Chapter Nine

The European Court of Human Rights in the UK: Litigation, Rights Protection and Minorities

Susan Millns, Christopher Rootes, Clare Saunders and Gabriel Swain

1. Introduction

The United Kingdom, with its historic absence of a written Constitution and accompanying Bill of Rights, has traditionally paid more attention to the need to respect individual freedom than the protection of positive substantive rights. However, following mounting criticism of judicial incapacity to redress human rights violations, and an increasing number of cases from the United Kingdom being heard before the European Court of Human Rights (hereafter the ECtHR or the Court), pressure for the introduction of a domestic Bill of Rights grew throughout the late twentieth century.

Prior to this, fundamental freedoms in the United Kingdom were typically upheld through a combination of legislation and judicial enforcement. Historically, legal remedies protecting civil liberties were closely linked to private law causes of action. So, for example, individual liberty and freedom from arbitrary detention was guaranteed by the action for false imprisonment or trespass to the person. As a result the courts were able to protect certain liberties through individual litigation.

That said, while in many other jurisdictions rights enjoy a constitutionally protected status, permitting judicial review of the constitutionality of legislation, this has not historically been the case in the UK. Instead, it is the judges who have sought to use the common law (that is unwritten, case law) to impose limitations upon legislative power. In this regard, the judges have identified certain standards as fundamental to the historical common law and these are

---

2 Ibid., p. 58.
used in the interpretation of legislation.\textsuperscript{3} Such standards include the presumption that legislation is not intended to be retroactive, is not intended to interfere with property rights and is not intended to oust the jurisdiction of the court.\textsuperscript{4} These presumptions, however, have not always been accorded sufficient weight as to protect individual rights with the power of the common law and judicial creativity being kept within limits. As such, a separation of powers has existed with politicians and the legislature keen to protect their freedom to enact legislation subject to a democratic mandate without interference by judges on the basis of uncodified and unlegislated rights.\textsuperscript{5} Equally, by virtue of the doctrine of parliamentary sovereignty, Parliament has effectively been able to encroach on freedom without legal constraint.

As a result of calls for reform to strengthen the power of the judiciary in their role as the guarantors of individual fundamental and human rights, one of the most important constitutional changes ever to have been introduced in the United Kingdom came with the arrival in power of the Labour government in 1997 together with its commitment to improve human rights protection. With the passage by parliament of the Human Rights Act 1998 (HRA), a new era has begun as a distinct rights culture has come to pervade UK law, society and political life and the government has realised its ambitious project to ‘bring rights home’. ‘Bringing rights home’, to use the rhetoric of New Labour,\textsuperscript{6} describes the process of ‘domestication’ of international human rights law. More specifically, it denotes the incorporation of parts of the European Convention on Human Rights and Fundamental Freedoms (hereafter the ECHR or the Convention) into internal UK law,\textsuperscript{7} with the effect that individuals can rely on the rights contained within the Convention before the domestic courts, thus avoiding the expense and delay of taking a case before the European Court of Human Rights in Strasbourg. Yet, while speed and cost effectiveness were given as the practical reasons for incorporation, the project was presented more broadly by New Labour as embodying an ideological commitment on the part of the government to a better protection of fundamental rights and freedoms.\textsuperscript{8}

\textsuperscript{3} Ibid., p. 61.
\textsuperscript{4} Ibid.
\textsuperscript{5} Ibid., p. 63.
\textsuperscript{7} The Human Rights Act 1998 is applicable in Northern Ireland and Scotland, as well as in England and Wales.
\textsuperscript{8} Rights brought home: The Human Rights Bill, para 1.17.