Cambridge Law Journal, **83(1)**, March 2024, pp. 132–157 © The Author(s), 2024. Published by Cambridge University Press on behalf of The Faculty of Law, University of Cambridge
doi:10.1017/S0008197324000011

CONSTITUTIONAL VALUES IN THE COMMON LAW OF OBLIGATIONS

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ABSTRACT. *"Constitutional values" is a term which appears to relate to concepts of what is now called public law. By constitutional values, I mean the basic ideas and interests which structure relations between the individual and the state, and the obligations to which they give rise, which underlie the common law and to which it gives recognition in more or less articulated forms. These are ideas and interests such as liberty, private life, freedom of expression and access to justice. Constitutional values and human rights overlap, but they are not necessarily and always the same, either in content or in effect. In exploring this topic I hope to retrieve and bring to the surface an important aspect of the common law in terms of both private law and public law.*

KEYWORDS: *Constitution*; *human rights*; *public law*; *private law*; *obligations*

I. INTRODUCTION

"Constitutional values" is a term which appears to relate to concepts of what is now called public law. By constitutional values, I mean the basic ideas[1] and interests which structure relations between the individual and the state, which underlie the common law and to which it gives recognition in more or less articulated forms. These are ideas and interests such as liberty, private life, freedom of expression and access to justice. Constitutional values and human rights overlap, but they are not necessarily and always the same, either in content or in effect.

The term "human rights" comes with certain connotations. It can suggest that the values represented in human rights are new, inventions of the Universal Declaration of Human Rights of 1948 or of the European Convention of Human Rights of 1950 (the "ECHR" or the "Convention"), which has furnished the rights being "brought home" in the form of obligations placed on public authorities under the Human

*Lord Sales, Justice of the Supreme Court of the United Kingdom. This article is based on the Cambridge Freshfields Annual Law Lecture, delivered on 10 March 2023. I am grateful to my former Judicial Assistant, Robert Steele, for his excellent assistance in preparing the lecture and this article and to the Journal's reviewers for their constructive comments. All errors are my responsibility.

[1] Sometimes these ideas are expressed in the language of "rights" for rhetorical effect.

Rights Act 1998 (the "HRA"). That is a picture which can be misleading as regards the constitutional values and protections inherent in the common law. They were an aspect of the common law of obligations and so featured in the area of what we might now designate as private law.

In exploring this topic I hope to retrieve and bring to the surface an important aspect of the common law in terms of both private law and public law. I will suggest that, in the common law, this distinction is not all it seems. What we now call public law and private law grew up together and to a large degree private law reflected, and continues to reflect, what we now think of as public law values. But English law has seen a process of increasing differentiation between public law and private law which tracks the growth of the reach and power of the administrative state. This process of differentiation has had implications for the role that constitutional values play in the common law of obligations.

For present purposes, three phases of the common law may be identified: the period before the making of the ECHR in 1950; the period between the ratification of the ECHR and the coming into force of the HRA; and the period since the HRA came into force. In the first phase, constitutional values were taken to be inherent in the common law of obligations. In the second phase, there was a growing sense of constitutional values in the form of human rights set out in the ECHR as providing a vantage point external to the common law which might have something to say about how the common law should develop. In the third phase, under the HRA there is a statutory obligation for courts to give effect to the Convention rights and this has focused minds more directly on the Convention rights as concepts external to the common law which express values now to be injected into the common law, and how that radiating effect should be conceived and managed.

Through the prism of this chronological framing, this article examines the conception of constitutional rights and values in English law, by comparison with the view of them in continental Europe, particularly within German constitutional law. It also contrasts the conceptions of the state prevalent within the Anglo-American and continental European, particularly French, traditions. Differences in these constitutional perspectives are traced into their impact upon the case law of the European Court of Human Rights (the "ECtHR"), particularly as that case law has developed in relation to positive obligations under the ECHR. The article then turns to domestic jurisprudence under the impact of the Human Rights Act. Finally, placed in this historical context, I will consider the modern-day impact of constitutional values on the common law of obligations.

In English law, the process of differentiation between public law and private law has reflected a recognition of the distinct role and responsibilities of the modern state. This process has been accentuated

by the HRA, which has been a conduit for the introduction of continental modes of thinking about the relationship between public law and private law. This has put pressure on the way in which the common law formerly reflected constitutional values in the private law of obligations. Nonetheless, English law still draws on its own conceptual resources according to which constitutional values are regarded as inherent in the private law of obligations, and has displayed resistance to the continental conceptual challenge while also accommodating it to some degree.

II. Historical Constitutional Values in the Common Law Before the European Convention on Human Rights

A. Constitutional Values Generally

"Human rights" is a modern term, but the values which they reflect are not.[2] I start by considering the history of constitutional values in the common law, prior to the drafting and ratification of the ECHR.

The common law has always reflected constitutional values. The constitutional values lie behind the specific actionable entitlements expressed in common law rules and doctrine, and provide a normative underpinning for them. Sometimes the constitutional values may be near the surface of the common law, sometimes they may be somewhat removed from the specification of a relevant legal entitlement yet operate in the background to provide justification for them. But the common law is ancient, and those values have changed over time. In his lectures on the Constitution published in 1908 as *The Constitutional History of England*, Maitland provided a series of snapshots of constitutional law at different points in history. The first was a snapshot of English public law at the death of Edward I. This contained a substantial section on land law. As Maitland explained,[3] under the feudal system the great part of public rights and duties were inextricably interwoven with the tenure of land, so that the whole governmental system was part of the law of private property. However, the long-standing roots of modern constitutional values in the common law tradition can also be seen emerging before this in the Magna Carta of 1215. Chapter 29[4] stated that "[n]o free man shall be taken, imprisoned, or disseised of his freehold, or liberties or free customs, or outlawed, exiled or in any way destroyed, nor will we proceed against him, save by the lawful judgment of his peers or by the law of the land. We shall not sell, deny or delay to any man right or justice".

[2] For analysis in relation to distinct constitutional values, see M. Elliott and K. Hughes, *Common Law Constitutional Rights* (Oxford 2020).
[3] F.W. Maitland, *The Constitutional History of England* (Cambridge 1908), 23–24.
[4] Clause 39 of the original charter of 1215, but numbered 29 in the statutory version of 1225.

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These are familiar concepts, although their content and significance have changed in modern times. One can see, articulated in the thirteenth century, the right to security of the person, the right to a fair trial, the principle of no punishment without law and the protection of property or possessions by law. In the seventeenth century, Sir Edward Coke championed Magna Carta as the epitome of rights recognised by the common law. Linda Colley has described how in the 18th century a cult developed around Magna Carta, as a foundational text that sustained Britain's Constitution, including in the writing of William Blackstone.[5] Those foundational rights are reflected in any charter of rights in legal systems today.

Dicey, in his seminal text on the UK Constitution,[6] lists three substantive rights which have constitutional status as aspects of the principle of the rule of law: (1) the right to personal freedom, particularly as protected by the courts by the writ of habeas corpus; (2) the right to freedom of discussion; and (3) the right of public meeting. These rights were exercisable in private law. Speaking of the right to personal freedom, Dicey emphasised the strict adherence of the judges to a principle which underlies "the whole of the law of the constitution and the maintenance of which has gone a great way both to ensure the supremacy of the law of the land and ultimately to curb the arbitrariness of the Crown", namely "that every wrongdoer is individually responsible for every unlawful or wrongful act in which he takes part" and cannot plead that he did it to comply with orders from a superior.[7]

The drafting of the ECHR in 1950 was not, therefore, an exercise of pure creation from a British point of view. There was much in terms of an understanding of English law for the British drafters to work with. It is recognised that British lawyers were closely involved in the drafting. The substance, if not the form, of the rights they went on to articulate were largely familiar and established. Much of it would have seemed familiar even to an English lawyer in the Renaissance period.[8]

B. Constitutional Values Throughout the Common Law

In the common law, constitutional values were not regarded as part of a distinct domain of public law. The very notion of public law is a late-comer in English law and is to some degree alien to it. It emerges and gathers force with a sense of the need to provide legal parameters for the operation of the burgeoning administrative state in the course of the

[5] L. Colley, *The Gun, the Ship & the Pen: Warfare, Constitutions and the Making of the Modern World* (New York 2021), 97–99.
[6] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London 1915), chs. V–VII.
[7] Ibid., at 206–07.
[8] J. Baker, *Collected Papers on English Legal History*, vol. II (Cambridge 2013), 935.

twentieth century. But it had to overcome resistance arising from three things.

First, the basic idea inherent in the common law tradition, as encapsulated by Dicey, that the same ordinary law applies to individuals and officials. Differential treatment for those acting in a public capacity merely by virtue of their public status has been resisted and there was no general principle of executive right or privilege.[9] Second, the absence of a developed idea of the state, as distinct from the essentially medieval idea of the Crown. Third, the absence of a dedicated institutional home in which public law could be developed, in the form of a specialised system of administrative justice such as existed in France.[10]

However, in the study and practice of law today we have become accustomed to the conventional distinction between public and private law. Alongside rules to distribute powers and responsibility between different public bodies, the former's focus is on the limits of state power in relation to the individual. The latter governs legal relationships between private persons. From there, we are also familiar with the conceptual distinction between the "vertical" and the "horizontal" nature of legal relationships. Public law is framed as vertical, involving the exercise of power from high to low, from the state to the individual and the regulation of that power. Private law is framed as horizontal, involving legal relationships between two private parties of equal legal standing.[11]

Unlike constitutional values as they emerged in the historic development of the common law, the public/private divide and the vertical/horizontal distinction reflect a modern way of looking at the world, and in particular of looking at the state as an entity distinct from civil society.[12]

Whereas civilian systems have historically been organised around categories of relationship (such as person-person and person-state), English law has traditionally organised itself around disparate forms of action, which paid little attention to the relationship between the parties.[13] Instead, the focus was on whether the facts fitted the procedural pigeonhole for issuing a writ and the grant of a remedy. The principle that the executive branch of government should be subject to the rule of

[9] Dicey, *Introduction*, ch. XII; Maitland, *Constitutional History*, 479. The Crown itself had legal immunity in tort prior to the Crown Proceedings Act 1947, but could be sued in contract under the petition of right procedure: P. Hogg, P. Monahan and W. Wright, *Liability of the Crown*, 4th ed. (Toronto 2011), ch. 1.

[10] See e.g. J. W. F. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford 1996); K. Dyson, *The State Tradition in Western Europe* (Oxford 1980); F. W. Maitland, "The Crown as Corporation" (1901) 17 L.Q.R. 131; P. Sales, "Crown Powers, the Royal Prerogative and Fundamental Rights" in H. Wilberg and M. Elliott (eds.), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Oxford 2015).

[11] See e.g. S. F. C. Milsom, "The Nature of Blackstone's Achievement" (1981) O.J.L.S. 1, 3.

[12] See e.g. Dyson, *State Tradition*, 201.

[13] J. Varuhas, "Transcending the Public Law-Private Law Divide" in C. Harlow (ed.), *A Research Agenda for Administrative Law* (Cheltenham; Northampton, MA 2023), 165.

https://doi.org/10.1017/S0008197324000011 Published online by Cambridge University Press

law is therefore a principle of ancient origin, but such aims were achieved through the medieval prerogative writs of prohibition, certiorari and mandamus[14] and the other forms of action. The law of tort, applied to public officials in the same way as to private individuals, provided important limits on what officials could do. The common law has developed to reflect a set of human values which require protection both from other individuals and, for essentially similar reasons and to the same extent, from state officials.[15]

Notwithstanding the abolition of the forms of action, the historic ambivalence about whom a particular action or writ was directed against cast a long shadow. As Maitland noted, "[t]he forms of action we have buried, but they still rule us from their graves".[16] An overwhelming remedial conception of the law therefore continued, which was always more pragmatic than theoretical or systematic.[17] The absence of a distinct body of public law is therefore traceable to the prerogative writs,[18] notwithstanding they were later adapted for the purpose of controlling government or public administration.[19]

The famous illustration of the Diceyan analysis is *Entick v Carrington*.[20] This established that public authorities had no special powers to override private rights, but were in the same position as ordinary private individuals. If they violated private rights they would be liable in law as tortfeasors, unless they could show they had statutory authority for what they had done.

This basic position has continued relevance in contemporary law. In *M v Home Office*[21] the House of Lords held by application of such foundational principles that the court retained a jurisdiction to grant injunctions against ministers and other officers of the Crown. A minister could be held to be personally liable in contempt for breach of such an order and did not enjoy special protections or privileges by virtue of his position. Most recently, the principle that ministers "could not order searches of private property without authority conferred by an Act of Parliament or the common law" was confirmed in *Miller (No 2)*.[22]

[14] S. De Smith, "The Prerogative Writs" [1951] 11 C.L.J., 40–56. See also A. Beever, "Our Most Fundamental Rights" in D. Nolan and A. Robertson (eds.), *Rights and Private Law* (Oxford 2012), 77.
[15] Beever, "Our Most Fundamental Rights", 80.
[16] F. W. Maitland, *The Forms of Action at Common Law: A Course of Lectures*, A.H. Chaytor and W.J. Whittaker (eds.) (Cambridge 1909), 2.
[17] Allison, *Continental Distinction*, 127; and S. Milsom, "Law and Fact in Legal Development" (1967) 17 University of Toronto Law Journal 1–19, 1.
[18] De Smith, "Prerogative Writs", 48.
[19] Varuhas, "Transcending the Public-Private Divide", 167, referring to S. De Smith, "Wrongs and Remedies in Administrative Law" (1952) 15 M.L.R. 189, 206.
[20] (1765) 19 State Tr. 1029.
[21] [1994] 1 A.C. 377.
[22] *R. (Miller) v Prime Minister; Cherry and others v Advocate General for Scotland* [2019] UKSC 41, [2020] A.C. 373, at [32].

Dicey emphasised and reinforced an historical resistance of the common law to a *droit public*, a body of law on the French model which confers special status and powers on government officials in the exercise of their public functions. The common law does not accept that those acting in a public capacity have different powers from ordinary individuals to interfere with private rights. What we would now think of as a modern form of public law remained without recognition, until the accelerating demands of the modern administrative state drew it into existence. Before that happened, the axis of the common law tended to remain horizontal, so that constitutional values were reflected in private law.

Why might that be? I suggest that the answer is in the historical context of constitutional values in the common law. Modern public law may be analysed in broad and rather simplified terms as having two dimensions. First, the control of public power to ensure it is used by the proper bodies to which it is assigned and for the public good. Second, the protection of individuals against arbitrary use of power in relation to them by the state through individual rights, extending from historic due process rights of natural justice to modern substantive rights in the form of human rights. The second dimension is framed as endowing the individual with rights to resist the excesses of state power as applied to them. As is now very familiar, in the application of human rights the potential conflict between individual rights and the public interest is resolved through a proportionality balancing exercise. That framing suggests that these competing rights and interests meet in that exercise for the first time, that they are of different origin and of a different nature and now fall to be brought into some form of harmony or accommodation. But, from the perspective of the common law, this is a rather distorted picture. Far from being newcomers, constitutional values have deep-rooted foundations in the common law. They are already present in the way the law has come to be articulated. Absorbed into the common law tradition, that tradition has already produced a resolution of competing values. The relevant balancing of interests was achieved at a prior stage as part of the background to the formulation of entitlements specified in the common law. The law in *Entick v Carrington* is not the product of, nor is it dependent upon, some form of proportionality balancing. It is the product of more fundamental conceptions of rights at common law operating essentially on the horizontal plane.

That history has consequences for the debate as to the impact of constitutional values on the private law of obligations and the extent to which values which are now conceived of in terms of public law may radiate into private law. If private law already accommodates those values, the extent to which public law as currently conceived can inject new content into the law of obligations may well be limited.

III. Common Law in the Period Between the European Convention on Human Rights and the Human Rights Act

The UK was heavily involved in the creation of the ECHR. The UK was the first country to ratify it and Lord McNair, the British judge, was the first president of the ECtHR. The ECHR was, to a significant extent, a UK invention, designed to internationalise the constitutional values (or human rights) which British subjects had long enjoyed.[23]

Whilst the adoption of the ECHR was of great significance for many reasons, an English common lawyer would not have considered there to be anything surprising in the rights themselves. They were taken to be a reflection of the existing, long-standing constitutional values inherent in the common law. Even if some of the rights given expression in the ECHR did not have precisely that form in English law, they were taken to be protected in practice by a network of specific common law entitlements and recognised civil liberties.[24] It was not therefore anticipated that the adoption of the ECHR would challenge the operation of English law itself, except perhaps in the colonies. The whole affair was treated as a matter of international relations, rather than considered to be a matter affecting domestic jurisprudence.[25]

However, the creation of a new institution in the form of the ECtHR, which was dedicated to expounding and applying the Convention rights, came to have major significance, especially after the extension of the right of application by individuals.[26] After a rather slow start, the court came to develop a detailed and sophisticated body of human rights law binding states. This was a court dedicated to the development of a specialised form of public law, operating on the international plane but directed to controlling the relationship between the state and individuals. The significance of this institution as the engine of new doctrine tailored to the modern state was as great as that of the French *Conseil d'Etat* as the institutional engine for doctrinal development of a specialised public law in France.

A. The Overlap Between Convention Values and the Common Law

Whilst during this period the UK courts were under no domestic law obligation to follow or comply with the rights set out in the ECHR and the Strasbourg case law, they came gradually to be aware of an overlap between domestic law and ECHR law. Whilst not bound to follow the decisions of the ECtHR, the belief was that the common law reflected

[23] See A.W.B. Simpson, *Human Rights and the End of Empire* (Oxford 2001), chs. 13–16.
[24] For example, the right to privacy (art. 8), particularly in the home, was protected by a range of property rights and the right to freedom of expression (art. 10) was recognised as a civil liberty.
[25] Baker, *Collected Papers*, 942.
[26] Accepted by the UK in 1966.

the values it was expounding anyway. Convention rights were therefore referred to in domestic case law, albeit predominantly only in a fairly abstract way in order to assert their consistency with constitutional values inherent in the common law.

By way of example, the common law demonstrated some degree of consistency with Convention rights in articles 3, 4 and 6. In *A v Home Secretary*[27] Lord Bingham noted that it was "clear that from its very earliest days the common law of England set its face firmly against the use of torture. Its rejection of this practice was indeed hailed as a distinguishing feature of the common law", as later encapsulated in article 3. In *Nokes v Amalgamated Doncaster Collieries*,[28] Lord Atkin emphasised the long-standing constitutional rejection of slavery (i.e. as now encapsulated in art. 4) noting that "the right to choose for himself whom he would serve constitutes the main difference between a servant and a serf". Similarly, in relation to article 6, it was well established in the common law that every citizen had a constitutional right of access to a court.[29]

But as the ECtHR's case law became more definite and refined over a lengthy period, it provided a determinate standard against which domestic law could be compared and potentially found wanting. Angelika Nussberger, a former president of the ECtHR, has described the gradual consolidation and expansion of the court's jurisprudence from the slow start in the 1950s, to "The Sleeping Beauty slowly waking up" in the 1980s, to the increasing number of cases and articulation of common values for Europe in the 1990s, to exponential growth in its case law in the 2000s.[30] Counsel in the UK came to refer to the ECHR jurisprudence more frequently. As the UK came to lose cases in Strasbourg,[31] increasingly a judicial sense of unease set in. Judges became conscious that their rulings might be subject to review before the ECtHR and became willing to refer to the ECHR to try to demonstrate that English law conformed with it. Even before the HRA, it was becoming impossible to ignore this growing and ever more specific body of law.

A consciousness that the common law of obligations reflected the same values as the ECHR and a desire to emphasise this emerged in this way in the 1990s. In the article 10 context of free speech, in *Attorney General v Guardian Newspapers Ltd. (No 2)*[32] Lord Goff observed that there was:

[27] [2005] UKHL 71, [2006] 2 A.C. 221, at [11].
[28] [1940] A.C. 1014, 1026.
[29] See e.g. *Bremer Vulcan v South India Shipping* [1981] A.C. 909, 971; *Raymond v Honey* [1983] 1 A.C. 1, 10; *Ex parte Anderson* [1984] Q.B. 778.
[30] A. Nussberger, *The European Court of Human Rights* (Oxford 2020), ch. 1.
[31] Such as *Sunday Times v UK* (1979) 2 E.H.R.R. 245; *McCann v UK* (1996) 21 E.H.R.R. 97.
[32] [1990] 1 A.C. 109, 282–84.

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> no inconsistency between English law on this subject and article 10 of the European Convention .... This is scarcely surprising, since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world. The only difference is that, whereas article 10 of the Convention, in accordance with its avowed purpose, proceeds to state a fundamental right and then to qualify it, we in this country (where everybody is free to do anything, subject only to the provisions of the law) proceed rather upon an assumption of freedom of speech, and turn to our law to discover the established exceptions to it.

Similarly, in *Derbyshire County Council v Times Newspapers*,[33] Lord Keith reached a conclusion on the extent of a right to freedom of speech "upon the common law of England without finding any need to rely upon the European Convention".

Alongside this sort of defensive language, in the 1990s the UK courts gave renewed emphasis to the so-called "principle of legality", according to which constitutional values recognised as immanent in the common law were brought to the surface as factors influencing the interpretation of legislation.[34] They also articulated a willingness to apply the *Wednesbury* rationality standard in a more modulated and potentially more intensive way, depending on the normative significance of the underlying interests in issue.[35] These developments allowed the UK courts to narrow any gap which might otherwise open up between domestic doctrine and the jurisprudence of the ECtHR.

Throughout this period, the UK courts and the ECtHR therefore proceeded in parallel, with the UK courts increasingly aware that the ECtHR was pedalling fast alongside them. The continued view in the UK, however, was that since the ECtHR was merely interpreting and applying what were already "UK values", there was little to learn or which required modification in the domestic legal system.

B. Seeds of Vertical and Horizontal Effect

It is relevant at this juncture to return again to the structure of the law in which constitutional values were situated. In the context of the unified common law system, without a clear substantive divide between public and private law, it was a matter of happenstance that the same values were applied in one context or the other. The common law rights which

[33] [1993] A.C. 534, 55.1.

[34] See e.g. *R. v Secretary of State for the Home Department, ex parte Leech* [1994] Q.B. 198; *R. v Secretary of State for the Home Department, ex parte Pierson* [1998] A.C. 539. For discussion, see J. Varuhas, "Administrative Law and Rights in the UK House of Lords and Supreme Court" in P. Daly (ed.), *Apex Courts and the Common Law* (Toronto 2019); also P. Sales, "A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998" (2009) 125 L.Q.R. 598.

[35] For instance, by reference to the idea of "anxious scrutiny" in *Bugdaycay v Secretary of State for the Home Department* [1987] A.C. 514; and see *R. v Ministry of Defence, ex parte Smith* [1996] Q.B. 517.

incorporated and reflected those values could, in theory, be asserted against a private individual or a public authority.

However, in the latter part of the twentieth century a domestic conception of public law emerged more clearly.[36] A more specialised domestic form of what could be called *droit public* developed in recognition of the need to fashion legal rules appropriate for the due regulation of the expanded administrative state.[37]

These developments were most clearly seen in a number of landmark House of Lords judgments in the 1960s and 1970s. In *Ridge v Baldwin* the House of Lords upheld a chief constable's challenge to his dismissal on the basis that the relevant committee was obliged to observe the rules of natural justice by informing him of the charges against him and giving him an opportunity to be heard.[38] In *Padfield* the House held that the decision of the Secretary of State not to compel the Milk Marketing Board to investigate a complaint about the operation of the milk marketing scheme under the Agricultural Marketing Act 1958 was subject to judicial review where the refusal to investigate would frustrate the policy of the Act.[39] In *Anisminic* an ouster clause which provided that the tribunal's determination "shall not be called into question in any court of law" was held not to apply because the tribunal had misconstrued the statute with the result that there had been no valid determination.[40] The ouster clause could not operate to prevent the court from determining whether or not the order was a nullity. In *British Oxygen Co. Ltd. v Board of Trade* it was confirmed that a person who has to exercise a statutory discretion must not fetter that discretion.[41] Public law grew in scope and coherence, increasingly conceived as something distinct from private law. In 1984 Lord Diplock summarised the position which had been arrived at by articulating a taxonomy of public law grounds of review under the heads of illegality, irrationality and procedural impropriety.[42] In 1999, in discussing the nature of common law development, Lord Goff suggested that "[p]erhaps the most remarkable example of such a development is to be found in the decisions of this House in the middle of this century which led to the creation of our modern system of administrative law".[43]

[36] The first English treatise on "public law" appeared in the 2000s: D. Feldman (ed.), *English Public Law* (Oxford 2004). See the discussion of this development in Varuhas, "Transcending the Public-Private Divide".

[37] Lord Woolf, "Droit Publique, English Style" [1995] P.L. 57; N. Johnson, *Reshaping the British Constitution: Essays in Political Interpretation* (London 2004), 149; P. Sales, "The Interaction of the Rule of Law and the Separation of Powers" [2022] P.L. 527.

[38] [1964] A.C. 40.

[39] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 997.

[40] *Anisminic Ltd. v Foreign Compensation Commission* [1969] 2 A.C. 147.

[41] [1971] A.C. 610.

[42] *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374.

[43] *Kleinwort Benson Ltd. v Lincoln City Council* [1999] 2 A.C. 347, 378.

The standard explanation for this sea-change is the rapid expansion of the executive and the prominence of state power in individuals' lives.[44] Changes in social attitudes may also have played a part, with a reduction of faith in political and non-legal administrative processes in the period after World War II, which encouraged and legitimised legal controls in relation to the exercise of political power.[45] There were also key developments in the way the courts managed public law claims. A specific procedure for judicial review applications was created in Order 53 of the Rules of the Supreme Court in 1977. The rules of locus standi were relaxed to allow campaign groups and others to commence proceedings to vindicate the rule of law.[46] In *O'Reilly v Mackman* procedural exclusivity was confirmed with respect to the use of judicial review for public law claims.[47] These developments also had a clearer institutional home, in the form of what became the Administrative Court.

The recognition of a specialised domain of public law is contrary to the Diceyan conception of the rule of law.[48] However, whilst momentous in many respects, the development of public law as a body of law was still far from a system of administrative law bound by a unified theory.[49] The development was piecemeal and normatively disparate, remaining (at least in part) in the long shadow of the prerogative writs. Lord Scarman recognised the continuing lack of any systemic or theoretical harmony in the 1990s:

> Since 1948 [the year in which the *Wednesbury* case appeared in the Law Reports] there has, of course, been remarkable progress in the development of judicial review. But we have not achieved a coherent body of law. Today's administrative law is made up of bits and pieces .... It is still no more than an *ad hoc* bunch of restraints, controls, and procedures wrung from government and encapsulated in statutes and statutory instruments of limited operation.[50]

As a result, to the extent the courts did fashion a conception of public law, this has been characterised as a conception of judicial review only.[51] It did not, for example, account for constitutional questions over the allocation of power and institutional relations. Instead, a comprehensive account of the law regulating public power would still need to include tort, contract and

[44] See e.g. W. Wade and C. Forsyth, *Administrative Law*, 11th ed. (Oxford 2014), ch. 1; and M. Elliot and J. Varuhas, *Administrative Law: Text and Materials*, 5th ed. (Oxford 2016), chs. 1, 4.
[45] Sales, "Crown Powers", 365.
[46] *Inland Revenue Commissioners v Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617.
[47] [1983] 2 A.C. 237.
[48] Sales, "Interaction of the Rule of Law".
[49] Varuhas, "Transcending the Public-Private Divide", 167.
[50] Lord Scarman, "The Development of Administrative Law: Obstacles and Opportunities" [1990] P.L. 490, 491–92.
[51] J. Varuhas, "The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications" in J. Bell et al. (eds.), *Public Law Adjudication in Common Law Systems* (Oxford 2016).

property.[52] Consistent with the common law tradition, private law remained an essential pillar in any comprehensive account of the regulation of public power.

Notwithstanding a lack of doctrinal coherence, a number of limitations developed from the basic position set out in *Entick v Carrington*. The law of tort was developed to give some public bodies a privileged position as compared with private individuals in some cases.[53] In *Hill v Chief Constable of West Yorkshire*,[54] a public policy limitation was spelled out to protect the police when faced with a claim of negligence in detecting and preventing serious crime, taking account of their limited resources and the danger of incentivising them to pursue an unhelpful set of priorities in the form of overly defensive policing.[55] This doctrine was subject to review in Strasbourg in *Osman v United Kingdom*,[56] through the prism of Convention rights. Whilst what was conceived of as a blanket immunity granted to police within the UK was held to be contrary to article 6, the ECtHR rejected the complaint that there had been a breach of article 2 arising from the failure to protect life, referring to similar policy considerations in relation to the allocation of resources. To this extent the European form of public law ran in tandem with the domestic law of obligations.

Viewed in this way, unlike private individuals, public bodies were not considered to have interests of their own, nor did they have residual, unreviewable freedoms. Instead, for constitutional reasons, they had to justify their actions in terms of the public, rather than their own, interest.[57]

The conceptual move to recognise this dimension of constitutional values in the law of obligations had already been foreshadowed in the law relating to confidential information. Where duties of confidence arise in the public sector, they will only be upheld to the extent that this is in conformity with the public interest. This was seen in *Attorney General v Jonathan Cape*[58] and *Attorney General v Guardian Newspapers (No 2)*,[59] both of which held that in relation to breach of confidence a public body would have to go further than a private individual and show that the public interest requires that publication of the information should be restrained before it could enforce the duty of confidence. This was the converse of the effect in *Hill*, where it was held that in view of their constitutional role it might be easier for a public body to defend itself against a private law claim,

[52] Varuhas, "Transcending the Public-Private Divide", 168.
[53] D. Oliver, *Common Values and the Private-Public Divide* (London 1999), 169.
[54] [1989] A.C. 53.
[55] On immunities, see J. Beatson, "'Public' and 'Private' in English Administrative Law" (1987) 103 L.Q.R. 34.
[56] (1998) 29 E.H.R.R. 245.
[57] Oliver, *Common Values*, 114.
[58] [1976] Q.B. 752, 770–71 (Lord Widgery C.J.).
[59] [1990] 1 A.C. 109, 256 (Lord Keith of Kinkel).

https://doi.org/10.1017/S0008197324000011 Published online by Cambridge University Press

so that the law opened up a space for their activity unimpeded by the law. In this context, also by reason of their constitutional position, it became harder for public bodies to maintain private law claims, so that the law reduced the scope for effective action by such bodies by comparison with private individuals.

The drawing of distinctions in this way between public bodies and private individuals in the law of obligations tended to emphasise the growing consciousness of a new vision of how the law should accommodate constitutional values along the public/private divide which was also coming to be regarded as central in the field of judicial review.[60]

Given the historical backdrop of the common law, with no recognition of a public and private law divide, the growth of such a distinction was not without friction. Allison has described such a transplant into the English legal tradition as a "Trojan horse".[61] Without due regard to the historical context, he suggests that the adoption of a procedural distinction in the application of the exclusivity doctrine to judicial review "was not a triumph for political theory but a further exposure of judicial ignorance".[62] Rather than signifying the coming together of the civil and common law traditions, it confirmed their traditional differences and illustrated the hazards of ill-considered transplantation.[63] By way of counter-example, the public/private divide recognised within French law has historically been sustained by jurisdiction-specific features, such as an established conception of the state and institutional structures including separate administrative courts. Those features were absent in England[64] and therefore, argues Varuhas, the transplant was "destined to fail".[65]

Notwithstanding the frictions caused by the differentiation of the public and the private spheres, its development appeared to involve a significant shift of perspective. Whilst the realm of private law originated from the unified common law system, in which constitutional values were embedded, it was now coming to be seen as distinct from public law,[66] which appeared to be the more natural home for constitutional values. The metaphor of the horizontal dimension of private law and the vertical dimension of public law took hold. It was reinforced by the growing awareness of the ECHR, since that instrument creates rights and freedoms for individuals as against states and thus clearly operates on a vertical model. In due course, the HRA

[60] See e.g. *R. v Panel on Take-overs and Mergers, ex parte Datafin Plc* [1987] Q.B. 815.
[61] Allison, *Continental Distinction*, chs. 5, 6.
[62] Ibid., at 100, referring to T.R.S. Allan, "Pragmatism and Theory in Public Law" (1988) 104 L.Q.R. 422; and P. McAuslan, "Administrative Justice: A Necessary Report?" [1988] P.L. 402.
[63] Allison, *Continental Distinction*, 135.
[64] Ibid.
[65] Varuhas, "Transcending the Public-Private Divide", 174.
[66] There was some irony in this development, as Allison notes, given the growing privatisation of the public sector at the same time: *Continental Distinction*, ch. 5.

reflected and reinforced this vertical structure since it imposed obligations on public authorities, not individuals.

The prominence of the contrast between the vertical dimension of public law and the horizontal dimension of private law gave rise to the possibility for a different way to conceive of how underlying constitutional values should be articulated and developed. If public law was the proper home of constitutional values, the question of the relationship between public law and private law became more acute. Should public law, conceived as a distinct source of constitutional values, have a role in projecting those values into private law in some way? The question whether public law should have this kind of radiating effect upon private law became more important with the enactment of the HRA and its creation of a tabulated schedule of positive rights as part of the scheme of public law.

IV. The Period from the Enactment of the Human Rights Act: The Radiating Effect of Human Rights in English Law

A. Positive Obligations and Bridging the Public/Private Divide

The HRA came into force on 2 October 2000. Among its important features was the imposition by section 6 of a statutory duty on public bodies to act compatibly with Convention rights. That duty applied to courts as well. The HRA greatly reinforced the perception that there was an important public/private divide in the law. Public authorities were subject to obligations which private individuals were not. Private individuals could point to a new source of rights which they could assert in disputes, although only against public authorities or those carrying out functions of a public nature. There was a proliferation of human rights textbooks. They were generally grouped together with books on public law, rather than private law. The domestic and Strasbourg jurisprudence on human rights was ever more dynamic, whilst by comparison private law seemed largely unchanging and in a world apart.

It was in this new constitutional context, and in light of an enhanced perception of the differentiation between public law and private law, that a new conception of the relationship between constitutional values and the law of obligations took hold. How could human rights, applicable only against public authorities, have continued relevance to private law? The answer, derived from the ECHR case law, was located in the doctrine of positive obligations. Two examples illustrate this.

In *Pla and Puncernau v Andorra*[67] a testatrix stipulated in her will that property would be left to a son and that it was then to pass to a son or grandson of a lawful and canonical marriage, failing which the estate was to pass to the children and grandchildren of the testatrix's daughters.

[67] (2006) 42 Eur. Ct. H. R. 25.

https://doi.org/10.1017/S0008197324000011 Published online by Cambridge University Press

The son made a will leaving the inherited assets to his wife and then to their adopted son Antoni. The question arose as to whether the inheritance could pass to Antoni, given the terms of the original will. The Andorran courts said no. Antoni and his mother successfully applied to the ECtHR, complaining of a breach of articles 8 and 14 by reason of the court's decision. Notwithstanding the private law context, the ECtHR said that "it cannot remain passive where a national court's interpretation of a legal act … appears … blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention".

Marckx v Belgium[68] concerned the status of illegitimate children. Under Belgian law, no legal bond between an unmarried mother and her child resulted from the mere fact of birth and the rights of an illegitimate child in relation to inheritance were also limited. Again, notwithstanding the private law context, the ECtHR held that the complaint was made out.

Where did this conception of positive obligations come from? It is related to the approach to the application of constitutional values in continental Europe, exemplified in German law.

B. The German Approach to Rights

This is a big topic which can only be touched upon in this article. I draw on the insightful account given by Cohen-Eliya and Porat in *Proportionality and Constitutional Culture*,[69] which contrasts the Anglo-American approach to rights with the German. A key difference is that whereas English law speaks of defined legal rights which persons have, the German approach focuses more on the enunciation of values and gives them legal effect. This relates to different views of the state and the state's role in relation to rights.

On the German conception of the state, which aligns with that widespread in continental Europe, the state is a legal person, recognised and constituted by law.[70] The state is seen as a corporation with inherent power to act through its officials, and in acting it embodies a distinctive public interest set apart from the voice of particular electoral majorities or lobby groups. Traditionally it was seen as a counterweight to political instability and governmental irresponsibility and ineffectiveness associated with parliamentary government.[71] It claimed to stand outside and above partisan politicking.[72] Rudolf Smend suggested that the state was the site where

[68] (1979–80) 2 E.H.R.R. 330.
[69] M. Cohen-Eliya and I. Porat, *Proportionality and Constitutional Culture* (Cambridge 2013), ch. 3.
[70] There are good discussions of these differences in Dyson, *State Tradition*, and L. Siedentop, *Democracy in Europe* (London 2001), ch. 6. See also J. McLean, *Searching for the State in British Constitutional Thought* (Cambridge 2012).
[71] See Dyson, *State Tradition*, 6, ch. 9.
[72] Ibid., at xiv.

individuals joined together in a shared life experience.[73] In this view, the Constitution is to serve as a "stimulus and channel" (*Anregung und Schranke*) for this process of integration.[74]

This is in contrast to the Anglo-American conception of the state. In the seventeenth century, Hobbes had been preoccupied with "that great Leviathan called a common-wealth, or state".[75] This notion "left an abiding impact" in continental Europe, but not in England.[76] The English legal profession, traditionally independent and historically linked to the Inns of Court, was generally insulated from political theory and conceptions of the state.[77] As a result, in the eighteenth and nineteenth centuries, conceptions of the state did not become the theoretical cornerstone of the English political and legal system.[78] The political nature of the British Constitution also suppressed any need to develop a clearer legal conception of the state.[79] The resulting differences in conceptions of the state may also reflect underlying cultural differences. A capitalist, free enterprise country may be influenced by a laissez faire liberal approach, which resists imposing limitations on the powers of the economically influential in order to protect the weaker or more vulnerable members of society, at least in the private sphere.[80] In the common law tradition, there is a greater suspicion of governmental regulation as a potential threat to property and economic freedom, as compared to the continental tradition, in which state action is more liable to be regarded as beneficent. Laski, in 1919, commented in relation to the English conception of the state:

> In England, that vast abstraction we call the state has, at least in theory, no shadow even of existence; government, in the strictness of law, is a complex system of royal acts based, for the most part, upon the advice and consent of the House of Parliament. We technically state our theory of politics in terms of an entity which has dignified influence without executive power.[81]

The parliamentary tradition in the UK encouraged neither an active role for the people (as distinct from their representatives), nor an activist conception

[73] J. Mathews, *Extending Rights' Reach: Constitutions, Private Law and Judicial Power* (New York 2018), 54–55, referring to R. Smend, *Constitution and Constitutional Law* (Berkeley, CA 1928). See also A. Jacobson and B. Schlink, *Weimar: A Jurisprudence of Crisis* (Berkeley and Los Angeles, CA 2000), 210.
[74] Smend, *Constitution*, 195.
[75] T. Hobbes, *Leviathan*, R. Tuck (ed.) (Cambridge 1991). See Q. Skinner, "The State" in T. Ball, J. Farr and R.L. Hanson (eds.), *Political Innovation and Conceptual Change* (Cambridge 1989), 90–131, 121.
[76] Q. Skinner, "Thomas Hobbes and his Disciples in France and England" (1966) 8 Comparative Studies in Society and History 153, 154.
[77] Allison, *Continental Distinction*, 74.
[78] Ibid., at 73.
[79] Sales, "Crown Powers", 365.
[80] D. Oliver and J. Fedtke (eds.), *Human Rights and the Private Sphere: A Comparative Study* (Abingdon 2007), 495.
[81] H.J. Laski, "The Discredited State: Thoughts on Politics before the War" (1919) 32 H.L.R. 447, 447.

of an executive power predisposed to educate and mobilise, rather than just react to, public opinion. A further consequence was an anthropomorphic conception of government which still persists. The hitching of monarchical prerogatives to parliamentarism, combined with ministerial responsibility, meant that government was personalised in legal terms as the actions of individual ministers.[82]

These differences in the conception of the state have effects with respect to differing conceptions of rights and the relationship between those rights and the state. Mathews describes the ways in which rights as entitlements differ from rights as values:

> Rights as entitlements are defined by the correlative responsibilities that they impose on other actors or institutions. They tend to have an all-or-nothing character: a right is either satisfied or not, with no middle ground. The "rights as values" perspective treats rights as embodying fundamental normative commitments that courts must ensure are adequately reflected in law. On this view, rights can be relevant to a legal dispute without necessarily being outcome-dispositive. Rights as values are more flexible than rights as entitlements. They can function more like substantive canons of construction that guide judicial decision making than as guarantees of a given outcome.[83]

In Germany, in order to facilitate the transformation of German society following World War II, the rights in the Basic Law were broadly construed, assigning a major role to the state to give effect to the new humanistic values it enshrined. By contrast, the Anglo-American view of constitutional values is premised on a traditional preference for state neutrality and a minimal role for the state, in which the realisation of "values" by government may be unwelcome.

In practice, the difference can be significant. The Anglo-American view traditionally frames rights narrowly and in negative terms, employing the notion of rights as entitlements rather than values. Rights are trumps[84] used to defend an individual from the excesses of the state's power. Values are to be pursued by the state and individuals for the benefit of society as a whole. Whereas broad values may be pursued by the state, negative rights constrain the kinds of action the state can take in pursuit of those values.[85] By contrast, in the German understanding, constitutional rights are not specific entitlements as such, but rather are vehicles for constitutional values, broadly conceived.[86] For example, the German courts have accepted the assertion of constitutional rights to ride

[82] Dyson, *State Tradition*, 40.
[83] Mathews, *Extending Rights' Reach*, 15.
[84] For this metaphor, see R. Dworkin, *Taking Rights Seriously* (Boston, MA 1977).
[85] J. Thomas, *Public Rights, Private Relations* (Oxford 2015), 3.
[86] See e.g. the discussion in D. Grimm, *Constitutionalism: Past, Present and Future* (New York 2016), ch. 7, "Fundamental Rights in the Interpretation of the German Constitutional Court". See also the discussion of rights as values in Mathews, *Extending Rights' Reach*, 19.

horses in the woods[87] or to feed pigeons in public squares.[88] There is what has been described as a "totalising" view of rights. In the case of *Lueth*,[89] the Federal Constitutional Court said: "constitutional rights are not just defensive rights of the individual against the state, but embody an objective order of values, which applies to all areas of the law . . . and which provides guidelines and impulses for the legislature, administration and judiciary."

Whilst the court confirmed that "constitutional rights are in the first instance intended to secure the individual's sphere of freedom against infringement by public authorities" and are therefore "defensive rights of the citizen against the state", the Basic Law also sets up "an objective order of values" (*objective Wertordnung*). This "system of values" serves "as a foundational constitutional commitment for all spheres of law".[90] This conception of rights echoes Smend's political theory and conception of the state, noted above.

This constitutional view has effects in the realm of positive obligations. German law adopts a concept of *Drittwirkung* (third-party effect) for constitutional values. This means that the constitutional values inherent in the rights set out in the Basic Law have a "radiating effect" (*Ausstrahlungswirkung*) on all aspects of the legal system, including private law.[91] The value system "naturally influences the civil law as well; no provision of the civil law can stand in contradiction to it, and each must be interpreted in its spirit".[92] The portal through which constitutional rights apply in private law disputes is the obligation on courts to enforce rights (including private law rights) in a manner compliant with constitutional values. The German courts have held that constitutional rights oblige the state, including the courts themselves, to take any necessary measures in order to ensure their realisation.[93] Whereas in the common law tradition constitutional values were concretised in determinate and specific rules, in the sense of rights as entitlements, in the German system there is no equivalent set of mediating norms. Constitutional values, in the sense of general ideas expressed as "rights", have a first order or primary status, so as to inform directly the positive content of the law.

[87] BVerfGE 39, 1, BVerfGE 88, 203.
[88] BVerfGE 54, 143, 147. For discussion of "rights inflation" generally, see K. Moller, "Proportionality and Rights Inflation" in G. Huscroft et al. (eds.), *Proportionality and the Rule of Law* (New York 2014).
[89] BVerfGE 7, 198 at [41].
[90] Mathews, *Extending Rights' Reach*, 50.
[91] M. Kumm, "Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law" (2006) 7(4) German Law Journal 341; J. Fedtke, "Germany: Drittwirkung in Germany" in Oliver and Fedtke (eds.), *Human Rights and the Private Sphere*, 125.
[92] Mathews, *Extending Rights' Reach*, 50.
[93] D. Grimm, "The Protective Function of the State" in G. Nolte (ed.), *European and US Constitutionalism* (Cambridge 2005), 137.

The ECtHR has been subject to the influence of both the German approach to rights as the vehicles for radiating constitutional values and the English tradition of rights as negative barriers to state action. In the *Marckx* case, the UK judge, Sir Gerald Fitzmaurice, expressed his own unease at the adoption of a totalising conception of rights. In a strongly worded dissent, he said:

> It is abundantly clear (at least it is to me) – and the nature of the whole background against which the idea of the European Convention … was conceived bears out this view – that the main, if not indeed the sole, object and intended sphere of application of Article 8 was that of what I will call the "domiciliary protection" of the individual. He and his family were no longer to be subjected to the four o'clock in the morning rat-a-tat on the door … in short the whole gamut of fascist and communist inquisitorial practices … [article 8 was] not for the regulation of the civil status of babies.

However, alongside the developing notion of the state in English law, the conception of rights as vehicles for individual freedom also shifted[94] from what Isaiah Berlin called negative freedom, requiring a certain freedom from governmental interference (i.e. according to the defensive, negative view of rights as traditional in the common law), towards a more positive form of freedom, allowing or requiring government to facilitate individual development and fulfilment by providing services and enabling political participation.[95] This positive view of freedom had previously had an impact on European political and legal culture, which was influenced not simply by an idea of "passive individualism" by also by "developmental individualism".[96] Changes in the conception of the state were associated with changes in the conception of individual freedom[97] and of rights more generally. Taken together, they challenged the traditional, remedial approach of the common law and made space for the development of a distinct body of public law. These developments and their potential, however, were necessarily context-specific and the extent of their ultimate realisation was dependent upon their compatibility with the legal system in which they occurred. As explained above, the common law tradition did not necessarily provide fertile ground.

[94] Allison, *Continental Distinction*, 82–83.
[95] I. Berlin, "Two Concepts of Liberty" in A. Quinton (ed.), *Political Philosophy* (Oxford 1967).
[96] Allison, *Continental Distinction*, 83, referring to P. Cane, "Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept" in J. Eekelaar and J. Bell (eds.), *Oxford Essays in Jurisprudence* (Oxford 1987), 57–78, 61.
[97] Allison, *Continental Distinction*, 83.

C. A False Dawn and the Continued Primacy of Common Law Constitutional Values

At the time of the enactment of the HRA, a revolution was anticipated in relation to private law. There was much debate about the potential horizontal effect of human rights in a private law context.[98] Under section 6, courts were public authorities which were bound to act compatibly with Convention rights. There was a widespread suggestion that private law rights in the common law would be "constitutionalised" by the importation of human rights values into the realm of private obligations. So, have the UK courts adopted a German-type view of public law rights?

In broad terms the answer is "no". The UK courts have resisted the German-style approach to constitutional rights. This is for two basic reasons. First, in its application of Convention rights, the ECtHR has adopted an intermediate position between the German and English view of rights. The Convention rights have not been given a fully "totalising" effect, and the conception of positive rights is comparatively restrained. This is particularly so in light of the doctrine of the margin of appreciation, with its respect for choices made by national authorities, especially democratic legislatures, as to how competing rights and interests should be balanced. In *Belcic v Croatia*,[99] for example, a private law dispute about the termination of a tenancy according to local law, the tenant's complaint based on the right to respect for their home under article 8 was rejected. The ECtHR concluded that it "will accept the judgment of the domestic authorities as to what is necessary in a democratic society unless that judgment is manifestly without reasonable foundation". The ECtHR has applied a widened margin of appreciation where national authorities have been called upon to balance competing rights and interests, as is typical in a private law dispute. The ECtHR has its own reasons for adopting this approach,[100] but its practical effect is a tendency to insulate domestic law from being found to be in violation of Convention rights and means that the balance already struck by that law can be left undisturbed.[101] Moreover, a double proportionality analysis may be required where Convention rights clash, such as the right of privacy under article 8 and the right to free speech under article 10, looking at the

[98] See e.g. K. Ewing, "The Human Rights Act and Parliamentary Democracy" (1999) 62 M.L.R. 79, 89; M. Hunt, "The Horizontal Effect of the Human Rights Act" [1998] P.L. 423, 438; G. Phillipson, "The Human Rights Act, 'Horizontal Effect' and the Common Law: A Bang or a Whimper?" (1999) 62 M.L.R. 824, 827; B. Markesenis, "Privacy, Freedom of Expression and the Horizontal Effect of the Human Rights Bill: Lessons from Germany" (1999) 115 L.Q.R. 47, 73; R. Singh, "Privacy and the Media after the Human Rights Act" (1998) European Human Rights Law Review 722, 724–26; and W. Wade, "The United Kingdom's Bill of Rights" in J. Beatson, C.F. Forsyth and I. Hare (eds.), *Constitutional Reform in the United Kingdom: Practice and Principles* (London 1998), 62–64.

[99] (2005) 41 E.H.R.R. 13.

[100] See P. Sales, "Proportionality and the Margin of Appreciation: Strasbourg and London" in S. Vogenauer and S. Weatherill (eds.), *General Principles of Law: European and Comparative Perspectives* (Oxford 2017).

[101] *Odievre v France* (2004) 38 E.H.R.R. 43; *Evans v UK* (2008) 46 E.H.R.R. 34, at [77]. *Chassagnou v France* (2000) 29 E.H.R.R. 615.

resolution of the dispute from both perspectives. This was referred to as the "ultimate balancing test" by Lord Steyn.[102] This again has a tendency to insulate domestic law, which already seeks to balance both perspectives, from any requirement for change based on Convention rights.

The extent to which the ECtHR adopted a rights or values-based approach, veering either towards the English model[103] or the German model, has varied through time. Given the influence of English practitioners in the creation of the ECHR, the original conception of rights in the ECtHR veered towards the English negative rights-based model. But the ECtHR case law has followed an arc of development in its approach to the Convention rights. *Pla* and *Marckx*, discussed above, were perhaps the high point of the influence of the German model on the Strasbourg court, reflecting adoption of the theory of positive obligations in the "radiating effect" mould of the Basic Law in Germany, with significant substantive effects in private law. More recently, there is evidence to suggest that the ECtHR has reverted to a more limited conception of rights and of its role as an agent for constitutional values which is more closely aligned with the English approach.[104] Robert Spano, another former president of the ECtHR, has noted a new phase in the case law of the ECtHR which he has called the "Age of Subsidiarity":[105]

> In the last decade or so the Court has to a considerable extent recalibrated the methodological parameters of its jurisprudence towards a more democratically incentive review mechanism. When national authorities have in good faith balanced competing interests, in other words, themselves adequately assessed the necessity of an interference into qualified rights, the Court is increasingly ready to apply the rule that it will require strong reasons for it to substitute its judgment for the one adopted by the national authorities.

On this approach, national law supplies an intermediate set of rules and entitlements, and the ECtHR is less forceful in treating the Convention rights as authorising the imposition of a direct solution of its own making to override these.

Second, and reinforcing the effect of this approach, the Supreme Court (and the House of Lords before it) has emphasised the way in which the

[102] *Re: S (Identity: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 A.C. 593, at [17].

[103] Which is aligned with and shares historical roots with the American model discussed in Cohen-Eliya and Porat, *Proportionality and Constitutional Culture*, based on a culture of authority, by contrast with a German culture of justification, and which is "characterized by categories and bright-line rules and distinctions", where the notion of balancing "has been marginalized" (p. 8); see also the discussion at pp. 52–60 of the individualistic and suspicion-based conception of the state in America and the emphasis upon liberty and a negative conception of "rights as trumps", which has historic affinities with English common law.

[104] The margin of appreciation is itself a principle of interpretation of Convention rights: see *R. (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2023] A.C. 559, at [76]–[78].

[105] R. Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity" (2014) 14(3) H.R.L.R. 487–502; also E. Bates, *The Evolution of the European Convention on Human Rights* (Oxford 2010), to which Spano refers. See also Sales, "Proportionality and the Margin of Appreciation", 184–89, describing the ECtHR's "withdrawal to a more supervisory role".

common law tradition already reflected constitutional values. In order for courts to start applying Convention rights horizontally, there needs to be a normative gap in the ordinary law that can plausibly be filled by such a constitutional norm. Such a gap exists when there is a substantial demand for the protection of an interest that is not being met by ordinary law.[106] Where the common law could already be seen to have struck an appropriate balance between the competing rights and interests at stake, there is no need to look to other sources of rights, nor is there any justification to disturb that balance by reference to Convention rights.[107]

In *R (Guardian News and Media Ltd.) v City of Westminster Magistrates' Court*,[108] Lord Toulson observed that "[t]he development of the common law did not come to an end on the passing of the Human Rights Act 1998". Similarly, in *Kennedy v Information Commissioner*,[109] Lord Mance said:

> [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 ... [But] the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene.[110]

These statements were made in the public law context. But, recalling the way in which constitutional values are embedded in the common law of obligations, similar points can be made in the sphere of private law. For example, in the recent case of *Fearn v Tate Gallery*,[111] Lord Leggatt and I both regarded the attempt to rely on the right to privacy in article 8 in a nuisance claim to be an unnecessary complication and distraction, since the common law already struck an appropriate balance between the competing rights and interests involved,[112] leaving no space for any radiating effect of article 8 in this area of private law.

Of course, it might be said that to the extent that the common law of nuisance already sufficiently reflected interests of privacy, it did so to accommodate basic human concerns to which it gives value, rather than to make any specifically constitutional point. That is true. But it also tells us something important about how constitutional values are embedded in the common law of obligations. They are themselves a reflection of the human values which the common

[106] Mathews, *Extending Rights' Reach*, 13.
[107] A similar approach applies in relation to the interpretation of statutes. The first stage of analysis is to determine the meaning of a statute according to ordinary domestic canons of construction, and it is only if that meaning is found to be incompatible with Convention rights (including after allowing for the margin of appreciation) that section 3 of the Human Rights Act may apply to change that meaning: *R. (Z) v Hackney LBC* [2020] UKSC 40, [2020] 1 W.L.R. 4327, at [114].
[108] [2013] Q.B. 618, at [88].
[109] [2015] A.C. 455, at [46].
[110] See also at [133] (Lord Toulson).
[111] [2023] UKSC 4.
[112] Ibid., at [113], [206].

https://doi.org/10.1017/S0008197324000011 Published online by Cambridge University Press

law of obligations endorses and protects against others. The protection is given against others in the form of other private persons, but also and in the same way against others in the form of public authorities. The common law builds out from basic human concerns and the constitutional effects follow indirectly as a consequence from that.

D. The Impact of Convention Rights and Constitutional Values on Private Law Obligations

Despite limits on the impact of human rights on the common law of obligations, there are ways in which the Convention rights set out in the HRA have had an impact in the sphere of private law. There has been some radiating effect, despite a general resistance to this.

The best example is the decision of the House of Lords in *Campbell v MGN Ltd.*[113] The *Mirror* newspaper published photos of the model Naomi Campbell leaving a "Narcotics Anonymous" meeting, with the title "Naomi: I'm a drug addict". Ms. Campbell objected to the invasion of her privacy. She could not bring an action in defamation: there was no denying the truth of the story. She could not rely directly on her right to privacy under article 8: the *Mirror* newspaper is not a public authority.

Instead, she alleged that the *Mirror* had committed a tort by interfering with her right to privacy. She sought to develop this by extension from an existing equitable concept of breach of confidence. Her submission to extend legal protection under the common law was accepted. The House of Lords examined the matter through the prism of Convention rights, holding that the tort needed to strike an appropriate balance between the claimant's right to privacy (art. 8) and the defendant's freedom of expression (art. 10). By conducting that balancing exercise explicitly on the basis of the constitutional values inherent in those rights, it held that Ms Campbell's right to privacy had been tortuously interfered with.

So, by what means can constitutional values continue to impact on common law obligations?

Most directly, section 6 of the HRA imposes an obligation on courts to act in a manner which is compatible with Convention rights. As explained above, that obligation has led to more modest consequences in the UK than in relation to the Basic Law in Germany. This portal for specified Convention rights to have an effect will only therefore fall to be utilised where the common law has not considered the relevant rights and interests, or has signally failed to strike the appropriate balance.[114]

[113] [2004] UKHL 22, [2004] 2 A.C. 457.

[114] In addition to the direct potential impact of Convention rights on the common law via section 6 of the Human Rights Act, Convention rights may be given horizontal effect through a conforming interpretation under section 3 of the Human Rights Act of statutory provisions applicable as between private individuals: see e.g. *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 A.C. 557.

However, there is also scope for a more indirect effect. In evaluating how the common law should develop from case to case, human rights are capable of operating as an external standard to inform and legitimate change through the development of the common law rules. Human rights may be treated as a type of wider class of what Melvin Eisenberg calls "social propositions",[115] by which he means social standards which are capable of informing the development of the common law as it adapts to changing demands and expectations in society. Sir John Laws alluded to a similar notion in describing the ECHR as a "legitimate aid" to determine what the "policy of the common law" should be.[116] Lord Bingham in *Van Colle* recognised that in some instances the common law "had evolved in a direction signalled by the Convention".[117] In *Campbell v MGN Ltd.*, Lord Nicholls said "development of the law has been spurred by enactment of the Human Rights Act 1998".[118]

The extension of the qualified privilege defence in the law of defamation in the case of *Reynolds v Times Newspapers*,[119] which preceded the coming into effect of the HRA, can be seen as an example of this.[120] The Convention rights may therefore have a more indirect legitimising role in guiding the development of the common law. This is because they reflect the values prized and protected in modern democratic society. To demonstrate its continued authority, legitimacy and acceptability, the common law must keep pace with such values, reflecting and balancing them in appropriate ways.[121]

This might also be the best explanation for *Campbell v MGN*. The references to human rights standards in that case may have served a purpose in unblocking a logjam in the development of the common law to recognise privacy as protectable in its own right, apart from confidentiality.[122] Judicial statements supporting the extension of the action for breach of confidence to include disclosures of private information, regardless of whether that information was provided in confidence or not, are evident in case law pre-dating the enactment of the HRA.[123] The HRA therefore provided further impetus for this change as well as modifying the justification of a new tort of misuse of private information[124] through a rights-focused approach to judicial reasoning,

[115] M.A. Eisenberg, *The Nature of the Common Law* (Cambridge, MA 1988); cf. Oliver, *Common Values*.
[116] J. Laws, "Is the High Court the Guardian of Fundamental Rights?" [1993] P.L. 59, 64.
[117] *Chief Constable of the Hertfordshire Police v Van Colle* [2008] UKHL 50; [2009] 1 A.C. 225, at [58], referring in particular to the Court of Appeal decision in *D v East Berkshire Community Trust* [2003] EWCA Civ 1151; [2004] Q.B. 558, at [55]–[88].
[118] [2004] 2 A.C. 457, at [11].
[119] [2001] 2 A.C. 127.
[120] See discussion in P. Sales, "Rights and Fundamental Rights in English Law" [2016] C.L.J. 86, 104–05.
[121] See generally P. Sales, "The Common Law: Context and Method" (2019) 135 L.Q.R. 47, 56.
[122] P. Sales, "Equity and Human Rights: A Commentary" in P. Turner (ed.), *Equity and Administration* (Cambridge 2016), 419.
[123] See e.g. *AG v Guardian Newspapers Ltd. (2)* [1990] 1 A.C. 109, 281; and *Hellewell v CC of Derbyshire* [1995] 1 W.L.R. 804, 807 (Laws L.J.).
[124] Lord Nicholls described it as a tort in *Campbell v MGN Ltd.* [2004] 2 A.C. 457, at [13]–[15].

moving away from the protection of an equitable interest towards a focus on the need to balance the right to privacy and the right to freedom of expression.[125] However, this is not to say that the common law would not have developed in this way without the stimulus of the HRA.[126]

This difference in focus and reasoning is of significance, but it must be viewed against the background context examined above. As Sedley L.J. commented in a case about commercial confidentiality and freedom of expression: "In the present case, as one would hope in most cases, the human rights highway leads to exactly the same outcome as the older road of equity and common law. But it may be said that it is in some respects better signposted, and it is therefore helpful that it has played a central role in that argument."[127]

V. Conclusion

Consideration of the three periods examined above provides an informative perspective on the place of constitutional values in the law of obligations. Constitutional values have always been embedded within the common law of obligations. The growing differentiation of public law and private law threatened to obscure that, and the human rights model in the ECHR and the HRA seemed to offer a replacement theory based on the doctrine of positive obligations. But that doctrine is actually quite muted and does not have the totalising effect for constitutional values which one sees in German law. More recently, there has been a renewed appreciation of the constitutional values embedded in the common law, including as they infuse the common law of obligations. This reduces the need or justification for reliance on the doctrine of positive obligations. However, there does still remain some scope for it to apply, through the portal created by section 6 of the HRA, in circumstances where the common law has signally failed to arrive at an acceptable accommodation of human rights. There is also scope for human rights and constitutional values more broadly to function in limited circumstances as social propositions capable of guiding the development of the law of obligations.

[125] A. Young, "Horizontality and the Constitutionalisation of Private Law" in K. Ziegler and P. Huber, *Current Problems in the Protection of Human Rights: Perspectives from Germany and the UK* (Oxford and London 2013), 83. In *Campbell v MGN Ltd.* [2004] 2 A.C. 457, at [44]–[51], Lord Hoffmann characterised the change as one from an equitable duty of good faith to the protection of human autonomy and dignity with respect to control over private information about oneself.

[126] See e.g. S. Sedley, *Lions Under the Throne* (Cambridge 2015), 205.

[127] *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491, [2003] E.M.L.R. 4, at [62].