

Constitutional values in the common law of obligations

Cambridge Freshfields Annual Law Lecture

10 March 2023

Philip Sales*

I am honoured to have been invited to give the Cambridge Freshfields Annual Law Lecture for 2023. I am grateful to Lionel Smith for asking me. I wish him all the best for the next decade and beyond of the work of the Cambridge Private Law Centre. A broad range of topics has been covered in past Freshfields lectures, across the legal spectrum. I have picked a topic which brings together values typically associated, in the modern legal map, with public law, on the one hand, and, on the other, the private law of obligations within the common law.

“Constitutional values” is a term which appears to relate to concepts of what we would now call public law. By constitutional values, I mean the basic rights 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 rights and interests such as liberty, private life, freedom of expression and access to justice. They sound much like human rights, you might think. You would be right. Constitutional values and human rights overlap, but they are not necessarily and always the same, either in content or in effect. At times I use the terms “constitutional values” and “human rights” interchangeably; at others, I will differentiate between them. 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, which has furnished the rights being “brought home” in the form of obligations placed on public authorities under the Human Rights Act 1998.

As I will show, 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

* Lord Sales, Justice of the Supreme Court of the United Kingdom. I am grateful to my Judicial Assistant, Robert Steele, for his excellent assistance in preparing this lecture.

obligations and so featured in the area of what we might now designate as private law. In exploring this, 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. Indeed, 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. I will try to explain how this process of differentiation has had implications for the role that constitutional values play in the common law of obligations.

I do this by looking at three phases of the common law: the period before the making of the European Convention of 1950; the period between the ratification of the Convention and the coming into force of the Human Rights Act; and the period since the Act 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 Convention 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 Human Rights Act 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, I will explore the conception of constitutional rights and values in English law, by comparison with the view of them in German constitutional law. I will seek to trace the differences in these constitutional perspectives through the case-law of the European Court of Human Rights in Strasbourg, particularly as the Strasbourg case-law has developed in relation to what are called positive obligations under the European Convention. This journey then brings me back home 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. But first, let me start at the beginning.

Historical constitutional values in the common law, before the European Convention

Constitutional values generally

“Human rights” is a modern term, but the values which they reflect are not. I want to start by considering the history of constitutional values in the common law, prior to the drafting and ratification of the European Convention.

The common law has always reflected constitutional values. But the common law is ancient and those values have changed over time. In his lectures 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,¹ 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. Chapter 29² stated that:

“No 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.”

These are concepts familiar to us, although their content and significance has changed in modern times. We can see, articulated in the 13th 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 17th century, Sir Edward Coke championed Magna Carta as the epitome of rights

¹ F.W. Maitland, *The Constitutional History of England* (1908), 23-24

² Clause 39 of the original charter of 1215, but numbered c. 29 in the statutory version of 1225.

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.³ Those foundational rights are reflected in any charter of rights in legal systems today.

Dicey, in his seminal text on the UK constitution⁴, 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.⁵

The drafting of the European Convention 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 was largely familiar and established. Much of it would have seemed familiar even to an English lawyer in the Renaissance period.⁶

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

³ L. Colley, *The Gun, the Ship & the Pen: Warfare, Constitutions and the Making of the Modern World* (2021), 97-99

⁴ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, 1915), Chapters V – VII.

⁵ *Ibid.*, 206-207.

⁶ J. Baker, *Collected Papers on English Legal History* (2013), Vol II, 935.

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.⁷ Secondly, the absence of a developed idea of the state, as distinct from the essentially medieval idea of the Crown. And 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 France.⁸

However, in the study and practice of law today we have become accustomed to the conventional distinction between public and private law. The former focuses 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. Private law is framed as horizontal, involving legal relationships between two private parties of equal legal standing.⁹

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.

The famous illustration of the Diceyan analysis is *Entick v Carrington*¹⁰, from 1765. 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.

⁷ *Introduction*, n 4 above, Chap XII.

⁸ See, eg, J. 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 and Fundamental Rights” in H. Wilberg and M. Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (2015).

⁹ See, eg, S.F.C. Milsom, “The Nature of Blackstone’s Achievement” (1981) OJLS 1, 3.

¹⁰ (1765) 19 State Tr 1029

This basic position has continued relevance in contemporary law. In *M v Home Office*,¹¹ in 1994, 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.

Dicey emphasised and reinforced an historical resistance of the common law to a *droit publique*, 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 as a modern form of public law remained without recognition, until the accelerating demands of the modern administrative state pulled 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 has two dimensions. First, the control of public power to ensure it is used 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

¹¹ [1994] 1 AC 377

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 law in *Entick v Carrington* is not the product of, nor is it dependent on, 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 European Convention and the Human Rights Act

I will now move from the historic position of the common law up to the middle of the 20th century and the making of the European Convention to the position following the ratification of the Convention, but prior to the coming into force of the Human Rights Act.

The United Kingdom was heavily involved in the creation of the Convention. The UK was the first country to ratify it and Lord McNair was the first President of the Strasbourg Court. The Convention was, to a significant extent, a UK invention, designed to internationalise the constitutional values (or human rights) which British subjects had long enjoyed.¹²

Whilst the adoption of the European Convention 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. It was not therefore anticipated that the adoption of the Convention would challenge the operation of English law itself, except perhaps in

¹² See A.W.B. Simpson, *Human Rights and the End of Empire* (2001), chapters 13 to 16.

the colonies. The whole affair was treated as a matter of international relations, rather than considered to be a matter affecting domestic jurisprudence.¹³

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.¹⁴ 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. 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.

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 Convention and the Strasbourg case-law, they came gradually to be aware of an overlap between domestic law and Convention law. Whilst not bound to follow the decisions of the Strasbourg Court, the belief was that the common law reflected 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 the consistency with them of constitutional values in the common law.

By way of example, the common law demonstrated consistency with Convention rights in Articles 3, 4 and 6. In *A v Home Secretary (No 2)*¹⁵ 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”, a value reflected in Article 3. In *Nokes v Amalgamated Doncaster Collieries*¹⁶, Lord Atkin emphasised the long-

¹³ Baker, n 6 above, 942.

¹⁴ Accepted by the UK in 1966.

¹⁵ [2005] UKHL 71, para 11.

¹⁶ [1940] AC 1014, 1026.

standing constitutional rejection of slavery (ie the value reflected in Article 4) in 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 the court.¹⁷

But 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. Angelika Nussberger, a former President of the Strasbourg Court, 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 caselaw in the 2000s.¹⁸ Counsel in the UK came to refer to the Strasbourg jurisprudence more frequently. As the UK came to lose cases in Strasbourg,¹⁹ 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 Convention to try to demonstrate that English law conformed with it. Even before the Human Rights Act, 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 Convention 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)*²⁰ Lord Goff observed that there was:

“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

¹⁷ See, for example: *Bremer Vulkan v South India Shipping* [1981] AC 909, 971; *Raymond v Honey* [1983] 1 AC 1, 10; *Ex p Anderson* [1984] QB 778.

¹⁸ A. Nussberger, *The European Court of Human Rights* (2020), ch 1.

¹⁹ Such as *Sunday Times v UK* (1979) 2 EHRR 245; *McCann v UK* (1996) 21 EHRR 97.

²⁰ [1990] 1 AC 109, 282-4

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*²¹, 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.”

Throughout this period, the UK courts and the Strasbourg Court therefore proceeded in parallel, with the UK courts increasingly aware that the Strasbourg Court was pedalling fast alongside them. The continued view in the UK, however, was that since the Strasbourg Court 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

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 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 20th century, a domestic conception of public law emerged more clearly.²² This had a clearer institutional home, in the form of the Administrative Court, operating under a special procedural regime. A more specialised domestic form of what

²¹ [1993] AC 534, 55.1

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 J. Varuhas, “Transcending the Public Law – Private Law Divide” in C. Harlow (ed), *A Research Agenda for Administrative Law* (2023).

could be called *droit publique* developed in recognition of the need to fashion legal rules appropriate for the due regulation of the expanded administrative state.²³

As a result, a number of limitations developed from the basic proposition 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.²⁴ In *Hill v Chief Constable of West Yorkshire*²⁵, 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.²⁶ This doctrine was subject to review in Strasbourg in *Osman v United Kingdom*²⁷, 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 Strasbourg Court 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. The European form of public law thus ran in tandem with the domestic law of obligations.

The other side of the coin was that, 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.²⁸

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*²⁹ and *AG v Guardian Newspapers*³⁰, both of which held that lack of a public interest in the disclosure of information is a

²³ Lord Woolf, 'Droit Publique, 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 D. Oliver, *Common Values and the Private-Public Divide* (1999), 169.

²⁵ [1989] AC 53, HL.

²⁶ On immunities, see J. Beatson "'Public' and 'private' in English administrative law" (1987) 103 LQR 34.

²⁷ (1998) 29 EHRR 245.

²⁸ Oliver, n 24 above, 114.

²⁹ [1975] 3 All ER 484, QBD.

³⁰ (No 2) [1990] 1 AC.

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. In this context, also by reason of their constitutional position, it became harder for public bodies to maintain private law claims.

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.³¹

This growing sense of differentiation of the public and the private spheres 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 more 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 European Convention, since that instrument creates rights and freedoms for individuals as against states and thus clearly operates on a vertical model. In due course, the Human Rights Act reflected 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 Human Rights Act and the creation of a tabulated schedule of positive rights as part of the scheme of public law.

³¹ See, eg, *R v Panel on Take-overs and Mergers, ex p Datafin Plc* [1987] QB 815.

Human Rights Act: radiating effect of human rights in English law

Positive obligations and bridging the public/private divide

The Human Rights Act 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 Act greatly reinforced the perception that there was an important public/private divide. 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. 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, while 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 of 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 Strasbourg case-law, was located in the doctrine of positive obligations. Two examples will illustrate this.

The first is *Pla and Puncernau v Andorra*³², in which a testatrix, in her will, stipulated 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 sought to leave the inherited assets, in a codicil, 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 Strasbourg Court said that "it cannot

³² (2006) 42 Eur. Ct. H. R. 25

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”.

The second case is *Marckx v Belgium*³³, which concerned the status of “illegitimate” children in Belgium. 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 Strasbourg Court held that the complaint was made out.

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

The German approach to constitutional rights

This is a big topic and today I can only scratch the surface of it. I draw on the insightful account given by Cohen-Eliya and Porat in their book, *Proportionality and Constitutional Culture*.³⁴ A key difference is that whereas English law speaks of rights, the German approach focuses more on the enunciation of values inherent in rights. This relates to different views of the state's role in relation to rights. In Germany, in order to facilitate the transformation of German society following World War 2, the rights in the German 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 rights and 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 pursuit of values over rights may also reflect underlying cultural differences. A capitalist, free enterprise country may be influenced by a *laissez faire* liberal approach, which resists

³³ (1979-80) 2 EHRR 330.

³⁴ M. Cohen-Eliya and I. Porat, *Proportionality and Constitutional Culture* (2013), Chapter 3.

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.³⁵

In practice, the difference can be significant. The Anglo-American view traditionally frames rights narrowly and in negative terms. Rights are trumps³⁶ used to defend an individual from the excesses of the state's power and the power of other private persons. 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.³⁷ By contrast, in the German understanding, constitutional rights are really the vehicles for constitutional values, broadly conceived. For example, the German courts have accepted the assertion of constitutional rights to ride horses in the woods³⁸ or to feed pigeons in public squares.³⁹ There is what has been described as a “totalising” view of rights. In the case of *Lueth*⁴⁰, 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.”

This constitutional view plays out in the realm of positive obligations. German law adopts a concept of *Drittwirkung*, meaning “third party effect”. By this, it is meant that the constitutional values of the Basic Law have a “radiating effect” (*Ausstrahlungswirkung*) on all aspects of the legal system, including private law.⁴¹ The portal by which these 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,

³⁵ D. Oliver and J. Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study* (2007), 495.

³⁶ For this metaphor, see R. Dworkin, *Taking Rights Seriously* (1977).

³⁷ J. Thomas, *Public Rights, Private Relations* (2015), 3.

³⁸ BVerfGE 39, 1, BVerfGE 88, 203.

³⁹ 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* (2014).

⁴⁰ BVerfGE 7, 198 at para 41.

⁴¹ 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.

including the courts themselves, to take any necessary measures in order to ensure their realisation.⁴²

The Strasbourg Court 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.”

A false dawn and the continued primacy of common law constitutional values

At the time of the enactment of the Human Rights Act, 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.⁴³ Under section 6, courts were public authorities which were bound to act compatibly with the Convention rights. There was the widespread suggestion that private law rights in the common law would be “constitutionalised” by the importation of human rights

⁴² Dieter Grimm, “The protective function of the state”, in George Nolte (Ed.), *European and US Constitutionalism* (2005) 49, 137.

⁴³ 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 Sir William 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* (1998), 62–4. For thoughtful consideration of the issue in the context of a private law dispute concerning unfair dismissal, see the judgment of Mummery LJ in *X v Y* [2004] ICR 1632.

values into the realm of private obligations. So, have the UK courts adopted a German-type view of rights?

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 the Convention the Strasbourg Court has adopted a position part-way between the German view and the 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 *Belic v Croatia*⁴⁴, for example, concerning 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". Where, in a common law system, the courts have worked out the relevant balance of interests with care through the development of case-law, and subject always to correction by legislation if the democratic Parliament judges it unacceptable at any point, they do enjoy a margin of appreciation. The Strasbourg Court 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. This tends 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.⁴⁵ 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 resolution of the dispute from both perspectives. This was referred to as the "ultimate balancing test" by Lord Steyn.⁴⁶ This again has a tendency to insulate

⁴⁴ (2005) 41 EHRR 13.

⁴⁵ *Odièvre v France* (2004) 38 EHRR 43; *Evans v UK* (2008) 46 EHRR 34, para 77. *Chassagnou v France* (2000) 29 EHRR 615.

⁴⁶ *Re: S (Identity: Restrictions on Publication)* [2004] UKHL 47, para.17.

domestic law, which already seeks to balance both perspectives, from any requirement for change based on the Convention rights.

Secondly, and reinforcing that effect, the Supreme Court (and the House of Lords before it) has emphasised the way in which the common law tradition already reflected constitutional values. Where the common law could already be seen to have struck an appropriate balance between the competing rights and interests at stake, there was no need to look to other sources of rights nor any justification to disturb that balance by reference to Convention rights.

In R (*Guardian News and Media Ltd*) v *City of Westminster Magistrates' Court*⁴⁷, 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*⁴⁸, 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.”⁴⁹

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*,⁵⁰ 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 involved⁵¹, 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

⁴⁷ [2013] QB 618, para 88.

⁴⁸ [2015] AC 455, para 46

⁴⁹ See also para 133 (Lord Toulson).

⁵⁰ [2023] UKSC 4.

⁵¹ *Ibid.*, paras 113 and 206.

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 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 often follow indirectly as a consequence from that.

The impact of Convention rights and constitutional values on private law obligations

I have discussed how human rights have had a limited impact on the common law of obligations. I want to conclude, however, by saying something about the ways in which the Convention rights set out in the Human Rights Act have had an impact on private law obligations. There has been some radiating effect, despite the general resistance to that.

The best example is the decision of the House of Lords in *Campbell v MGN Ltd*⁵². 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 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 tort of breach of confidence. Her submission to extend the tort 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 (Article 8) and the defendant’s freedom of expression (Article 10). By conducting that balancing exercise explicitly on the basis of the constitutional

⁵² [2004] UKHL 22

values inherent in those rights, it held that Ms Campbell's right to privacy had been tortiously interfered with.

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

Most directly, section 6 of the Human Rights Act imposes an obligation on courts to act in a manner which is compatible with Convention rights. For the reasons I have explained, 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.

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"⁵³, 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. I would suggest that the extension of the qualified privilege defence in the law of defamation by reference to the Article 10 case-law in Strasbourg in the case of *Reynolds v Times Newspapers*⁵⁴ case, which preceded the coming into effect of the Human Rights Act, can be seen as an example of this.⁵⁵ 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, reflect and balance those values in an appropriate way. This might also be the best explanation for the *Campbell v MGN* case. The references to human rights standards in that case may have

⁵³ M.A. Eisenberg, *The Nature of the Common Law* (1988); cf. Oliver, *Common Values*, n 24 above.

⁵⁴ [2001] 2 AC 127.

⁵⁵ See discussion in P. Sales, "Rights and Fundamental Rights in English Law" [2016] CLJ 86, 104-105.

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.⁵⁶

Conclusion

In conclusion, I suggest that consideration of the three periods I have mentioned 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 gradual differentiation of public law and private law threatened to obscure that, and the human rights model in the European Convention and the Human Rights Act 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 Human Rights Act, 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.

⁵⁶ P. Sales, "Equity and human rights: a commentary", in P. Turner (ed.), *Equity and Administration* (2016), 419.