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RIGHTS AND FUNDAMENTAL RIGHTS IN ENGLISH LAW

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ABSTRACT. *This paper examines the role of rights and fundamental rights in English public law and private law in recent times. It argues that the idea of fundamental rights has been more significant in the filed of public law and seeks to explain why. It compares the operation of domestic fundamental rights with the rights in the European Convention of Human Rights and suggests a methodology for identifying the existence and scope of the former. The paper considers the possible legal effects which might follow from repeal of the Human Rights Act 1998.*

KEYWORDS: *rights, fundamental rights, public law, statutory interpretation, private law, common law theory.*

I. INTRODUCTION

In this article, I seek to explore what seems to me an interesting divide between the significance of fundamental rights in English public law and private law. The idea of fundamental rights has galvanised public law, but not private law. Why should this be? How does each wing of the law accommodate rights? Comparing the two in this way can help to bring into relief important aspects of each of them.

Rights discourse exists in uneasy tension with English law. The tension is with the positivism which has been such a strong feature of our law. English legal positivism is associated with the doctrine of the sovereignty of Parliament[1] and the early theory of the common law as something fixed since time immemorial,[2] later reinforced by acceptance of Parliament as the democratic institution with the necessary authority to change the law. But, from the latter part of the twentieth century, rights discourse has made a bid to become more central in the way we reason about

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[1] N. Duxbury, *Elements of Legislation* (Cambridge 2013); J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Cambridge 1999).

[2] See e.g. *In re Hallett's Estate* (1880) 13 Ch.D. 696, 710; G. Postema, *Bentham and the Common Law Tradition* (Oxford 1986), ch. 8. In the constitutional context, see N. Johnson, *In Search of the Constitution* (Oxford 1977), 134, 149, 219–21.

law.[3] The discourse operates in two different dimensions: the vertical (affecting the law governing relations between state and individual citizen) and the horizontal (affecting the law governing relations between individual and individual) – that is, public law and private law.

There is in some respects a striking disjunction in the object and effect of rights discourse between these dimensions. In public law, rights are appealed to in order to mobilise judicial power, as compared with the power of the executive and the legislature. Where the appeal works, the courts are able to take a degree of initiative as law-makers. They have the role of identifying and articulating the rights in question, and of using them as tools to produce practical modification of the meaning of legislation[4] or to constrain executive discretion beyond the usual default rationality standard.[5] In private law, on the other hand, and especially in relation to the law of tort, rights are usually appealed to in order to limit judicial power.[6] Here, the main object of rights discourse is to limit the extent to which courts can act as law-makers to impose new outcomes on parties, particularly through expansion of a policy-driven law of negligence. This type of discourse in private law runs with the positivist grain of the common law and, indeed, draws its force from it.

However, an appeal to the discourse of *fundamental* (or human or constitutional) rights, when employed in private law contexts, may be used to seek to authorise disruption of what would otherwise be taken to be the usual rights and obligations of individuals in private law. This is most pronounced when one looks at the operation of the obligation of a public authority, imposed by s. 6(1) of the Human Rights Act 1998 ("HRA") and which is binding on courts by virtue of s. 6(3), to act compatibly with the Convention rights taken from the European Convention on Human Rights ("ECHR").[7] Even outside the application of the HRA, as was evident before it came into force, the courts may reason by reference to fundamental rights in the context of developing private law.[8] But there is an ambiguity here. Can it be said that there is a clear divide between rights and fundamental rights and the role they play in the development of private law? After all, property and contract rights are often taken to be one species of fundamental rights (particularly following a Lockean perspective) and are themselves the essence of rights in private law.

[3] See M. Loughlin, *The Idea of Public Law* (Oxford 2003), ch. 7; *R. v Lord Chancellor, ex p. Witham* [1998] Q.B. 575, 581, per Laws J.: "... the common law does not generally speak in the language of constitutional rights."

[4] P. Sales, "Three Challenges to the Rule of Law in the Modern English Legal System", in R. Ekins (ed.), *Modern Challenges to the Rule of Law* (Wellington 2011), ch. 10.

[5] See e.g. *Kennedy v The Charity Commission* [2014] UKSC 20.

[6] R. Stevens, *Torts and Rights* (Oxford 2007); see D. Nolan and A. Robertson (eds), *Rights and Private Law* (Oxford 2012): as Peter Cane observes at p. 50: "... for fundamentalists one of the main functions of rights in private law (apart, of course, from promoting individual autonomy) is to constrain judicial discretion."

[7] D. Beyleveld and S. Pattinson, "Horizontal Applicability and Horizontal Effect" (2002) 118 L.Q.R. 623.

[8] *Derbyshire County Council v Times Newspapers Ltd.* [1993] A.C. 534, 551.

Given the different contexts in which the discourses apply (vertical/public law and horizontal/private law), one would by no means necessarily expect the derivation, formulation, and function of rights in those contexts to be the same. Nonetheless, there is a certain commonality of objective, looking at the position from the perspective of the vertical, state–citizen dimension. Rights language is used in each context to constrain forms of state power. Rights as concepts used for the articulation of private law doctrine tend to operate as constraints on one form of state power (intrusive judicial legislative or supervisory power), while rights concepts used in public law doctrine operate to legitimise judicial power, but with the object of allowing judges to constrain other forms of state power (legislative and executive power).

Despite the difference between the object and effect of rights discourse in public law and private law, there is also an element of continuity between those dimensions, rooted in a common natural law tradition.[9] This tradition is a subtext for both public law and private law. One can look at Equity, or doctrines such as those involving appeal to business common sense – or, one might say, standards of commercial morality – in the interpretation of contracts,[10] as aspects of the law which qualify and smooth over highly positivist, text-centred approaches to the operation of the law, even if that is not always done using the rhetoric of rights. A vibrant law of judicial review also draws upon ideas of natural law, such as in the doctrines of natural justice and fairness,[11] as well as potentially more fundamentally in relation to possible challenges to or qualifications of parliamentary sovereignty.[12] In fact, one can see such ideas informing a whole spectrum of approaches to interpretation of legislation – from identification of the mischief at which it is aimed, to purposive construction, to the principle of legality – before one arrives at the more profound and controversial claim that the courts might have power to strike down legislation.[13]

In deciding what role rights discourse should be allowed to play in both public law and private law, a lot depends on the view one takes of judges as law-makers and of what legitimate scope they have for imaginative interpretation and development of the law in a democratic political system operating according to rule-of-law values. This is something which is likely to be informed by tensions within the clusters of ideas that make up our

[9] I use the term "natural law" to cover the range of moral argument exterior to positive rules of law, but which seeks to find a place in legal reasoning, including but not limited to the classical idea of natural law. Schauer highlights the tradition in US legal thinking which refers to moral considerations external to positive rules but then seeks to integrate them into the rules by a process of interpretation: in K.N. Llewellyn, *The Theory of Rules: Edited with an Introduction by Frederick Schauer* (Chicago 2011), 23–27.

[10] E.g. *Rainy Sky v Kookmin Bank* [2011] UKSC 50; [2011] 1 W.L.R. 2900; see P. Sales, "Equity and Human Rights", in P.G. Turner (ed.) *Equity and Administration* (forthcoming).

[11] *Ridge v Baldwin* [1964] A.C. 40, 67, 85.

[12] R. White, "Separation of Powers and Legislative Supremacy" (2011) 127 L.Q.R. 456; Loughlin, *The Idea of Public Law*, p. 128.

[13] *R (Jackson) v HM Attorney-General* [2005] UKHL 56; [2006] 1 A.C. 262.

concepts of democracy[14] and the rule of law.[15] So, for example, does democracy imply a thick conception of background rights as the foundation for an acceptance of law-making by the legislature as a legitimate and authentic expression of popular consent?[16] Should one emphasise the strands within rule-of-law thinking which place a premium on the predictability of the law and governance by rules rather than the rule of men,[17] or the strands associated with calling for a more active role for judges in enforcing substantive conceptions of what is really to count as the rule of law, perhaps requiring greater power for judges to make individualised decisions in particular cases? There is a marked tendency in the law of the ECHR, for instance, to require this latter sort of individualised decision-making in applying standards rather than rules, under the proportionality standard.[18]

II. Public Law

On traditional conceptions, English public law has been more concerned with wrongs than rights, being primarily focused on whether public authorities have breached the obligations imposed on them by legislation.[19] The intensive use of rights concepts in public law is a comparatively recent phenomenon. It is associated particularly with the impetus given to the so-called principle of legality in *R v Secretary of State for the Home Department, ex p. Pierson*[20] and the cases that followed it.[21] Although public law remains concerned primarily with wrongs committed by public authorities failing to follow their statutory obligations, the content of those obligations is now often informed directly by reference to fundamental rights.

[14] J. Dunn, *Setting the People Free: The Story of Democracy* (London 2005); J. Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21 Law & Phil. 137, s. 5.

[15] R. Fallon, Jr, "'The Rule of Law' as a Concept in Constitutional Discourse" (1997) 97 Columbia L.R. 1; R. Bellamy, "The Rule of Law and the Rule of Persons" (2001) 4 Critical Review of International Social and Political Philosophy 221; Waldron, "Is the Rule of Law".

[16] J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard 1980); J. Habermas, "Human Rights and Popular Sovereignty: The Liberal and Republican Versions" (1994) 7 Ratio Juris 1. However, the extent to which particular background conditions are necessary for effective operation of democracy is itself a contestable issue, in relation to which the argument that it should be settled by majoritarian decision-making procedures is itself strong: J. Waldron, *Law and Disagreement* (Oxford 1999); J. Tully, "The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy" (2002) 65 M.L.R. 204; B. Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton 2005), ch. 1; D. Crump, "How Do the Courts *Really* Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy" (1995–6) 19 Harv.J.L. & Pub. Policy 795, 876ff.

[17] K.M. Sullivan, "The Justices of Rules and Standards" (1992) 106 Harv.L.Rev. 22; A. Scalia, "The Rule of Law as a Law of Rules" (1989) 56 U.Chi.L.Rev. 1175.

[18] G. Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge 2009); P. Sales and B. Hooper, "Proportionality and the Form of Law" (2003) 119 L.Q.R. 426.

[19] See e.g. M. Taggart, "Proportionality, Deference, *Wednesbury*" [2008] N.Z. Law Rev. 423; J. McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge 2012), 238.

[20] *R v Secretary of State for the Home Department, ex p. Pierson* [1998] A.C. 539.

[21] P. Sales, "A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998" (2009) 125 L.Q.R. 598.

The reasoning in *Pierson* was based on a long-established approach to statutory interpretation, that there is a presumption that Parliament does not intend to abrogate rights established under the common law.[22] That is an approach which draws on the idea of rights as positive, institutionally recognised entitlements with specific and determinate content defined by the ordinary law. But *Pierson* used the approach with reference to a rather different type of right: a fundamental right of a comparatively abstract kind, one rather more like a principle, without clearly defined parameters.[23] This allows for a wider mobilisation of judicial power in interpreting statutes, authorising the reading in of words and reading down wide language to make the statute conform to the fundamental right identified by the court.[24] Under the principle of legality, a fundamental right is treated as respected by a statutory provision unless abrogated by express language or clear necessary implication. The idea that the right is "fundamental" or "constitutional" appears to authorise a greater role for the court in adapting what Parliament has said when giving it formal meaning to determine a dispute.

Prime examples of cases which adopted the *Pierson* type of approach are *Witham*[25] and *Simms*.[26] In a well-known dictum in *Simms*,[27] Lord Hoffmann said:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

In *Witham*, Laws J. identified in the common law a fundamental right of access to the courts, and employed that concept to read down a wide

[22] See e.g. *Maxwell on The Interpretation of Statutes*, 12th ed. (P. St. J. Langan, London 1969), 116–23; *Pierson* [1998] A.C. 539, 573G–575D, per Lord Browne-Wilkinson; cf. Duxbury, *Elements of Legislation*, pp. 36–39.

[23] *Pierson* [1998] A.C. 539, 587C–590A, per Lord Steyn, moving from the common law rights-based formulation to a wider "principle of legality", referring to "long-standing principles of constitutional and administrative law".

[24] Sales, "Three Challenges".

[25] *Witham* [1998] Q.B. 575.

[26] *R. v Secretary of State for the Home Department, ex p. Simms* [2000] 2 A.C. 115.

[27] Ibid., at pp. 131–32.

statutory rule-making power which had purportedly been exercised to impose legal fees to use the courts on persons without means. He identified the right by reasoning primarily based on English authorities, but also including this passage:

> [Claimant's counsel] relied also on the jurisprudence of the European Court of Human Rights, and referred to *Golder v United Kingdom* (1975) 1 E.H.R.R. 524, *Airey v Ireland* (1979) 2 E.H.R.R. 305, *Andronicou and Constantinou v Cyprus* (unreported), 23 May 1996, a decision of the European Commission of Human Rights, and *Ireland v United Kingdom* (1978) 2 E.H.R.R. 25. For my part I do not find it necessary to refer to these cases, since I consider that the issue may correctly be resolved by reference to the substance of our domestic law. As regards the ECHR jurisprudence I will say only that, as it seems to me, the common law provides no lesser protection of the right of access to the Queen's courts than might be vindicated in Strasbourg. That is, if I may say so, unsurprising. The House of Lords has held the same to be true in relation to the right of freedom of expression: *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W. L.R. 1248, 1296f-1297f, *per* Lord Templeman, *Attorney-General v Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 283–284, *per* Lord Goff of Chieveley and *Derbyshire County Council v Times Newspapers Ltd.* [1993] A.C. 534, 551f-g, *per* Lord Keith of Kinkel. I cannot think that the right of access to justice is in some way a lesser right than that of free expression; the circumstances in which free speech might justifiably be curtailed in my view run wider than any in which the citizen might properly be prevented by the state from seeking redress from the Queen's courts. Indeed, the right to a fair trial, which of necessity imports the right of access to the court, is as near to an absolute right as any which I can envisage.[28]

The use of fundamental rights in this way ran in parallel with other developments, using appeals to Convention rights in the ECHR in a form of incorporation *avant la lettre* of the HRA[29] and treating certain statutes as having constitutional status and therefore requiring respect in the interpretation of later legislation in much the same way as by reference to fundamental rights under the principle of legality.[30]

As noted above, the notion of fundamental rights can be seen as supportive of certain conceptions of legality and as a foundation for the very idea of parliamentary supremacy. However, there is a tendency of fundamental rights doctrine in English law to operate in tension with both parliamentary

[28] *Witham* [1998] Q.B. 575, 585.

[29] *Watkins v Home Office* [2006] UKHL 17; [2006] 2 A.C. 395, at [64], per Lord Rodger. The focus on fundamental rights emerged at a time when more customary constraints had diminishing effect: L. Siedentop, *Democracy in Europe* (New York 2001), ch. 4 and p. 142; Johnson, *In Search of the Constitution*, ch. 3; but this focus creates particular tension with democratic values due to the relatively 'closed' character of the British legal class: Siedentop, ibid., at p. 150; Loughlin, *The Idea of Public Law*, pp. 128–30.

[30] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] Q.B. 151; *R. (HS2 Action Alliance Ltd.) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 W.L.R. 324.

supremacy and the rule of law, understood as rule by predictable and determinate rules laid down in advance. The effect of both that part of the principle of legality which operates by reference to fundamental rights and s. 3 of the HRA (requiring legislation to be read in a manner compatible with Convention rights, if possible) is to undermine the predictability of the meaning to be given to legislative rules and to authorise the courts to amend in potentially radical ways what Parliament has said in legislation.[31] To overlay an additional interpretive framework by reference to fundamental rights which are themselves defined at a high level of abstraction and indeterminate is to create a risk of distorting positive legal norms into vague, uncertain, and poorly articulated standards. It also involves a practical transfer of law-making power from legislature to the courts, as the decision-makers on the ground, operating this interpretive regime when applying the standards in the particular cases that come before them.[32] If Parliament does not have fair warning of what the words it uses will be taken to mean, its ability to function as an institution which amends the law in accordance with what the elected representatives intend (and may have promised to achieve) will be undermined: the link between democratic will and law will be disrupted. If a citizen does not have a fair warning of what the words used in legislation mean, his ability to plan his affairs will to that extent be undermined. This is not to say that judicial development of the law to identify fundamental rights is improper; but development comes at a price and over-ambitious development may come at a price in terms of sacrifice of these other key values in our political and legal system which might be excessive.

To contain these problems, and ensure that the judiciary operates within defensible legitimate bounds, one needs reasonably determinate criteria to identify the fundamental rights which are going to be the basis to create these interpretive effects. This is necessary both to limit the negative rule-of-law effects (by injecting a process of structured legal reasoning into working out what is a fundamental right and its extent) and to limit the negative impact on democratic principle (given effect in legal doctrine by the concept of parliamentary sovereignty).

If a fundamental right is identified clearly in advance of the act of legislating, it is plausible to infer that, when Parliament legislated, it meant to do so taking that right into account without needing to say so.[33] Employed in this way, fundamental rights can be regarded as legitimate aids to amplify and support the intention of the democratic legislature, rather than as something

[31] P. Sales and R. Ekins, "Rights-Consistent Interpretation and the Human Rights Act 1998" (2011) 127 L. Q.R. 217; Sir Jack Beatson, "Common Law, Statute Law and Constitutional Law" (2006) 27 Stat. L.R. 1, 13.

[32] Duxbury, *Elements of Legislation*, p. 226.

[33] Cf. other background aids to interpretation such as White Papers and Law Commission reports.

which undermines or contradicts it.[34] Indeed, under this approach, a practical accommodation can be achieved between democratic values and liberal rule-of-law values which may itself be regarded as having democratic legitimacy.

A fundamental right is – or ought to be – the end of one process of reasoning (the identification stage) and the beginning of another (the interpretive stage). It is a tool to produce interpretive effects. Both stages need to be clearly articulated in terms of legal process and what counts as legitimate legal argument, even if not in terms of fully precise positive law. It is the vagueness and indeterminacy of the criteria to identify fundamental rights, especially domestic law fundamental rights,[35] which represents a problem for English legal reasoning by reference to fundamental rights. The more abstract the formulation of fundamental rights, as broad general standards rather than concrete positive rules, the greater the threat to the rule of law and democratic principle inherent in using them to produce concrete legal outcomes. There is a danger that they are taken to allow for a large transfer of decision-making power to the judges, without adequate constraints found in legitimate, objective rules or standards located in reasonably determinate positive law.

A positivist-orientated approach enables judges, in justifying their decisions, to rely on established sources of legitimacy reflected in the rules or standards applied. Venturing beyond positive legal rules or standards feels increasingly uncomfortable the further one goes, as the legitimacy for judicial decisions becomes more attenuated and self-referential. As Loughlin says, "although the rights revolution has been fuelled by the rhetoric of natural or human rights, the idea of nature no longer offers any fixed, objective point against which conduct can be evaluated".[36]

There is a distinct tendency in the recent jurisprudence of the Supreme Court to seek to fashion legal reasoning around domestic fundamental rights in preference to over-hasty and over-elaborate resort to Convention rights.[37] It is not unreasonable to think that one reason for this is the prevailing political environment in which, after years of hostile criticism of European human rights decisions in certain sections of the press and

[34] Contrast this conceptualisation of the role of domestic constitutional rights with some interpretations of common law constitutionalism, which treat those rights as pre-political or external to, and controlling of, the parliamentary process of making legislation: T. Poole, "Questioning Common Law Constitutionalism" (2010) 25 L.S. 142; J. Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge 2010), ch. 2.

[35] There are different problems of indeterminacy regarding identification of Convention rights under the ECHR, which require elaborate reasoning and detailed knowledge of the case law of the ECtHR to establish what they mean, before using them as interpretive tools under s. 3 of the HRA.

[36] Loughlin, *The Idea of Public Law*, p. 128.

[37] See e.g. *R. (Osborn) v Parole Board* [2013] UKSC 61; *Bank Mellat v HM Treasury (Nos. 1 and 2)* [2013] UKSC 38; [2013] UKSC 39; *Kennedy* [2014] UKSC 20, at [45]–[47], [133]; *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 W.L.R. 1591; *R. (Faulkner) v Secretary of State for Justice* [2013] UKSC 23, [29]. See R. Clayton, "The Empire Strikes Back: Common Law Rights and the Human Rights Act" [2015] Public Law 3.

media,[38] the future of the HRA has been placed in serious doubt by the position adopted by the Conservative Party, now returned to government. If the HRA is repealed, the role of domestic fundamental rights may become more important.[39] The tendency to emphasise domestic fundamental rights makes more urgent the task of spelling out acceptable criteria to identify them and their limits, which do not open the judiciary to the charge of making them up on a whim, in an illegitimate exercise of practical legislative power.[40] The judiciary need to be able to offer justification for their intervention in the typical kind of case where precisely the legitimacy of that is in issue, namely where the alleged right is being relied upon to override what may appear to be a clear expression of legislative intention in a statute or to strike down executive action where the executive has taken steps to pursue some public interest which it maintains is important, and the existence or ambit of the alleged right is in question.

The principle of legality can be seen as a method, at the doctrinal level, for domestic law to reconcile two distinct philosophical traditions, the liberal and the democratic, which underpin the regime which has become established in the UK.[41] But this observation does not carry one further forward in the task of establishing criteria to identify fundamental rights in cases where there is doubt about their ambit. There is no natural, a priori basis for reconciliation of the traditions. They fall to be reconciled by way of practical accommodations specific to the political environment of each individual polity.[42]

The principle of legality operates by reference to a range of constitutional understandings (such as that, absent clear language, a statute does not bind the Crown), not just fundamental rights.[43] Indeed, the language of "fundamental rights" risks overstating what is really a subclass of powerful (but defeasible, not absolute) interests of constitutional concern, and creating too strong a tension with parliamentary sovereignty and the rule of law. The language of fundamental rights is wonderful legitimating rhetoric, until the notion of a fundamental right itself is unpicked and exposed, as is liable to happen. Although certain types of interest have been identified in the authorities as giving rise to fundamental rights, such as the right of freedom of speech, the rights are identified at a level of some abstraction, and in difficult cases the precise scope and import of a particular right

[38] See S. Marks, "Backlash: The Undeclared War against Human Rights" (2014) E.H.R.L.R. 319.
[39] Much may depend on the form of legislation which might replace the HRA and on whether the UK continues to be a member of the EU, and so bound by the Charter of Fundamental Rights within the scope of EU law.
[40] Cf. Ely, *Democracy and Distrust*, pp. 58–59; R. Bork, *The Tempting of America: The Political Seduction of the Law* (New York 1990), ch. 11.
[41] R. Geuss, *History and Illusion in Politics* (Cambridge 2001), ch. 3; Webber, *The Negotiable Constitution*, pp. 7–8 and ch. 2.
[42] T. Koopmans, *Courts and Political Institutions: A Comparative View* (Cambridge 2003).
[43] Sales, "A Comparison".

will be in question. In other situations, the courts are invited to identify new "fundamental" rights, not previously recognised as such in the authorities, as a step in the legal analysis applicable in a particular case.[44]

In a period which is so used to the employment of "rights talk", however,[45] perhaps it is necessary to live with a degree of dissonance between this legitimating rhetoric and actual judicial practice, in which fundamental rights are not treated as trumps but really as interests or concerns of significant weight, varying with context, to be balanced against other interests or concerns in the interpretive exercise. They are really just part of a sort of vector analysis which informs almost any exercise of interpretation in difficult cases, for the court to produce a final resultant vector, namely the norm which it then applies to the case.

Domestic fundamental rights should be distinguished from the fundamental rights contained in the HRA. Lord Hoffmann appeared to equiparate the two in *Simms* but, as well as similarities, there are significant differences. There are two important differences in their mode of operation in the English legal system and two underlying constitutional differences:

(1) Although there can be significant uncertainty and great scope for argument about what Convention rights mean in a specific context when applying Convention rights and the Strasbourg case law, there is a clear process of legal reasoning to resolve disputes, authorised by an underlying legal instrument (the ECHR), and when one comes to the end of it one has a stated norm of positive law to use as a hard-edged tool in the process of interpretation of domestic legislation. That is a process of reasoning of a kind which is not yet clearly articulated when one tries to identify domestic fundamental rights in any situation not already clearly covered by previous precedent.
(2) Not only is there greater fuzziness in the boundaries of domestic fundamental rights, there is greater fuzziness in the way they are applied in the interpretive process. They are more like principles than rules. They come more into focus in some contexts and fade away at the edges. They have greater interpretive weight in some places and less in others. Section 3 of the HRA, on the other hand, gives a harsher and more clear-cut mandatory interpretive command to the courts.
(3) These differences reflect an important constitutional difference. The fundamental rights in the HRA are capable of being given determinate and predictable content over time as the European Court of Human Rights ("ECtHR", supplemented by and at times in dialogue with the

[44] See e.g. *A. v Secretary of State (No. 2)* [2005] UKHL 71; [2006] 2 A.C. 221 (right not to have decisions based on evidence extracted under torture); *Pham* [2015] UKSC 19; [2015] 1 W.L.R. 1591 (right not to be deprived of citizenship at [60], [98], [108]–[110]).

[45] M.-A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York 1991); C.R. Epp, *The Rights Revolution* (Chicago 1998); Loughlin, *The Idea of Public Law*, pp. 125–28; Goldsworthy, *Parliamentary Sovereignty*, pp. 9–13.

UK Supreme Court) fills in the practical meaning of the Convention rights by its decision-making as the years go by. What we have is a sort of common law of European human rights, legitimised by the text of the Convention itself and the ECtHR's constitutional role within the Convention system.[46] The effect is that Convention rights have clearer legitimate and increasingly determinate content as positive law than domestic fundamental rights (absent an articulated method to identify their scope), and are in these respects less in tension with the rule-of-law ideal.

(4) Convention rights, as they operate in domestic law, are also less in tension with parliamentary sovereignty and democratic principle, because they have been directly promulgated as rights by Parliament, which has also stipulated in the HRA how they are to inform the process of statutory interpretation and control executive action.[47]

How, then, should the courts move beyond simple assertion by individual judges of the existence and dimensions of fundamental rights? The task is made more difficult, and more pressing, by the gradual collapse of normative consensus among the governing elite (political and legal) in the UK.[48] Where there is a normative consensus at the level of custom and unspoken assumptions, that can make application of open-ended standards more predictable and more acceptable according to rule-of-law standards.[49] Where such customs and assumptions break down, and become subjects of dispute rather than agreement, positive rules need to be articulated to govern the disputes which arise; and those rules need to be regarded as legitimate.[50]

The US courts have faced a similar problem of legitimacy, when seeking to draw out unenumerated fundamental rights from the US Constitution.[51] David Crump details the methods which have been attempted, but identifies their limited justificatory effectiveness. He argues that the effort to recognise unenumerated rights "must be coupled with judicial restraint that increases according to the vagueness of the method",[52] since the vagueness of the method equates to an absence of rule-based legitimisation of judicial power. Attempts to use a method grounded in ideas of natural rights or the importance of particular individual interests suffer from "manipulability, subjectivity and lack of limiting principle", and may ignore legitimate

[46] See P. Sales, "Law and Democracy in a Human Rights Framework", ch. 15, in D. Feldman (ed.), *Law in Politics, Politics in Law* (Oxford 2013), 231–32.

[47] See e.g. *R. (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, at [152], per Lord Kerr J.S.C.

[48] Siedentop, *Democracy in Europe*, ch. 4. Cf. D. Beetham, *The Legitimation of Power* (Basingstoke 1991), ch. 5; Loughlin, *The Idea of Public Law*, ch. 7.

[49] Fallon, Jr, "'The Rule of Law'", pp. 49–50 ("In contexts marked by normative consensus, there might be broad agreement about how standards should be applied, and standards would permit both citizens and officials to be ruled by law"); Loughlin, *The Idea of Public Law*, ch. 1.

[50] Loughlin, *The Idea of Public Law*, p. 128.

[51] See e.g. Crump, "How Do the Courts"; Bork, *The Tempting of America*; M. Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community* (New York 2010), ch. 3.

[52] Crump, "How Do the Courts", p. 804.

governmental interests and destroy the rights of others.[53] By contrast, an approach grounded in history and constitutional tradition "has the advantage of providing a touchstone outside the judge's own perceptions . . .: the opinions of others, expressed over an extended period of time"[54] but it still allows for a high degree of subjectivity in the identification of relevant tradition and in the articulation of the degree of generality at which it should be expressed.[55] Crump argues that it is desirable to temper use of the various positive methodologies to identify fundamental rights which he reviews with use, in parallel, of negative methodologies, actively searching for reasons why an interest should not be regarded as fundamental; these would ask more directly what the consequences would be for the legislative and judicial roles that would result from labelling an interest as fundamental, with a view to identifying whether those consequences could be justified or not.[56]

In English law, without the reference point of a written constitution, certain of the techniques and sources of legitimacy discussed by Crump are not available. The constitutional landscape, with English emphasis on the sovereignty of Parliament, is materially different. So are the potential sources of evidence to identify fundamental rights and the justifications which may be available to support them. However, Crump's analysis may provide some pointers for a possible way forward in English law.

The relative degree of objective grounding in evidence for the history and tradition approach would seem to make it the most acceptable basic methodology for English circumstances.[57] The selection of evidence used to identify a fundamental right and the level of generality at which it operates can be explained and justifications offered. The requirements of looking to historical precedent and of explanation and justification of the choice and use of evidence impose constraint and discipline on judges, which operate much like the constraint and discipline of the common law. Identification of a right through looking for evidence of a tradition of special respect for an underlying interest, reflecting a sense of obligation to accommodate it in all usual cases, would involve a procedure similar to that

[53] Ibid., at pp. 859–60.

[54] Ibid., at pp. 860, 913. .

[55] Ibid., at pp. 861ff. The wider the level of generality chosen, the greater is the judicial power to mould the interpretation of legislation and legal powers using the concept of fundamental rights: pp. 859–60. See also Rosenfeld, *The Identity*, ch. 3; P. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York 2011), 104–07.

[56] Ibid., at pp. 898ff, 913–14; ". . . questions of judicial competence, conflicting objectives, linedrawing, and legislative flexibility should be emphasised in every case that breaks new ground in the categorisation of rights with elevated status" (p. 906).

[57] See the reference to constitutional tradition in *R. (Bancoult)* [2008] UKHL 61; [2009] 1 A.C. 453. Cf. *Nairn v University of St Andrews* [1909] A.C. 147, 160–61, using the same methodology to identify a constitutional tradition which could not be taken to be overridden by general words in a statute. See also T. Aleinikoff, "Constitutional Law in the Age of Balancing" (1987) 96 Yale L.J. 943, 962–63; Williams, *In the Beginning*, p. 61 (". . . the discovery of what rights people have [is] a political and historical one, not a philosophical one").

for identification of constitutional conventions.[58] As with conventions, fundamental rights encapsulate aspects of the underlying morality of the political system[59] which the courts are capable of recognising as the product of joint action and acceptance by a range of key constitutional actors (politicians, civil servants, Parliament in its collective capacity and government in its, and then in turn the courts), rather than simply being the invention of the courts. They are drawn from the collective constitutional wisdom of those directly involved in making the constitution work, where that can be distilled and identified by the courts as having sufficient definition and normative potency to qualify for the status of a fundamental right. Part of the normative potency derives from the fact that they provide a foundation for the reasonable expectations of such actors in their efforts to carry the constitution forward in a stable and collaborative way; part from the way in which they underlie the common expectations of citizens more generally; and part from the willingness of the domestic courts to endorse them as compatible with general conceptions of liberal democratic values, as informed by consideration of what can potentially be a wide range of sources, including relevant case law of other courts and relevant international instruments.

It becomes more debatable how far the judiciary should press beyond this sort of approach. As Crump notes, assertions of fundamental rights by general reference to individual interests can leave judges exposed to question in terms of the legitimacy of their decisions in the face of legislation which appears to qualify those interests. Judges might feel reticent about taking on their own shoulders, so to speak, the responsibility for positing a fundamental right capable of modifying the meaning of a statute. To what extent can legal technique, in which the judges have recognised expertise,[60] support such a move? Nonetheless, in particular contexts, judges may feel that the degree of consensus about the importance of the interest, in the absence of any clear countervailing public interest, is so strong as to justify them in identifying the interest as having the strong normative force associated with a fundamental right, where that can be done in a way judged to be in harmony with constitutional tradition or by limited extension from existing precedents.[61]

But, in tandem with this positive methodology, with a view to safeguarding against false positives and as a further constraining discipline in line with Crump's proposals, perhaps the courts should utilise a conscious

[58] See W.I. Jennings, *The Law and the Constitution*, 5th ed. (London 1960), 134–36. Though not enforceable, courts sometimes pronounce upon them.

[59] Cf. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. ([1915] Indianapolis 1982), cxli.

[60] Cf. J. Waldron, "Do Judges Reason Morally?", ch. 2, in G. Huscroft (ed.), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge 2008).

[61] *Pham* [2015] UKSC 19; [2015] 1 W.L.R. 1591 illustrates this. The interest there was underwritten by international instruments.

negative methodology, scrutinising critically whether there are reasons inherent in the distribution of constitutional authority between Parliament and the courts why the putative fundamental right should not be accepted as such. Although having a close resemblance with common law method, the overall methodology is not itself a function of the common law. Primary law-making authority is vested in Parliament, and it is Parliament's intention which should be the focus of inquiry. I suggest that the courts should only identify a fundamental right or interest for the purposes of the principle of legality if it is plausible to infer that Parliament as a collective body itself recognises such a right or interest and may thus be taken to have legislated on the assumption that it applies (unless clearly abrogated by the legislation under review).[62] This test is likely to lead to a comparatively narrow approach to identification of constitutional rights, limited to those cases where there is a sufficient overlapping consensus of views from different political and normative perspectives to justify such an inference, notwithstanding the language actually used by Parliament.[63]

Since it is not a question of common law, but of recognition by the courts of constitutional understandings within the polity as a whole, the range of evidence and argument to which reference may be made in addressing the issue whether a fundamental right of relevant ambit can be identified as embedded in the constitution is wide. This creates its own problems: how are these disparate sources to be brought into account and weighed against each other? Is there a determinate structure of analysis which is to be applied?

This is not easy to supply. The choices to be made are inevitably value-laden and, in choosing, the courts have at some level to commit themselves to some form of constitutional vision.[64] This is arrived at not simply by reference to the values of the judges themselves, but after they have done their best to take account of evidence of other values immanent within our constitutional system. What is in issue is constitutional coherence, rather than a narrower type of doctrinal coherence which is relevant where the development of the common law is in question. Courts should strive for coherence and "fit" in relation to wider constitutional understandings.[65] This involves taking account of both the strength of the evidence for a constitutional principle and the force of the underlying reasons for it, alongside other matters. In carrying out this exercise, the identification of the general orientation of the constitution at a high level of abstraction will itself be a significant structuring principle, albeit one which is not fully determinative as to the

[62] See *Electrolux Home Products Pty Ltd. v Australian Workers Union* (2004) 221 C.L.R. 309, 329, per Gleeson C.J.; Sales, "A Comparison", pp. 605–06.

[63] J. Rawls, *Political Liberalism*, expanded ed. (New York 2005), Lecture IV, "The Idea of an Overlapping Consensus"; C. Sunstein, *Legal Reasoning and Political Conflict* (New York 1996), ch. 2, "Incompletely Theorised Agreements".

[64] Kahn, *Political Theology*, ch. 3.

[65] Cf. R. Fallon, "A Constructivist Coherence Theory of Constitutional Interpretation" (1987) 100 Harv.L.R. 1189, following R. Dworkin, *Law's Empire* (Harvard 1986).

result. Parliament is taken to legislate for a liberal democracy, in a constitutional state which observes the rule of law.[66] But this leaves a great deal of latitude regarding how the competing principles of democracy and the rule of law should be reconciled in practical terms in concrete situations, and the usual expectation – informed both by democratic principle and rule-of-law thinking – is that in the first instance this reconciliation is to be achieved by Parliament itself in the language it uses for the legislation it creates.[67]

Three forms of wider evidence for constitutional understandings which may inform a conclusion regarding a fundamental right or a constitutional principle merit particular mention here. First, a statutory provision may in certain circumstances have special constitutional force, such that it will not be treated as overridden by later legislation unless by express language or very clear implication.[68] Such constitutional force may be inferred from the circumstances in which a particular piece of legislation was passed,[69] or may be acquired over time from the prominence it is given in constitutional debate.[70] Discussion about this tends to be framed in terms of whether a particular statute is constitutional.[71] However, I suggest that it may be more accurate and helpful to regard particular provisions as evidence of constitutional understandings, to be taken into account alongside other evidence which supports or detracts from any argument that a constitutional right or principle should be found to exist. It is unlikely to be the case that full constitutional force can or should be given to every provision in a particular statute, even if it can be said in a general way that the statute is of constitutional importance. Moreover, in view of the wide frame of reference for evidence relevant to whether something has acquired constitutional force or not, and the possibility that the position might change over time, to speak of a provision as constituting evidence of constitutional force rather than being awarded that status once and for all by a definitional manoeuvre means that the analysis remains properly focused and there is proper scope for other relevant evidence to be brought into account, assessed at the relevant point in time.[72]

[66] See e.g. *Electrolux Home Products*, (2004) 221 C.L.R. 309, and the speeches of Lord Steyn in *Pierson* [1998] A.C. 539, and *R. (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36; [2004] 1 A.C. 604, at [26]–[31].

[67] See Webber, *The Negotiable Constitution*, chs. 4–6.

[68] *Thoburn* [2002] EWHC 195 (Admin); [2003] Q.B. 151; and *R. (HS2 Action Alliance Ltd.)* [2014] UKSC 3; [2014] 1 W.L.R. 324.

[69] Perhaps following a referendum, as with the Scotland Act 1998, or in the exceptional circumstances in which a new constitutional settlement was consciously created after the Glorious Revolution; cf. B. Ackerman, *We the People: Foundations* (Harvard 1991).

[70] Something like this happened with Magna Carta. The importance of the European Communities Act 1972 was underlined by the referendum in 1975.

[71] Cf. *Thoburn* [2002] EWHC 195 (Admin); [2003] Q.B. 151, at [63]; and e.g. F. Ahmed and A. Perry, "The Quasi-Entrenchment of Constitutional Statutes" [2014] C.L.J. 514.

[72] Constitutional force may be acquired, or may conceivably come to be lost. What is in question is whether an inference can be drawn from a constitutional principle existing at the time the legislation was passed as to the meaning that the enacting Parliament intended that legislation to have.

Secondly, international human rights instruments such as the ECHR and the International Covenant on Civil and Political Rights may be referred to in order to support an argument that a *domestic* fundamental right or constitutional principle should be found to exist. Although disavowed by Laws J. in the passage from *Witham* quoted above, it is clear that he derived at least rhetorical support for the domestic constitutional right in issue from the case law of the ECtHR which he cited. Convention rights have been treated as relevant supporting evidence for domestic fundamental rights in a number of recent cases.[73] At a level of some abstraction, this seems right. The European Convention, in particular, represents a considered West European expression of liberal democratic values, and particular Convention rights may provide some evidence and a useful cross-check when the identification of constitutional rights in domestic law is in issue. But there are significant gaps to be bridged between the general expression of such rights in the Convention, the detailed interpretation of those rights by the ECtHR, and the way in which those general rights are implemented in domestic law. As one moves along this spectrum, the indications regarding the precise content to be given to the rights may become more concrete (and in that sense provide clearer guidance), but at the same time they may become more controversial (and in that sense provide less helpful or authoritative guidance, which may be outweighed by other evidence regarding domestic constitutional understandings). In the movement from general principle to detailed application in particular cases, what was an overlapping consensus at the level of principle may wear very thin or disappear. Further, if the Human Rights Act were repealed, the courts might feel distinctly uncomfortable in drawing in any very concrete way on the Convention rights or the case law of the ECtHR as evidence for domestic fundamental rights.

Finally, judgments of courts in other liberal democratic countries may provide another source of evidence of values which should be regarded as inherent in a liberal democracy's constitutional order. Recourse to foreign jurisprudence may offer some prospect for judges to bolster the legitimacy of their identification of constitutional rights, in the face of domestic democratic pressures. But again, the guidance is likely to be at a level of some abstraction, because each state has developed its own particular constitutional arrangements and will have established its own particular balance between the authority and roles of different institutions.[74] There is always a danger of misunderstanding and mis-transposition in attempting

Accordingly, the constitutional tradition identified in *Nairn* [1909] A.C. 147 that women do not have the vote, would not be relevant to legislation passed in 2016.

[73] See note 37 above, in particular in *R. (Osborn)* [2013] UKSC 61, at [62]. In *Moohan v Lord Advocate* [2014] UKSC 67, the potential relevance of drawing on international law when deciding whether a common law constitutional right exists was acknowledged, at [33], [35].

[74] See note 42 above.

to undertake comparative constitutional law.[75] Ultimately, although reference to foreign examples may carry some weight and "add lustre" to the analysis, any finding of domestic fundamental rights and constitutional principles will have to be solidly grounded in domestic law and constitutional practice.[76]

III. Private Law

Private law presupposes a background distribution of property and entitlements which is founded on institutionally recognised rights and obligations. It is this background that makes sense of the ideas of corrective justice which underpin private law (when should property be restored and when should compensation be paid to rectify some harm done to the fund of wealth of the claimant?)[77] and which also defines the area within which a person's property, person, and freedom of action are to be protected from interference by others and the state.

The discourse of rights in private law seeks to refocus private law on these core ideas, as a corrective to over-extensive development of the law to impose obligations on individuals to protect others against harm or loss, in particular through the law of negligence. Emphasis on the rights of a defendant to answer a claim for extension of their obligations has been a feature of the common law in other areas as well. The rejection of a tort of malicious interference with a trade provides a good example.[78]

There is a lively debate in the literature regarding whether rights can have the central place in private law for which some argue.[79] Peter Cane, for example, contends that private law is not all about rights, and rights cannot explain the shape of the law: "Protection of individual autonomy is certainly one of the values under-pinning private law, but it also protects social interests."[80] It is not the purpose of this article to adopt a position in that debate, but rather to bring out how rights discourse operates in the field of private law, by contrast with its operation in public law.

Private law rights are subject to adjustment in three ways to take account of changing social needs and conceptions of justice: (1) through operation of Equity, (2) by development and change in the common law, and (3) by

[75] C. McCrudden, "A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights" (2000) 20 O.J.L.S. 499; J. Goldsworthy, "Questioning the Migration of Constitutional Ideas: Rights, Constitutionalism and the Limits of Convergence", ch. 5, in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge 2006).

[76] See J. Bell, "The Relevance of Foreign Examples to Legal Development" (2011) 21 Duke J.Comp.& Int'l L. 431.

[77] E. Weinrib, *The Idea of Private Law* (Harvard 1995).

[78] See *Allen v Flood* [1898] A.C. 1, 198–99, per Lord Watson; 118–19, per Lord Herschell; 152–53, per Lord Macnaghten; also *Quinn v Leathem* [1901] A.C. 495, 533–34, per Lord Lindley; and now see *OBG Ltd. v Allan* [2007] UKHL 21; [2008] 1 A.C. 1.

[79] See Nolan and Robertson, *Rights and Private Law*.

[80] P. Cane, "Rights in Private Law", ch. 2, in Nolan and Robertson, *Rights and Private Law*, p. 62.

legislative intervention. How do references by the domestic courts to fundamental rights, particularly in the form of the Convention rights, fit within this scheme?

Equity was originally the primary mechanism for adjustment, of especial importance when the common law was regarded as reified and rigidly fixed by reference to the formulae given by the forms of action.[81] Equity has itself, however, become increasingly defined in terms of rules and standards, to promote rule-of-law values of predictability and certainty. In that respect, the law of Equity comes to resemble more closely the common law. Determinate property and rights exist in Equity, much as they do under the common law. At the same time, the common law has come to be seen as a flexible instrument, far more open to development and change in light of ideas of justice and contemporary need than was previously the case. The common law developed from a formulary system based on the forms of action into a system of rules justified by, and adjustable in light of, underlying reasons. Common law and Equity have thus found themselves on converging paths.[82] They both define rights and obligations in reasonably determinate terms, and the scope for those rights and obligations to be varied is set by the limits within which it is acceptable for judge-made law to develop.

Those limits are set by common law theory, having regard to the legitimate role of judges in a liberal democracy. The approach to precedent – and the choice of whether to follow a previous judgment or distinguish or overrule it – is at the centre of common law theory. This is not a matter of scientific deduction (which is an unsustainable conception in the field of law), but turns on value judgments informed by the legal-political culture in which judges operate. "Demonstrating the likeness of cases means settling on a principle to govern their treatment"[83] and that is always a matter of evaluative choice for a judge.[84] Melvin Eisenberg explains the reception and expansion of an authority's precedential value by reference to "social propositions" (i.e. propositions outside legal doctrine, "such as propositions of morality, policy and experience"[85]), which may favour doctrinal expansion or may favour limitation. Judges have to make a choice informed by standards of congruence with social propositions, systemic consistency, and doctrinal stability.[86]

[81] See *In re Hallett's Estate* (1880) 13 Ch.D. 696, 710: "… the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial." Historically, the common law was capable of development – "The life of the common law has been in the unceasing abuse of its elementary ideas" (S. Milsom, *Historical Foundations of the Common Law*, 2nd ed. (London 1981), 6) – but not in the same self-critical, reason-based way which is familiar today.

[82] Sales, "Equity and Human Rights"; also D. Laycock, "The Triumph of Equity" (1993) 56 L.C.P. 53.

[83] N. Duxbury, *The Nature and Authority of Precedent* (Cambridge 2008), 175.

[84] Duxbury, *The Nature*, ch. 5; J. Stone, *Precedent and Law: Dynamics of Common Law Growth* (Sydney 1985), 45; K. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston 1960), 185, 202, 213ff; Fallon, "A Constructivist Coherence Theory", pp. 1202–04, 1242.

[85] M. Eisenberg, *The Nature of the Common Law* (Harvard 1988), 1–2, and ch. 4.

[86] Ibid., chs. 5–8; B. Cardozo, *The Paradoxes of Legal Science* (New York 1928), 14–15, 30, 36–37.

An important source of guidance for the development of the common law is the jurisprudence of senior courts in other common law jurisdictions. The force of this source appears to be greater in relation to the development of private law than in relation to public law.[87] This reflects the decision-making authority allowed to the courts by constitutional tradition to work out a coherent common law system of inter-personal rights and obligations in private law,[88] the similarity of the conceptual schemes of private law in those jurisdictions,[89] the relative autonomy of the courts in relation to that process from other pressures associated with the particular distribution of authority within local constitutional arrangements, and, consequently, the comparative closeness of relevant analogies provided by such jurisprudence.

The discourse of common law constitutionalism seems to have less resonance in the field of private law. In part, this is due to the particular role it plays in the interpretation of statutes and an unwillingness on the part of the senior courts to use the concepts of fundamental rights developed in that context for the very different purpose of developing private law.[90] But more profoundly, it may reflect the fact that the distribution of rights and obligations is already inherent in the common law, as developed by the judges themselves by reference to underlying standards of justice and the proper balance of interests. The discourse of common law constitutionalism is already aligned with the common law itself and, unlike the Convention rights and Convention jurisprudence, does not appear as an outside force originating from an external vantage point and appealing to significantly different concepts of justice or law. There is therefore less scope for common law constitutionalism to operate as a source of social propositions in the role of external guideposts for the development of the common law.

International law may supply relevant social propositions which are capable of influencing the development of the common law. It may also inform relevant public policy, where the common law refers to public policy requirements.[91] For some time before the HRA came into effect, English courts had treated the ECHR as a source of social propositions

[87] See e.g. *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, at [45] (it is "highly desirable … to lean in favour of harmonising the development of the common law round the world").

[88] *Re Spectrum Plus Ltd. (in liquidation)* [2005] UKHL 41; [2005] 2 A.C. 680, at [32]–[34].

[89] N. Jansen, *The Making of Legal Authority: Non-Legislative Codifications in Historical and Comparative Perspective* (Oxford 2010), 19 ("… the law has its own conceptual and discursive rationality; this is especially true for private law. This alone suffices for making private law – at least to a substantial degree – independent and autonomous from the general political, social and moral discourse").

[90] See *Watkins* [2006] UKHL 17; [2006] 2 A.C. 395.

[91] See e.g. *Oppenheimer v Cattermole* [1976] A.C. 249; *Kuwait Airways Corp. v Iraqi Airways Co. (No. 6)* [2002] UKHL 19; [2002] 2 A.C. 883; *Elton John v MGN Ltd.* [1997] Q.B. 586 (assessment of damages for libel, informed by Article 10).

for development of the common law.[92] This is perhaps most clearly in evidence in the important speech of Lord Nicholls in *Reynolds v Times Newspapers Ltd.*,[93] in which he drew on the ECtHR jurisprudence on freedom of speech and the equivalent of a defence of qualified privilege for press reporting in order to develop the English law of privilege in relation to defamation. Lord Nicholls referred to the enactment of the HRA (although it was not yet in force) as a relevant factor legitimising development of English law by reference to the jurisprudence of the ECtHR.[94] In an area where the rhetoric of fundamental rights was strongly implicated, engaging as it did freedom of speech for the press and the right of privacy, the House of Lords regarded it as legitimate to refer to the ECHR and the jurisprudence of the ECtHR for guidance as to how the common law should be developed; and the force of those social propositions was treated as boosted by the presence of the HRA in the background.

What happened after the HRA came into effect? I suggest that the basic pattern of reasoning exemplified in *Reynolds* continued to apply. Although there was a good deal of debate at the time regarding the horizontal effect of Convention rights as a result of the duty imposed on the courts by s. 6(1) and (3) of the HRA to act in a way compatible with Convention rights,[95] which it was sometimes said created an obligation for the courts to develop the common law by reference to the Convention rights, the mechanism for this was not fully thought through or explained. Identification of the relevant analytical model could have important implications if the HRA were repealed.

The greatest impact of the HRA in the field of private law has perhaps been in relation to the law of privacy. In *Wainwright v Home Office*,[96] the House of Lords chose not to develop the common law to create protection against invasion of privacy. The facts occurred in 1997, before the HRA had been passed. The House of Lords chose not to extend the law by reference to Convention rights. In *A v B plc*,[97] however, the Court of Appeal responded to what it perceived to be a deficiency in protection of

[92] See the quotation at note 28 above, and the authorities cited. The experience of English law in seeking to adjust the tort of negligence to ECtHR jurisprudence was not positive: C. Booth and D. Squires, *The Negligence Liability of Public Authorities* (Oxford 2006), 121–31. This illustrates the dangers of developing English law too readily by reference to the ECtHR jurisprudence, without careful reflection on how well that jurisprudence fits with domestic legal principles; cf. R. Bagshaw, "Tort Design and Human Rights Thinking", ch. 6, in D. Hoffman (ed.), *The Impact of the UK Human Rights Act on Private Law* (Cambridge 2011). *Michael v Chief Constable of South Wales* [2015] UKSC 2 exemplifies a more cautious approach.

[93] *Reynolds v Times Newspapers Ltd.* [2001] 2 A.C. 127, 200–04; also 207–08, per Lord Steyn; 214–15, per Lord Cooke. See now the Defamation Act 2013.

[94] Ibid., at p. 200; also pp. 207–08, per Lord Steyn; pp. 223–24, per Lord Cooke; p. 234, per Lord Hope.

[95] E.g. H.W.R. Wade, "Horizons of Horizontality" (2000) 116 L.Q.R. 217; Beyleveld and Pattinson, "Horizontal Applicability".

[96] *Wainwright v Home Office* [2004] 2 A.C. 406.

[97] *A. v B. plc* [2003] Q.B. 195, at [4].

Convention rights under ordinary domestic law by modifying the action for breach of confidence to incorporate the requirements of Articles 8 and 10. The House of Lords proceeded to develop the law in a similar way in *Campbell v MGN Ltd.*,[98] the facts of which occurred after the HRA came into force in 2000. With the coming into effect of the HRA, it appears that the guiding force of Convention rights and the Strasbourg jurisprudence for the development of the common law increased. Reference to human rights standards allowed the House of Lords to by-pass the blockage created by *Wainwright* and to develop the common law to protect privacy interests in their own right, apart from the law of confidentiality – a development of the common law which some regarded as over-due.[99] Thus, after the coming into force of the HRA, the courts continued to use human rights as external standards to inform and legitimate changes in domestic legal rules, inferring from s. 6 that they had been given special licence by the legislature to modify the general common law.[100]

In this way, fundamental rights external to the common law have been specified which have had a certain disruptive effect. They have provided a reference point to rearrange existing patterns of rights and obligations in private law. But, overall, the effect has been rather muted.[101] The ECHR is protective of property rights, including legitimate expectations and contract rights.[102] Where a court is asked to intervene in a dispute between private parties and to adjust, by reference to Convention rights, the entitlements they would otherwise enjoy, it acts as a state authority and its intervention falls to be justified in Convention terms by reference to the law of positive obligations under the ECHR.[103] The issue is whether the values and interests protected by a Convention right are so strong as to justify disruption of ordinary patterns of rights and property in domestic law.[104] The ECtHR has adopted a cautious approach to implying positive obligations into the ECHR, which is primarily an instrument whose object is to have effects on the vertical state–citizen axis.[105] Moreover, since property and contract rights are protected under the ECHR, the state usually has a wide margin of appreciation in deciding how to balance them with other

[98] *Campbell v MGN Ltd*. [2004] 2 A.C. 457; also *McKennitt v Ash* [2006] EWCA Civ 1714; [2008] Q.B. 73.
[99] See G. Phillipson, "Privacy", ch. 7, in Hoffman, *The Impact*; and see *Michael* [2015] UKSC 2, at [124].
[100] Sales, "Equity and Human Rights".
[101] J. Wright, "A Damp Squib? The Impact of Section 6 HRA on the Common Law: Horizontal Effect and Beyond" [2014] Public Law 289.
[102] See e.g. *Malhous v Czech Republic*, ECtHR (GC), decision of 13 December 2000.
[103] A. Young, "Mapping Horizontal Effect", ch. 2, in Hoffman, *The Impact*.
[104] Sales, "Equity and Human Rights".
[105] D.J. Harris, M. O'Boyle, and C. Warbrick, *The Law of the European Convention on Human Rights*, 2nd ed. (Oxford 2009), 18–21, 342–43. Also see H. Collins, "On the (In)compatibility of Human Rights Discourse and Private Law", in H.-W. Micklitz (ed.), *Constitutionalization of European Private Law* (Oxford 2014), ch. 2.

Convention rights,[106] which diminishes the legitimacy of disruptive interventions by the domestic courts (since it is correspondingly difficult to say that any particular balance struck between competing rights and interests is incompatible with the ECHR).

If this explanation of what has been happening in private law by reference to fundamental rights endorsed by Parliament through the HRA is correct, it may well have implications for what might happen in the area of private law if the HRA were repealed. First, it seems that the common law has genuinely advanced (using Convention rights and the jurisprudence of the ECtHR as "social proposition" reference points); therefore, that advance would not be reversed by simple repeal of s. 6(1) of the HRA and the Convention rights set out in the act. The next privacy case after repeal would still be decided by reference to the common law as stated in *A v B plc* and *Campbell* – that is, the adjudicating court would not suddenly find itself relieved of a statutory obligation to comply with Convention rights, and treat those authorities as reversed in consequence.

However, for the future development of the common law, might there be a rebound with a double effect – that is, by a mirror reversal of the reasoning displayed in *Reynolds*? Presumably Convention rights would cease to have the heightened status as "social propositions" attributable to endorsement by the HRA; but might they also be subject to a further diminution in status by reason of the very fact that Parliament once chose to endorse them but now has deliberately chosen to remove its endorsement? Would the courts become especially cautious in treating the Convention rights, and more particularly the Strasbourg jurisprudence, as guides for the development of the common law? It is difficult to predict how the courts might react to such a scenario.

IV. Conclusion

Fundamental rights struggle to find purchase in private law. The distribution of entitlements in that field reflects a precise balancing of interests worked out through time, particularly through judicial development of the common law, in the course of which underlying values have been gradually absorbed into the positive legal rules. The specified rights set out in positive law tend to crowd out fundamental rights. Despite one or two striking examples, the disruptive effect of fundamental rights (in the shape of Convention rights) upon the scheme of private law has proved to be limited. The ECtHR and the domestic courts have been cautious in creating horizontal effects, using the muted and heavily qualified doctrine of positive

[106] *Neij and Sundi Kolmisoppi v Sweden* (app. No. 40397/12), ECtHR, judgment of 19 February 2013, paras. 150, 155; *Axel Springer AG v Germany* (2012) 55 EHRR 6, para. 88; Delfi AS v Estonia (2016) 62 EHRR6, para. 139.

obligations. Convention rights take their place as one among many sources of "social propositions" guiding the development of the common law, albeit boosted to a degree by the endorsement given to them by the legislature by the HRA.

The discourse of fundamental rights has had greater appeal in public law. But the idea is a contested one, with different weighting being given to it depending on the underlying conceptualisation which is adopted (which itself is not always spelled out). Despite some similarities, there are important differences between domestic fundamental rights and Convention rights in the ECHR and the HRA. It is suggested that, in the long run, the most defensible concept of domestic fundamental rights is likely to be one which draws upon constitutional traditions and expectations within the polity generally, using an increasingly articulated and determinate methodology which aims to identify common background understandings of both courts and legislature to inform the interpretation of legislation. This approach allows for a reasonable and coherent integration of democratic and rule-of-law principles. If that does prove to be the way forward, some of the more ambitious claims for common law constitutional rights to step in to take the place of Convention rights if the HRA were repealed may be found to go too far. One thing is clear, if the courts do find themselves operating in a world in which the HRA has been repealed, they will need to feel their way forward cautiously and with great sensitivity for the constitutional context.