its formal dismantling in more recent times. This history of law would find law's proper place in the perpetuation of a certain cultural, social and economic hegemony.

Whereas the story of nation building and empire has been the dominant account, and it would be wrong to downplay the legacies of colonialism in which we are all implicated, we need to link these issues to a new set of questions. In our time, can the common law help build plural communities that are committed to democracy and the rule of law?

This question requires another historical perspective on the common law. This is why one of our early chapters examines two 'slave' cases from the seventeen and eighteen hundreds. In these cases we can see a battle taking place over the proper role of the law; and indeed, we are also concerned with the proper language in which to talk about the law. Is the proper task of the common law the protection of property rights, even if this extends to the right of a master to own his slaves? Or must the common law realise the exemplification of the spirit of liberty, equality and dignity, and affirm that a human being is not a chattel? There are a number of compromises between these positions – and it could no doubt be seen as traditional English duplicity to affirm that there can be no slavery in mainland Britain, while enjoying the economic products of systems of slave-holding safely located on the colonial periphery. The slave cases show how different narratives about the law circulate, and how different political claims about the values of law oppose one another. Law's 'open texture' has allowed (at least to some extent) legal challenges to be mounted on even the most seemingly settled of cultural institutions, even if the courts prefer not to develop the law in a progressive manner.

What else do these cases suggest? As Granville Sharp appreciated (see Chapter 2), to engage with the law necessitates a legal training. This means that the tyro must submit to a course of study and 'become' a lawyer – a process that testifies to law's (relative) autonomy as a discipline. It is this autonomy, and its contemporary forms, that interests us in this book. In order to make this theme manageable, our starting point is an engagement with the practices of legal education, precedent and statutory interpretation, the two areas of study that have traditionally served as something of a portal into an understanding of law's peculiar form.

These early chapters also make use of the un-scholarly 'I'. As these chapters concern the interlinking of personal histories and biographies with broader structures of legal ideology, we wanted to make use of the 'I' as a foregrounding device. If political

1 'Post-colonial' is a difficult term to define. We mean it in its least problematic sense: the period after 1945 when European Empires were either dismantled or fell apart. See Douzinas and Gearey (2005).

sentiments begin with the questioning of one's teachers and traditions, then the 'I' is a (limited) way of examining the values of law, and opening up important political questions.

JUDICIAL PRACTICES, LEGITIMACY AND DEMOCRACY

The doctrines of precedent and statutory interpretation have to be understood as judicial practices.[2] To describe precedent and statutory interpretation as practices draws attention to the way in which judges interpret the law and act on the basis of those interpretations. Practices take shape within a culture that determines how they are composed.[3] Chapters 3 and 4 will present an account of judicial legal interpretation within these terms. This approach will allow us to discuss judicial law making and to understand its contemporary dynamic. Our discussion of precedent and statutory interpretation thus raises the question of institutional legitimacy. The doctrine of the separation of powers (to the extent that it applies to the constitution of the UK) would stress that judicial law making should be kept within careful boundaries, lest the judges usurp Parliament's law-making powers. The judiciary, the executive and the legislature are to be kept to their correct constitutional provinces. This theme needs to be connected with fundamental questions about British democracy.[4]

Without trespassing too far into the province of public law, we can observe that the British constitution rests on the doctrine of the sovereignty of Parliament. That Parliament should be able to make or unmake any law that it so chooses is justified by the claim that it is elected by 'the people'. It is thus entirely proper (so the argument goes) that in a democracy, the legislature should be sovereign – and the executive's domination of the legislature is justified by the fact that the majority of people have voted for it and its legislative programme. The sovereignty of Parliament thus rests on a majoritarian thesis about its 'popular' legitimacy.

However, one of the central themes of constitution in recent years has been the extent to which a political party with a large majority can exploit the sovereignty of Parliament to push through its policies unhindered by checks or balances on its power. The political accountability of the executive to Parliament appears too remote to make much of a difference to the activities in which government engages.

To understand our arguments it is necessary briefly to outline the way in which judicial review operates in English law. Judicial review allows the High Court to examine

2 The philosophical orientating points for a proper understanding of the practice of precedent would have to draw on Wittgenstein – perhaps even as mediated by de Certeau (2006).

3 Any sensible development of these themes would have to take into account Peter Goodrich's work, especially *Reading the Law* (1986) and *Languages of Law*. These are essential texts for understanding the dynamics of the common law traditions.

4 See Lord Steyn (2005). Lord Steyn posits two 'strands' to the 'democratic ideal'. The first relates to the notion that Parliament is an elected body, accountable to the people. The second is that 'the basic values of liberty and justice for all and respect for human rights and fundamental freedoms must be guaranteed'. Where there is conflict between these values, an 'impartial and independent judiciary' must find the balance 'in accordance with principles of institutional integrity'.

the way in which public bodies exercise their powers. The doctrine of Parliamentary sovereignty defines the fundamental parameters of judicial review. The court cannot declare an empowering Act void. It is entirely concerned with whether or not a public body has acted within the powers given either by common law or statute.

Judicial review thus raises the issue of the rule of law. It concerns the extent to which the courts can control executive agencies of the state. If the political checks and balances of the constitution have been thrown out, to what extent can they be 're-set' by judicial review? We don't want to be misunderstood on this point. At no point do we argue that there is any real support for a doctrine of judicial review that would allow the courts to strike down Acts of Parliament. However, in the wake of the Human Rights Act, there is a sense in which the constitutional balance is shifting. Empowered by the Act, certain judges are willing to question their traditional deference to Parliament, and to be more critical of the executive. To what extent is this judicial 'activism' legitimate if it protects human rights against executive encroachment?

Our assessment of the judiciary will be made in this constitutional context. Arguments about the legitimacy of judicial law-making must also take into account the claim that human rights are not justified on majoritarian grounds. Rather, they raise certain values above 'political' processes. These concerns will also take us towards an assessment of the procedures for the appointment of judges. We will argue that given the constitutional shifts underway, the present reforms of the system leave a lot to be desired and that further reforms are required to produce a judiciary that is democratically accountable, transparent and 'representative' of contemporary British society.

In Chapter 5, we will urge caution lest this theme be misunderstood. We are not asserting that the judges should always decide cases where human rights are in issue against the executive. Such a position would clearly be stupid to assert as the overriding judicial function is one of neutral adjudication. However, to the extent that post-war public law shows a predominant (but by no means exclusive) sympathy towards the executive, the relevant question is the extent to which the judiciary can, while remaining neutral, legitimately decide cases against the government.

How can we engage with these general concerns? In Allen's words:

> We may imagine a dialogue between the judge and the representative legislator ... [t]he opposition between parliamentary sovereignty and the rule of law has been conceived too starkly. On close examination these principles are more interdependent than independent, enabling legislative will and common law reason to be combined in accordance with the demands of justice and the common good.[5]

While we do not accept the concept of dialogue between the judges and Parliament in unqualified terms, we do think that it is a useful way of describing the post-Human Rights Act constitutional settlement.[6] The dialogue is no longer one where the courts assume deference to Parliament. They attempt to define the correct roles of each branch of the State in a constitution that upholds human rights values. Those commentators who have objected to the idea of dialogue from various republican premises have

5 Allen (2003).

6 Cohn (2007). The judge is as an 'actor in a continuous multi-participant process or network of decision-making'.

indeed articulated a valid criticism of the term.[7] It is still necessary to be critical of the constitutional propriety of unelected, unaccountable and unrepresentative judges. However, any scepticism directed towards the judges has to be tempered by criticism of executive dictatorship. With radical democratic reform off the political agenda, it would appear that a rather skewed dialogue between the courts and Parliament is the best for which one might hope. It still remains to be seen whether the British constitution can move from its tendencies towards centralisation of power to meaningful democratic accountability.

This connects with our engagements with race, plurality and the law. Chapter 6 shows how race and racism have been central to the cultural expression of the common law. There are fundamental continuities between the experiences of Empire and the history of 'race relations' in the post-war period. Can the common law put its house in order? Can it articulate meaningful forms of protection to those oppressed by racial discrimination? This is a question of law and politics. It is inseparably connected with what we call the realisation of plural communities. While not seeking to present this as the only issue in British politics, it strikes us that this is one of the most pressing concerns. We will deal with it through a study of the Begum case and the issues it raises about multiculturalism and the role of human rights in defining the way in which people can live together in mutual respect.

THE EUROPEAN CONTEXT

The common law cannot be studied in a vacuum. The European context takes us to law of the European Union (EU) and the European Convention on Human Rights (ECHR). Our chapters on the EU and the ECHR elaborate the themes that we have discussed in the introduction. To take the EU first, understanding our approach requires a little history.

The European Union was founded in 1992 with the Treaty on European Union. It was formerly known as the European Community. Defining the Union is a difficult task; and indeed, the political implications of various definitions of the Union are currently being fought out in European politics. A basic working definition is, however, possible. The European Union is essentially a common market. Linked to the common market, and open to varying degrees of acceptance by the member states of the Union is an ongoing experiment in social democracy. This means that the common market is subject to regulation, and, that there is a commitment to various social, economic and welfare rights. From a legal perspective the most important aspect of the Union is the fact that it is a supranational institution. Lawyers have tended to link law to the nation state. There is thus something of a challenge in conceiving a legal order that is international but creates rights that can be used in national courts.

Our focus on the EU is provided by the question of its legitimacy. To what extent do the institutions of the EU bring together due process, human rights and democratic politics to legitimise an international legal order? We will argue that the EU

7 See Tomkins (2005).

is characterised by ongoing reforms that are endeavouring to give form to the values of accountability, transparency and the rule of law.

Our engagement with the Convention is also concerned with the functions of an international legal order dedicated to the provision of basic human rights. The European Convention on Human Rights (ECHR) was signed in Rome in 1950 and entered into force in 1953. The Convention guarantees certain rights including the right to life, freedom from torture, freedom from arbitrary arrest, the right to a fair trial, the right to privacy, freedom of religion, freedom of expression, and freedom of assembly and association. Institutionally, the Convention provided for an international court, the European Court of Human Rights (ECtHR) and a Commission to consider complaints and decide whether or not to remit them to the court.

We will argue that the Convention creates a human rights 'regime' – a coherent statement of the relationship between due process and substantive human rights. This regime provides the terms in which we can think about the legitimacy of sovereign states. These themes are developed below under the heading of 'integrity rights'.

In turning to the impact of Convention rights on the common law, we will consider what we have called the 'general jurisprudence' of the Human Rights Act. Matters that fall into the general jurisprudence can be described as follows: we will be concerned, first of all, with the general structure of the Act and the mechanisms that it sets up. We will then turn our attention to the linked concerns of the vertical and horizontal effect of the Human Rights Act and the vexed question of the definition of public authority. After examining the equally troubled question of the Act's retrospective effect, we will look at the relationship of common law and European human rights law, and the question of whether or not the judges have seized upon the HRA as a catalyst to develop an indigenous human rights law that draws on the traditions of common law as much as the European legal inheritance.

INTEGRITY RIGHTS

If human rights provide the foundational standards of law, a number of crucial concerns must be addressed. What is the precise form of the international standard provided by human rights? We will argue that, as far as the institutional nature of European Human Rights law is concerned, this takes us to the structure of the Convention, and the precise ways in which breaches of human rights can be remedied. This can be linked to the justification of a series of rights which preserve the coherence of intentional human rights law and hence the integrity of law. We will call these 'integrity rights' or rights that protect rights and thus define law's legitimacy. One could perhaps see integrity rights as 'second-order' rights that enshrine due process. In Chapter 9, we show that Articles 7, 13, 15, 17, 18 and 57 and Protocol 7 can be understood in precisely this sense.

Our argument about integrity rights should not be confused with Fuller's notions of an integral ordering of law, and we are entirely agnostic in relation to Dworkin's claims about the structure of law. Integrity rights reflect an entirely contingent legal reality: to the extent that a nation commits itself to the Convention, it is compelled to

adhere to a certain set of legal values. This does not mean that law in general must have any particular form or that the inherent indeterminacy of rights are limited. We will return to this latter point below.

As well as mandating a fundamental procedural structure for law, integrity rights prevent rights being used 'against themselves'. There are two elements to this issue. Rights give the executive the power to limit or suspend their operation in certain limited circumstances. Unless this power is circumscribed, the guarantees provided by human rights are meaningless. This is inseparable from the problematic concern of how European democracies respond to 'terrorism', or a violence that opposes itself to the lawfully sanctioned violence of the state. The second problem that integrity rights thus confront is the possibility that certain groups might use rights arguments to limit rights. An example of this would be a placard observed in 2007 during a demonstration by Islamic fundamentalists in London in 2007 which read 'Death to freedom of speech'. We can thus appreciate the scope of Article 17. It gives expression to the 'spirit' of human rights as it prevents rights being used in such a way as to destroy Convention rights. It is worth remembering that Article 17 is invoked in situations which fall short of those dealt with under Article 15, which allows the state to suspend rights in a time of emergency or war.

The pressing issue, therefore, is the extent to which we can distinguish between legitimate and illegitimate limitations of human rights. As with our discussion of Article 13, we will be concerned with finding precisely where this line might lie. Indeed, integrity rights are not themselves immune from certain criticisms about the precise form of the legal order they create. They rest on a problematic distinction between the rights of European nationals or citizens, and those others to the European order that present themselves as migrant workers, refugees or asylum seekers or 'sans papiers'. Although this category of persons is not entirely deprived of rights, they are accorded rights of a lesser status.[8] Integrity rights make necessary distinctions between an 'inside' and an 'outside' of a legal order, and a limnic zone through which people move between nations either with or without the blessing of the law.

PROCEDURE, FAIRNESS AND POWER

Integrity rights inform us about the general structure of the law. In turning to issues of due process and Article 6 we are focusing on the structure of the law at the more specific levels of civil and criminal procedure. While Article 6 and procedural law can be seen as forms of integrity rights, we will use this term primarily with reference to the Articles discussed in the section above. Furthermore, in our discussion of procedure we will not just be concerned with Article 6. Due process is inseparable from wider concerns that take us beyond human rights law and require an engagement with democratic culture. How do we approach these themes? We need to begin with a reference to important scholarship on common law procedure and its values.

8 This position has a striking resemblance to the way in which colonial law operated. See the work of Mamdani (1996).