Rights as Entitlements vs Rights as Values: A Comparative Perspective on the Position of Rights in the UK and German Constitutional Systems

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In both English law and German law, it is public law which is the primary location for the application of express principles and rules with constitutional significance. However, there is also scope for constitutional principles and values to have effects in the sphere of the private law of obligations. But that happens in very different ways in the two systems.

In English law, the private law of obligations reflects and gives effect to constitutional values alongside more direct expressions of constitutional values in public law. The basic model of rights in English private law is one of rights expressed as entitlements, where the formulation of the right is in closed terms which are taken sufficiently to cover the constitutional values in play.

The model of rights in German constitutional law is based on the positive rights set out in the Basic Law, Germany's written constitution, but where those constitutional rights are capable of being overlaid across the ordinary rights and obligations provided for in private law and are thereby capable of producing material changes in the operation and effect of those rights and obligations. The constitutional rights in the Basic Law are thus taken to express constitutional values which originate from outside private law but work changes upon it. According to this model, those constitutional values are not conceived of as being already inherent in the basic formulation of obligations and entitlements in private law. The values drawn from the Basic Law are external factors which inform and modify the operation of private law. Accordingly, the German model is sometimes referred to as a model of a 'totalising' constitution, where public law values radiate across private law and affect its application.

Therefore, the interaction of public law values and private law values is a matter covered by the formulation of entitlements in English private law, whereas it is a matter for argument and express articulation in German law in terms of constitutional rights understood as generalisable values.

Two authorities

I hope you will forgive me for quoting from two authorities, one English and one German, to make this point.

[*] Deputy President of the Supreme Court of the United Kingdom. I am grateful to my former Judicial Assistants Robert Steele and Dana McGibbon for their assistance at various stages with this lecture. The lecture draws on P. Sales, 'Constitutional Values in the Common Law of Obligations' [2024] CLJ 132.

The *Lüth* judgment[1] of the German Federal Constitutional Court in 1958 is the foundation of the development to constitutionalize ordinary private law. The Court stated, on the one hand, that fundamental constitutional rights are only defensive rights against the state. On the other hand, however, it explicitly formulated the radiating effect that such constitutional rights would have throughout private law.

Mr Lüth called for a boycott of a film made by Mr Harlan, a director who had had Nazi connections. Mr Harlan successfully sued for an injunction to stop this, relying on his rights in private law to be protected from intentional damage caused in a manner offending common decency. Mr Lüth successfully brought a constitutional complaint before the Constitutional Court to have the injunction set aside, citing his constitutional right to freedom of expression. The Court had to clarify the extent to which that right could be applied in civil law disputes:[2]

> "Without doubt, fundamental rights are primarily intended to protect the individual's sphere of freedom from interference by public authorities; they are the citizen's rights of defence against the state. This follows from the intellectual development [*geistesgeschichtliche Entwicklung*] of the concept of fundamental rights and from the historical events that led to the inclusion of fundamental rights in the constitutions of individual states. This is also the meaning of the fundamental rights of the Basic Law, which, by placing the section on fundamental rights at the beginning, sought to emphasise the primacy of the individual and his dignity over the power of the state. It is consistent with this that the legislature has granted the special legal remedy for the protection of these rights, the constitutional complaint, only against acts of public authority.
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> It is equally true, however, that the Basic Law, which does not seek to be a value-neutral order, has also established an objective value system in its section on fundamental rights, and that this is precisely where a fundamental strengthening of the validity of fundamental rights is expressed. This system of values, which has its centre in the human personality and its dignity, freely developing within the social community, must apply as a fundamental constitutional decision to all areas of law; legislation, administration and jurisprudence receive guidelines and impetus from it. It therefore naturally also influences civil law; no civil law provision may contradict it, and each must be interpreted in its spirit.
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> The legal content of fundamental rights as objective norms unfolds in private law through the medium of the provisions directly governing this area of law. Just as new law must be in harmony with the fundamental value system, existing older law is aligned with this value system in terms of content; from it flows a specific constitutional content that henceforth determines its interpretation. A dispute between private individuals over rights and obligations arising from such fundamental rights-influenced norms of conduct under civil law remains a civil law dispute in terms of both substance and procedure. Civil law is interpreted and applied, even if its interpretation must follow public law, the constitution."

[1] BVerfGE 7, 198.
[2] BVerfGE 7, 198, 204 ff. I am grateful to Gabriele Britz for this translation.

In this way, constitutional rights have "indirect horizontal effects" between private individuals and thus have the potential to have a far-reaching impact on society.

The second authority is a decision of the UK Supreme Court of 2025: *Abbasi v Newcastle Upon Tyne NHS Trust*.[3] This too was a case involving a fundamental right to freedom of expression, this time that contained in article 10 of the European Convention on Human Rights – the ECHR - as applied in English law by the Human Rights Act 1998 – the HRA. The case concerned parents whose children had died, tragically, while in the care of NHS hospitals, who wished to be able to publish criticisms of clinicians delivering that care. In similar circumstances in the Charlie Gard case, clinicians had been subjected to harassment and abuse. At a certain level of intensity, such conduct could potentially involve intrusion upon the rights of clinicians to respect for their private life, a value protected by article 8 of the Convention. The NHS trusts which employed the clinicians applied for injunctions to prevent the parents naming and discussing the clinicians, relying on their article 8 rights, saying that they had to be balanced against the article 10 rights of the parents. Injunctive relief was granted against the parents to prevent them from speaking about the care their children had received. In the event, the Supreme Court held that in the circumstances which applied some years after the initial grant of relief, there was no sufficient justification to continue to maintain the injunctions in place and it discharged them.

In doing so, Lord Reed and Lord Briggs made important comments about how ordinary provisions of English law protect the values covered by article 8, so that separate recourse to article 8 was unnecessary and inappropriate. They said:[4]

> "… in situations where the Convention has what is sometimes described as "horizontal" as contrasted with "vertical" effect – that is to say, where it requires domestic law to secure Convention rights by regulating the legal relations between private individuals or bodies, as distinct from the legal relations between private individuals and the state – domestic law normally complies with the Convention by providing an appropriate cause of action, thereby enabling parties to apply to the court for a remedy which will protect their Convention rights. …
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> The point can be illustrated by a familiar example of an interest which is protected by article 8 of the Convention, namely an individual's interest in his or her reputation. In English law, that interest is protected primarily by the law of defamation. Individuals who wish to prevent the publication of defamatory statements about themselves can apply for an injunction on the basis of their cause of action in defamation. They cannot properly ignore the domestic law of defamation and bring proceedings based solely on section 37(1) of the Senior Courts Act taken together with section 6(1) of the Human Rights Act. That is because our law of defamation is not constituted by article 8 of the Convention, although that provision is relevant to its application. A fortiori, if a third party, such as the individuals' employer, were to apply for an injunction in order to protect them from defamation, relying on the width of the court's powers under section 37(1) of the Senior Courts Act and on section 6(1) of the Human Rights Act, the court would not be acting unlawfully if it refused to grant a remedy in those proceedings. The court does not act in a way which is incompatible with a Convention right by insisting

[3] [2025] UKSC 15.
[4] Paras 88-92.

> that individuals avail themselves of the domestic cause of action which is available to protect that right, and that the action is brought by the individual whose Convention right is in issue.
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> The position is the same in relation to many other interests protected by article 8, such as individuals' interests in preventing the publication of confidential personal information, or in protecting themselves against harassment, or in preventing intrusions into their homes. Our domestic law provides them with causes of action against persons who threaten those interests, and they must normally avail themselves of those causes of action if they wish to obtain a remedy from the courts. … in this context, in so far as the state is under a positive obligation arising from article 8 to intervene in relations between private persons in order to protect such interests, the obligation is usually satisfied by providing the person affected with the means of seeking legal redress.
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> Those causes of action which are available to ensure compliance with article 8 – such as defamation … are the subject of a developed or developing body of law, in which rules and principles have been established or are in the process of becoming established. Those rules and principles reflect how our domestic law balances competing interests – for example, in the law of defamation, through the concepts of absolute and qualified privilege, through the defence of truth, and through statutory provisions such as section 4 of the Defamation Act 2013. …
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> … as Lord Mance said in *Kennedy v Information Comr*, para 46, "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". …".

To similar effect, I said:[5]

> "The concrete implementation of those rights will be mediated primarily through existing legal rights in domestic law, taking account of the state's margin of appreciation. So, for example, where the common law can already be seen to have struck an appropriate balance between the competing rights and interests at stake, within the state's margin of appreciation, there is no need to look back beyond that to the underlying Convention rights, nor is there any justification to disturb that balance by reference to those rights …. Where individual rights are being balanced, the margin of appreciation is usually wide …, and this tends to reduce the need or justification for direct reference back to the Convention rights. … But the possibility that the common law or statute does not strike an acceptable balance in particular cases cannot be completely discounted, in which case a court as a public authority for the purposes of the Human Rights Act 1998 …, subject to a duty to act compatibly with Convention rights ([under] section 6(1)), may be obliged to conduct its own balancing exercise by reference to the Convention rights."

[5] Para 190

Thus, unlike in German law, the direct application of fundamental rights is a final backstop. The starting point is to examine the operation of ordinary law and to apply ordinary law according to its terms, without modification.

The development of the common law

I will suggest that, in the common law, the distinction between public law and private law 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.

Historical constitutional values in the common law, before 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,[6] 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 longstanding roots of modern constitutional values in the common law tradition can also be seen emerging before this in the Magna Carta of 1215.

[6] F.W. Maitland, *The Constitutional History of England* (1908), 23-24.

In the 17th century, Sir Edward Coke championed Magna Carta as the epitome of rights recognised by the common law. Linda Colley, in her book *The Ship, the Gun and the Pen*, 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.[7]

Dicey, in his *Introduction to the Study of the Law of the Constitution*,[8] lists three substantive rights which have constitutional status as aspects of the principle of the rule of law: (i) the right to personal freedom, particularly as protected by the courts by the writ of habeas corpus; (ii) the right to freedom of discussion; and (iii) 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.[9]

The drafting of the ECHR in 1950 was not, therefore, an exercise of pure creation. There was much in terms of an understanding of English law for the 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.

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 20th 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.[10] Secondly, the absence of a developed idea of the state, as distinct from the essentially medieval idea of the Crown. Thirdly, 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 Germany and France.[11]

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[7] L. Colley, *The Gun, the Ship & the Pen: Warfare, Constitutions and the Making of the Modern World* (2021), 97-99.
[8] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, 1915), Chapters V – VII.
[9] *Ibid*., 206-207.
[10] Dicey, *Introduction*, Chap XII.
[11] See, e.g., J. W. F. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (1996); K. Dyson, *The State Tradition in Western Europe* (1980); F. W. Maitland, "The Crown as Corporation" (1901) 17 LQR 131; P. Sales, "Crown Powers, the Royal Prerogative

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.[12]

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.[13]

Whereas civilian systems such as Germany's 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.[14] 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 law is therefore a principle of ancient origin, but such aims were achieved through the medieval prerogative writs of prohibition, certiorari and mandamus[15] 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.[16]

The famous illustration of the Diceyan analysis is *Entick v Carrington* in 1765.[17] 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.

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. The common law does not accept that those acting in a public capacity have different powers than ordinary individuals to interfere with private rights. What we would now think of

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and Fundamental Rights" in H. Wilberg and M. Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2015).

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

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

[14] J. Varuhas, "Transcending the public law-private law divide" in C. Harlow (ed), *A Research Agenda for Administrative Law* (2023), 165.

[15] S. De Smith, "The Prerogative Writs" (1951) 11 CLJ, 40-56. See also A. Beever, "Our Most Fundamental Rights", in D. Nolan and A Robertson (eds), *Rights and Private Law* (2012), 77.

[16] Beever, n 15 above, 80.

[17] (1765) 19 State Tr 1029.

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. Secondly, 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.

Common law in the period between the ECHR and the HRA

The UK was heavily involved in the creation of the ECHR. 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.[18]

An English common lawyer would not have considered there to be anything surprising in the ECHR rights themselves. Even if some of the rights given expression in the ECHR did not

[18] See A. W. B. Simpson, *Human Rights and the End of Empire* (2001), chs 13 to 16.

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.[19]

However, the creation of a new institution in the form of the Strasbourg Court, 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.[20] 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 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. As the Strasbourg 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. As the UK came to lose cases in Strasbourg,[21] increasingly a judicial sense of unease set in. Judges became conscious that their rulings might be subject to review in Strasbourg 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.

Throughout this period, the UK courts and the European Court of Human Rights (ECtHR) 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.

Seeds of vertical and horizontal effect

In the context of the unified common law system, the common law rights which incorporated and reflected constitutional values could, in theory, be asserted against a private individual or a public authority.

[19] For example, the right to privacy (Article 8), particularly in the home, was protected by a range of property rights and the right to freedom of expression (Article 10) was recognised as a civil liberty.
[20] Accepted by the UK in 1966.
[21] Such as *Sunday Times v UK* (1979) 2 EHRR 245; *McCann v UK* (1996) 21 EHRR 97.

However, in the latter part of the 20th century a domestic conception of public law emerged more clearly,[22] to regulate the expanded administrative state.[23]

These developments were most clearly seen in a number of landmark House of Lords judgments in the 1960s and 1970, beginning in 1964 with *Ridge v Baldwin.*[24] Public law grew in scope and coherence, increasingly conceived as something distinct from private law. In 1984[25] 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.

The standard explanation for this sea-change is the rapid expansion of the executive and the prominence of state power in individuals' lives.[26] Also, a specific procedure for judicial review applications was created in 1977. Administrative law then acquired 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.[27] 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.[28] The development was piecemeal and normatively disparate, remaining (at least in part) in the long shadow of the prerogative writs. 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.[29] For example, in *Hill v Chief Constable of West Yorkshire,*[30] 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.[31]

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

[22] The first English treatise on "public law" appeared in the 2000s: D. Feldman (ed), *English Public Law* (2004). See the discussion of this development in Varuhas, n 14 above.
[23] Lord Woolf, 'Droit Public, English Style' (1995) Public Law 57; N. Johnson, *Reshaping the British Constitution: Essays in Political Interpretation* (2004), 149; P. Sales, 'The Interaction of the Rule of Law and the Separation of Powers' (2022) Public Law 527.
[24] [1964] AC 40.
[25] In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
[26] See, e.g., W. Wade and C. Forsyth, *Administrative Law*, 11th edn (2014), ch 1 and M. Elliot and J. Varuhas, *Administrative Law: Text and Materials*, 5th edn (2016), chs 1 and 4.
[27] Sales, "Interaction of the Rule of Law and the Separation of Powers", n 23 above.
[28] Varuhas, n 14 above, 167.
[29] D. Oliver, *Common Values and the Private-Public Divide* (1999), 169.
[30] [1989] AC 53.
[31] On immunities, see J. Beatson "'Public' and 'private' in English administrative law" (1987) 103 LQR 34.

own, interest.[32] 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 they do not conflict with the public interest. This was seen in *AG v Jonathan Cape*[33] and *AG v Guardian Newspapers (No 2),*[34] both of which held that lack of a public interest in the disclosure of information is a prerequisite to enforcement of a duty of confidence owed to a public body. 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, 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.[35]

Notwithstanding the frictions caused by the differentiation of the public and the private spheres, the development of public law 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, 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 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.

[32] Oliver, n 29 above, 114.
[33] [1976] QB 752.
[34] [1990] 1 AC 109.
[35] See, e.g., *R v Panel on Take-overs and Mergers, ex p Datafin Plc* [1987] QB 815.

The period after the enactment of the HRA

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 filed in libraries in the section on public law, apart from the section on 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.

Pla and Puncernau v Andorra[36] illustrates this. 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. 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 Strasbourg court, complaining of a breach of articles 8 and 14 by reason of the court's decision. Notwithstanding the private law context, the court 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". This reasoning looks similar to that of the German Constitutional Court in Lüth.

The German approach to rights

My account of the German approach to rights draws on the insightful account given by Cohen-Eliya and Porat in *Proportionality and Constitutional Culture*,[37] who contrast 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

[36] (2006) 42 ECHR 25.
[37] M. Cohen-Eliya and I. Porat, *Proportionality and Constitutional Culture* (2013), Ch 3.

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, the state is a legal person, recognised and constituted by law.[38] It claimed to stand outside and above partisan politicking.[39] Rudolf Smend suggested that the state was the site where individuals joined together in a shared life experience.[40] In this view, the constitution is to serve as a "stimulus and channel" (*Anregung und Schranke*) for this process of integration.[41]

This is in contrast to the Anglo-American conception of the state. It did not become the theoretical cornerstone of the English political and legal system.[42] The political nature of the British constitution also suppressed any need to develop a clear legal conception of the state.[43] In 1919 Laski commented:

> "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."[44]

Government was personalised in legal terms as the actions of individual ministers.[45]

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

[38] There are good discussions of these differences in Dyson, *State Tradition*, and L. Siedentop, *Democracy in Europe* (2001), ch 6. See also J. McLean, *Searching for the State in British Constitutional Thought* (2012).
[39] Dyson, *State Tradition*, p xiv.
[40] J. Mathews, *Extending Rights' Reach: Constitutions, Private Law and Judicial Power* (2018), 54-5, referring to R. Smend, *Constitution and Constitutional Law* (1928). See also A. Jacobson and B. Schlink, *Weimar: A Jurisprudence of Crisis* (2000), 210.
[41] Smend, *Constitution and Constitutional Law*, 195.
[42] *Ibid.*, 73.
[43] Sales, "Crown Powers", n 11 above, 365.
[44] H. J. Laski, "The Discredited State: Thoughts on Politics before the War" (1919) 32 *Harvard Law Review*, 447-72 at 447.
[45] Dyson, *State Tradition*, 40.

> rights as entitlements. They can function more like substantive canons of construction that guide judicial decision making than as guarantees of a given outcome."[46]

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.

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[47] used to defend an individual from the excesses of the state's power and from misuse of power by other individuals. 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.[48] By contrast, in the German understanding, constitutional rights are not specific entitlements as such, but rather are vehicles for constitutional values, broadly conceived.[49] They have a "radiating effect" (*Ausstrahlungswirkung*) on all aspects of the legal system, including private law.[50] 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.[51] 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.

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.[52] Under section 6, courts were public authorities which were bound to act

[46] Mathews, *Extending Rights' Reach*, 15.
[47] For this metaphor, see R. Dworkin, *Taking Rights Seriously* (1977).
[48] J. Thomas, *Public Rights, Private Relations* (2015), 3.
[49] See, e.g., the discussion in D. Grimm, *Constitutionalism: Past, Present and Future* (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.
[50] 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 D. Oliver and J. Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study* (2007), 125.
[51] D. Grimm, "The protective function of the state", in G. Nolte (ed.), *European and US Constitutionalism* (2005), 137.
[52] See, for example: K. Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 MLR 79, 89; M. Hunt, 'The Horizontal Effect of the Human Rights Act' (1998) Public Law 423, 438; G. Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: a Bang or a Whimper?' (1999) 62 MLR 824, 827; B. Markesenis, 'Privacy, Freedom of Expression and the Horizontal Effect of the Human Rights Bill: Lessons from Germany' (1999) 115 LQR 47, 73; R. Singh, 'Privacy and the Media after the Human Rights Act' (1998) *European Human Rights Law Review* 722, 724–6; and W. Wade, 'The United Kingdom's Bill of Rights',

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 constitutional 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 Strasbourg court 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,*[53] 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 Strasbourg court 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 extent to which the Strasbourg court adopted a rights or values-based approach, veering either towards the Anglo-American model 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 Anglo-American negative rights-based model. But the Strasbourg case-law has followed an arc of development in its approach to the Convention rights. The *Pla v Andorra* case was 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 Strasbourg court 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 Anglo-American approach.[54] Robert Spano, a former President of the court, has noted a new phase in the case-law of the ECtHR which he has called the "Age of Subsidiarity":[55]

> "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

in J. Beatson, C. F. Forsyth and I. Hare (eds.), *Constitutional Reform in the United Kingdom: Practice and Principles* (1998), 62–4.

[53] (2005) 41 EHRR 13.

[54] 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] AC 559, paras 76-78.

[55] R. Spano "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity" (2014) HRLR 14 (3), 487-502; also E. Bates, *The Evolution of the European Convention on Human Rights* (2010), to which Spano refers.

> 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 court is less forceful in treating the Convention rights as authorising the imposition of a direct solution of its own making to override these.

Secondly, and reinforcing the effect of this approach, the Supreme Court has emphasised the way in which the common law tradition already reflected constitutional values. The *Abbasi* case is a prime example. 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.[56] 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.[57]

Abbasi and *Kennedy* tell 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 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.

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,*[58] in which it referred to article 8 to develop a tort of breach of privacy.

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

Section 6 of the HRA imposes an obligation on courts to act in a manner which is compatible with Convention rights. 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

[56] Mathews, *Extending Rights' Reach*, 13.
[57] 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 HRA may apply to change that meaning: *R (Z) v Hackney LBC* [2020] UKSC 40, [2020] 1 WLR 4327, para 114.
[58] [2004] UKHL 22, [2004] 2 AC 457.

effect will only 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.[59]

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",[60] 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.[61]

Conclusion

Consideration of the three periods I have examined provides an informative perspective on the place of constitutional values in the English law of obligations, by contrast with German law. 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.

[59] In addition to the direct potential impact of Convention rights on the common law via section 6 of the HRA, Convention rights may be given horizontal effect through a conforming interpretation under section 3 of the HRA of statutory provisions applicable as between private individuals: see e.g. *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.
[60] M. A. Eisenberg, *The Nature of the Common Law* (1988); cf. Oliver, *Common Values*, above.
[61] J. Laws, "Is the High Court the Guardian of Fundamental Rights?" [1993] PL 59, 64.