Civil Liberties Law: The Human Rights Act Era

Noel Whitty
Law Department, Keele University

Thérèse Murphy
School of Law, University of Nottingham

Stephen Livingstone
School of Law, Queen's University, Belfast
Contents

Preface v
Table of statutes xi
Table of statutory instruments xv
Table of European instruments xvii
Table of international instruments xix
List of cases xxi

Chapter One
Civil liberties law: the Human Rights Act era 1
Introduction 1
   Towards a civil liberties law for the Human Rights Act era: continuity and change 6
   Towards a civil liberties law for the Human Rights Act era: deflating human rights claims 15
   Civil liberties law: the Human Rights Act era 17
II. The Human Rights Act: a basic outline 18
    The European Convention on Human Rights 18
    The Human Rights Act 21
III. Reviewing the Human Rights Act: more doctrinal analysis 23
    The impact on judicial review 27
    The right to a remedy 29
    The definition of ‘victim’ and standing to litigate 31
    Defining a public authority and public function 33
    Private autonomy and power: the Human Rights Act’s horizontal effect 35
IV. ‘Someone must be trusted. Let it be the judges’: whither democracy? 39
    The judicial record and judges’ views on civil liberties, the common law and modern constitutionalism 41
    Awaiting the Human Rights Act: two old orthodoxies and a new orthodoxy on judges and judging 46
V. Reconstructing constitutionalism: towards a nonfoundationalist approach to law and adjudication 52
Conclusion 55
CHAPTER TWO
PUBLIC ORDER LAW AND PRACTICE  57
Introduction  57
I. Overview  59
  Public order law and practice and the UK 'rights' tradition  59
  'Law and order' and public order  63
  New directions in public order  66
II. Outline of public order law  68
III. Protest and order  71
  Protest, disorder and riot  73
  Peace, order and public order  76
IV. Balance  80
  Public meetings and marches  81
  Public order legislation: 1986–2001  83
  The advent of zero tolerance  85
  Towards balance  87
V. The decision-makers  94
  The courts  94
  The public order police  95
Conclusion  101

CHAPTER THREE
TERRORISM: RHETORIC AND REALITY  103
Introduction  103
I. Anti-terrorist law, civil liberties and civil libertarians  105
  The costs of anti-terrorist law and practice  105
  Anti-terrorism and the civil libertarian dilemma  108
II. The reality of terrorism  112
  The discourse of terrorism  112
  The definitions of terrorism  117
  The extent of the terrorist threat in the UK  121
  Justifying the Terrorism Act 2000  125
III. Responding to terrorism: the lessons of Northern Ireland  128
  Choices in anti-terrorist strategy  128
  Implementing anti-terrorist policy: the role of the military  138
  Implementing anti-terrorist policy: the role of the police  143
IV. Terrorism and civil liberties: sites of struggle  150
  Parliament  151
  The media  153
  The courts  155
  International forums  159
Conclusion  161

CHAPTER FOUR
FAIR TRIAL VALUES: POLICING, PROSECUTION AND TRIAL PRACTICES  163
Introduction  163
  Fair trial and the Human Rights Act  165
I. Fair trial in the civil liberties textbook tradition  167
Contents

Catalysts for rethinking fair trial values 169
II. The pre-trial stage: access to legal advice in police custody 180
   Empirical findings on custodial legal advice 181
   Explaining the empirical findings: due process v crime control? 183
   Towards an account of the right to legal advice in context 188
III. The trial stage: rape and the criminal process 192
   Disclosure of evidence to the defence in rape cases 196
   Cross-examination on previous sexual history in the trial 206
   Rape prosecutions, rights discourse and the Human Rights Act 211
Conclusion 213

CHAPTER FIVE

PRISONERS' RIGHTS 215
Introduction 215
I. The changing dynamics of imprisonment 219
   Government officials and policy 220
   Prison staff 227
   Prisoners 232
II. Legal strategies for protecting prisoners’ rights 237
   The ‘rule of law’ strategy 239
   The ‘prison as public body’ strategy 240
   The ‘human rights of prisoners’ strategy 242
III. Sites of legal conflict 244
   (1) Establishing the accountability of prison authorities 247
   (2) Maintaining prisoner contacts with the outside world 253
   (3) Challenging discipline and control policies 261
   (4) Improving prison conditions 265
   (5) Reforming prisoner release procedures 268
Conclusion 277

CHAPTER SIX

DEMOCRATISING PRIVACY 279
Introduction 279
I. An overview of privacy law 280
   Parliament, the press and privacy 280
   The judiciary and the ‘right to privacy’: a special relationship? 283
II. The European Convention on Human Rights and privacy 292
III. Property and privacy 298
IV. The value of privacy: searching for a common feature 302
   The public-private divide 304
   Privacy explained? 305
V. ‘The way we live now’: the information society and privacy 310
   Technology, commerce and governance in information society 310
   Media culture and practices in information society 315
VI. Trumping privacy 317
   Privacy, power and democratic publicity 318
   Privacy in public 320
   Privacy violations and the common good 324
Conclusion 326
CHAPTER SEVEN

B E Y O N D  T H E  S E C R E T  S T A T E  3 2 9

Introduction 329

I. Beyond the Secret State 331
II. Secrecy: the British way 339
III. A supporting role: the Official Secrets Acts of 1889 and 1911 346
   The 1889 and 1911 Acts: second time lucky? 346
   Official secrets and national security: creating the link 348
IV. The Official Secrets Act 1989: ‘legislation to last a generation’? 360
V. Glasnost 361
   Inside the belly of government: sleaze and secrets 362
   Freedom of information: from principle to practice 363
   Changing media practices 365
   ‘The name is Shayler, David Shayler’ 366
VI. ‘Mission Impossible’?: new directions for civil liberties law in the
   HRA era 368
   Constitutional vacuum? 369
   War and privatisation 372

Conclusion 375

CHAPTER EIGHT

T H E  S T U F F  O F  L E G E N D :  F R E E D O M  O F  E X P R E S S I O N  A N D  E Q U A L I T Y  3 7 7

Introduction 377

I. Freedom of expression in the civil liberties tradition 380
II. Equality and non-discrimination in the civil liberties tradition 387
   Anti-discrimination law: a late starter 389
   Law, law and more law 397
   Article 14, ECHR 403
III. Expression and equality in the age of recognition 405
   The late-modern way: injury, identity and law reform 405
   Progress denied 421
Conclusion: towards critical pragmatism and imagination 428
   Introducing critical pragmatism and imagination 429

Select bibliography 435
Appendix 449
Index 471