The protection of fundamental rights in the common law

Sir Rabinder Singh[1]

Faculty of Advocates, Parliament House, Edinburgh

19 November 2026

Introduction

In recent years both judges and academics have suggested that, before turning to the express list of Convention rights set out in the Human Rights Act 1998 ("HRA"), one should look to the common law first. Indeed, there is a view that it may then be unnecessary to go to the HRA at all. In the last decade or so, a number of judges in the Supreme Court, including the current President, Lord Reed, and his successor, Lord Briggs, have stressed that the HRA should not normally be treated as the starting point in any case in which human rights issues arise.[2]

As Lord Reed observed in *R (Osborn) v Parole Board*:

> "The importance of the Act is unquestionable. It does not however supersede the protection of human rights under the common law or statute, or create a discrete body of law based on the judgments of the European Court. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate."[3]

Last year, in his lecture to the NGO, Justice, on the 25th anniversary of the HRA, 'Protecting human rights: the common law as the starting point', Lord Briggs said:

> "In short, it is the common law which usually provides the cause of action, even if the [HRA] is there to ensure that those causes of action are Convention compliant. … [T]he common law in fact often affords the same (or sometimes

[1] I would like to thank my judicial assistant, Ilona Roberts, for her assistance with research for this lecture. I would also like to thank Lord Ghosh for his comments on an earlier draft.

[2] See e.g. *Abbasi and Another v Newcastle upon Tyne NHS Foundation Trust* [2025] UKSC 15, [2026] AC 63, at paras 87-99 (Lord Reed PSC and Lord Briggs JSC).

[3] [2013] UKSC 61, [2014] AC 1115, at paras 54-63, in particular para 57.

> even greater) protections, particularly in 'horizontal' scenarios where private individuals seek to assert their human rights against one another."

In a helpful introduction to this subject, Common Law Constitutional Rights, edited by Prof. Mark Elliot and Dr Kirsty Hughes in 2020, they said:

> "If we turn to consider common law constitutional rights it is evident that despite renewed academic and judicial interest we have limited insight into what rights we have, how they work and what they offer."[4]

In this lecture I hope to explore the historical and conceptual background to the protection of fundamental rights in the common law and consider the principal routes by which they have come to be protected by the common law in recent years. The topic is vast, so inevitably I shall have to be selective. I will do so in three main parts:

(1) the common law before the HRA;

(2) the impact of public law doctrines;

(3) the development of the common law since the HRA.

I should also acknowledge that my account will be based on English legal history, although I hope that it will stimulate discussion in Scotland too.

(1) The common law before the HRA

It is clear from the helpful collection of essays edited by Elliott and Hughes that the history of the common law in recognising certain rights as fundamental was varied and patchy. Some rights, for example the right to personal liberty, the right to property and the right of

[4] M Elliott and K Hughes (eds), Common Law Constitutional Rights (2020, Hart), p. 5.

access to the court, were well protected by the common law. Others, such as the right to privacy, the rights to freedom of assembly and association and the right to vote, were not generally regarded as fundamental rights, or indeed rights protected by the common law at all.

Traditionally, English common law tended not to speak in terms of rights, let alone fundamental rights, but rather in terms of remedies. As Sir Nicolas Browne-Wilkinson VC put it in *Kingdom of Spain v Christie, Manson & Woods Ltd*:

> "In the pragmatic way in which English law has developed, a man's legal rights are in fact those which are protected by a cause of action. It is not in accordance, as I understand it, with the principles of English law to analyse rights as being something separate from the remedy given to the individual".[5]

The common law was forged in the crucible of the forms of action before they were abolished in the late 19th century. Where the common law granted a remedy for a cause of action, then it could be said by implication that there was a legal right which was being protected. For example, legal wrongs such as trespass to land or goods, or trespass to the person, could give rise to the suggestion that the common law recognised a fundamental right to property or to bodily integrity and personal liberty. As we shall see later, although the forms of action were abolished by the Judicature Act 1873, their "ghosts" have continued to influence the development of the common law even in the 21st century.[6]

In the late 19th century, Dicey emphasised that English common law tended to focus on remedies rather than rights when he famously said that:

---

[5] [1986] 1 WLR 1120, at 1129. See also *Letang v Cooper* [1965] 1 QB 232, at 242-243 (Diplock LJ).

[6] Maitland wrote that "the forms of action we have buried, but they still rule us from their graves" in F W Maitland, The Forms of Action at Common Law (1963, CUP) at p.2. See also Lord Atkin in *United Australia Ltd v Barclays Bank Ltd* [1941] 1 AC 1, at 29: "These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course is for the judge to pass through them undeterred".

> "the Englishmen whose labours gradually framed the complicated set of laws and institutions which we call the Constitution, fixed their minds far more intently on providing remedies for the enforcement of particular rights or (what is merely the same thing looked at from the other side) for averting definite wrongs, than upon any declaration of the Rights of Man or of Englishmen. The Habeas Corpus Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty."[7]

That said, Blackstone, in his Commentaries on the Laws of England,[8] did refer to what he called the three principal or "absolute" rights as being the right to personal security, which included life as well as limb, the right to personal liberty and the right to property. Again, we shall see later that the position is more nuanced even in relation to something that might be thought to be as basic as the right to life.

Blackstone published his Commentaries in 1765, the same year as a case that lies at the heart of the concept of the rule of law in this country. Every law student knows the celebrated decision in *Entick v Carrington*,[9] in which Lord Camden CJ said:

> "our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law."

That reference to there being no need for special damage to be proved was important, because the writ of trespass did not require it, in contrast to an action on the case, which did. As we shall see later, a tort such as misfeasance in public office did require proof of special damage, as it was not an action in trespass but an action on the case. Remarkable as it may seem, this still matters in the 21st century.

---

[7] See A V Dicey, Introduction to the Law of the Constitution (8th ed., 1915), p. 118.
[8] (1765), Part 1, Ch. 1, p. 125.
[9] (1765) 19 St Tr 1029, 95 ER 807.

As a matter of form, the action in *Entick* was brought in trespass, using the traditional formula that the defendants had entered the plaintiff's dwelling-house "with force and arms".

A more recent decision that can be contrasted with *Entick* is *Malone v Metropolitan Police Commissioner*, where, in words that might appear at first to turn *Entick* on its head, Sir Robert Megarry VC said:

> "If the tapping of telephones by the Post Office at the request of the police can be carried out without any breach of the law, it does not require any statutory or common law power to justify it: it can lawfully be done simply because there is nothing to make it unlawful."[10]

But the key to understanding *Malone* is that telephone interception invaded no property or other interest then protected by the common law.

Entick, which was regarded as being a case about general warrants, was distinguished in the following way:

> "The reason why a search of premises which is not authorised by law is illegal is that it involves the tort of trespass to those premises: and any trespass, whether to land or goods or the person, that is made without legal authority is *prima facie* illegal. Telephone tapping by the Post Office, on the other hand, involves no act of trespass."[11]

Sir Robert Megarry emphatically rejected the submission that there was a right to privacy in domestic law. He said that:

> "The extension of the existing laws and principles is one thing, the creation of an altogether new right is another. … No new right in the law, fully-fledged with all the appropriate safeguards, can spring from the head of a judge deciding a particular case: only Parliament can create such a right."

The case of *Malone* did not go on appeal in the domestic legal system but did go to the European Court of Human Rights, where the application was successful: *Malone v United Kingdom*. That Court concluded:

---

[10] [1979] Ch 344, at 367.
[11] At pp. 368-369.

> "on the evidence before the Court, it cannot be said with any reasonable certainty what elements of the powers to intercept are incorporated in legal rules and what elements remain within the discretion of the executive. … In the opinion of the Court, the law of England and Wales does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities. To that extent, the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society is lacking."[12]

This judgment necessitated the enactment of the Interception of Communications Act 1985.[13] And since then a range of statutes has been enacted to regulate covert surveillance and interception; and the intelligence services have been placed on an express statutory footing: in that sense the "spies have come in from the cold".[14]

Malone and *Kaye v Robertson*,[15] in which the Court of Appeal held that there was no actionable right to privacy in the common law in a case brought by the actor Gordon Kaye, whose photographs were taken when he was lying injured in hospital, were cited with approval by the House of Lords in *Wainwright v Home Office* for the proposition that there is "no general cause of action for invasion of privacy", if expressed at such a high level of abstraction. Lord Hoffmann considered that detailed protection in this area was a matter for legislation rather than broad common law principle.

Interestingly in view of more recent judicial statements about the relationship between the common law and the HRA, he said:

> "the coming into force of the [HRA] weakens the argument for saying that a general tort of invasion of privacy is needed to fill gaps in the existing remedies. Sections 6 and 7 of the Act are in themselves substantial gap fillers; if it is indeed the case that a person's rights under article 8 have been infringed by a public authority, he will have a statutory remedy. The creation of a general tort will … pre-empt the controversial question of the extent, if any,

[12] (1984) 7 EHRR 14, at para 79.
[13] For a discussion of the *Malone* litigation and its consequences, see Bernard Keenan, Interception (2025, MIT Press), pp. 132-137.
[14] See in particular the Security Service Act 1989, the Intelligence Services Act 1994, the Regulation of Investigatory Powers Act 2000 and the Investigatory Powers Act 2016.
[15] [1991] FSR 62.

> to which the Convention requires the state to provide remedies for invasions of privacy by persons who are not public authorities."[16]

Wainwright itself was not a "horizontal" case but a "vertical" one, as it concerned a public authority, the Home Office, which at that time had responsibility for prisons, and the action was brought by two people who had been strip searched when visiting a prisoner.

It is important to keep in mind that, although *Wainwright* was decided by the House of Lords well after the HRA had come into force, the facts had occurred before then. Accordingly, the HRA could not furnish a cause of action in itself. The question was whether the common law gave a cause of action for invasion of privacy in circumstances where there was no tort such as battery available. In fact, there was one act of battery, for which the defendants were held liable, but the more general issue of principle in the case was whether invasion of privacy by searching a person in circumstances where they were required to strip but where they were not touched by the prison officers could be actionable at common law. The House of Lords held not.

When *Wainwright* went to Strasbourg, the European Court found there to be a violation not only of Article 8, because the strip searches were not proportionate, but also of Article 13, because, in the light of the decision of the House of Lords, domestic law did not give any remedy for the invasion of privacy involved.[17]

One has to acknowledge that not every commentator has been an enthusiast about the common law and some have emphasised its poor historical track record in the protection of human rights.[18] The late Prof. Gearty took the view that, historically, the common law was very good at protecting rights such as property rights and personal liberty but not so good at

---

[16] At para 34.
[17] See *Wainwright v United Kingdom* (2007) 44 EHRR 40, at paras 48 and 55.

[18] See C Gearty, On Fantasy Island: Britain, Europe and Human Rights (2016, OUP).

protecting rights like the right to privacy or freedom of assembly. It was positively hostile to trade union rights, some of which are now implicit in Article 11 of the ECHR, for example the right to form trade unions and the right to go on strike. As the Supreme Court of Ireland has observed, in the 19th century the UK's courts were "hostile to organised labour" and, time and again, "pronounced on the law in a manner hostile to trade unions".[19]

Another example of a lacuna in English common law is provided by the law on freedom of assembly before the HRA. In *R (Laporte) v Chief Constable of Gloucestershire* Lord Bingham of Cornhill summarised the position as follows:

> "The approach of the English common law to freedom of expression and assembly was hesitant and negative, permitting that which was not prohibited. … Lord Hewart CJ reflected the then current orthodoxy when he observed in *Duncan v Jones* [1936] 1 KB 218, 222, that English law does not recognise any special right of public meeting for political or other purposes. The [HRA], giving domestic effect to articles 10 and 11 of the European Convention, represented what Sedley LJ in *Redmond-Bate v Director of Public Prosecutions* 163 JP 789, 795, aptly called a 'constitutional shift'."[20]

A further example is provided by the right to vote, which might be thought to be the most basic right in a democracy, but this has been the product of legislation and not the common law. In an appeal from Scotland, *Moohan v Lord Advocate*, Lord Hodge said:

> "It has … been our constitutional history that for centuries the right to vote has been derived from statute. … It is not appropriate for the courts to develop the common law in order to supplement or override the statutory rules which determine our democratic franchise."[21]

However, in an important *obiter* passage, Lord Hodge did not exclude the possibility that, if a parliamentary majority abusively sought to entrench its power by curtailing

[19] See *H A O'Neil Ltd v Unite the Union* [2024] IESC 8, [2024] 1 ILRM 77, at para 22 (O'Donnell CJ).
[20] [2006] UKHL 55, [2007] 2 AC 105, at para 34.
[21] [2014] UKSC 67, [2015] AC 901, at para 34.

the franchise, the common law, informed by democracy, the rule of law and international norms, might be able to declare the legislation unlawful.[22]

In the early years after the coming into force of the HRA, the courts appeared to give the impression that what some academics have called a "common law inertia" set in, for example in *Watkins v Secretary of State for the Home Department*,[23] which was a case about the tort of misfeasance in public office. In that case the claimant's correspondence with his legal advisers had been unlawfully viewed by prison officers. It was common ground that all the elements of the tort of misfeasance, including bad faith, were made out except for the requirement of special damage. The Court of Appeal held that this was unnecessary, because the common law had developed to such an extent that it now recognised certain rights were so basic that the mere violation of them would suffice. That decision was reversed by the House of Lords.

Lord Rodger of Earlsferry, a great Scottish judge who sadly died in office, suggested that, now that the HRA had incorporated the ECHR, the common law did not need to go to lengths to protect rights and, indeed, that where something "falls within an ECHR right then a claimant could be expected to invoke a remedy under the HRA rather than seek to fashion a new common law right." Lord Rodger continued:

> "In using the language of 'constitutional rights', the judges were … looking for a means of incorporation *avant la lettre*, of having the common law supply the benefits of incorporation without incorporation. Now that the [HRA] is in place, such heroic efforts are unnecessary."[24]

Lord Bingham similarly considered that Parliament intended infringements of the core rights protected by the HRA to be remedied under that Act, rather than through the development of

[22] At para 35.
[23] [2006] UKHL 17, [2006] 2 AC 395. I should mention that I was leading counsel for the (unsuccessful) Respondent in that case.
[24] At para 64.

parallel common law remedies.[25] Lord Bingham also expressed concern that, "in the absence of a codified constitution", terms such as "fundamental, basic or constitutional" are "incapable of precise definition".

As we have seen, the attitude of the courts, particularly in the Supreme Court, seems to have shifted since that time. Although those decisions from around 20 years ago are not inconsistent with more recent ones, the tone does seem to have changed. It has been made clear that one should go to the common law first and only go to the HRA if necessary.

One should also never forget what the HRA itself says in section 11, which preserved other rights which were not in the HRA itself. Section 11 provides that a person's reliance on the Convention rights does not restrict (a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom; or (b) his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 to 9. In *Watkins* Lord Bingham considered section 11 but rejected its significance in a context where what was being called for was a departure from well established common law principles.

Lord Rodger's speech in *Watkins* brings me to the second part of this lecture: the impact of public law doctrines. As we shall see, the common law has come to speak of fundamental rights, not in the sense of an interest which is protected by law and whose violation will give rise to a cause of action for damages, but as values which form the backdrop to the application of what we now call principles of public law, itself a terminology that is relatively recent in the lexicon of this country, dating from the early 1980s, in particular in decisions given by Lord Diplock.[26]

---

[25] At para 26.
[26] See e.g *O'Reilly v Mackman* [1983] 2 AC 237; cf *Davy v Spelthorne BC* [1984] AC 262, at 276 (Lord Wilberforce).

(2) The impact of public law doctrines

The principle of legality

Traditionally it was said that public law was not concerned with rights as such but with wrongs.[27] From the mid-1990s onwards, it began to be suggested by the higher courts that the existence of fundamental rights in the common law could be used so as to trigger a presumption of statutory interpretation. Although this was not a new approach, as it goes back at least to cases decided during and after the First World War, it gained a new terminology and came to be known as the "principle of legality". The most famous enunciation of the principle of legality is to be found in *R v Secretary of State for the Home Department, ex p. Simms*,[28] where Lord Hoffmann said:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. … But the principle of legality means that Parliament must squarely confront what it is doing and accept the political costs. 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 essence, the principle amounts to a presumption that Parliament does not intend to breach, or to authorise the breach of, certain fundamental rights recognised by the common law. If Parliament is to take that unlikely course, the presumption has to be rebutted by clear language, not necessarily express language but certainly by necessary implication.

---

[27] See e.g. *R v Somerset CC, ex p. Dixon* (1998) 75 P & CR 175, at 183: "Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power" (Sedley J). It should be noted that this was said in the context of an issue about standing.
[28] [2000] 2 AC 115, at 131.

The doctrine of ultra vires

Another important way in which the common law began to speak the language of fundamental rights was through the doctrine of *ultra vires*, particularly in relation to statutory powers conferred by Parliament on the executive to make secondary legislation. In one sense this was an aspect of the principle of legality, the presumption of statutory construction that general words are not intended to permit the executive to interfere with fundamental rights. We can see the principle at work in the decision of the Divisional Court in *R v Lord Chancellor, ex p. Witham*. This concerned the power to prescribe the level of court fees, which was conferred on the Lord Chancellor by section 130 of what was at that time called the Supreme Court Act 1981.[29] In reaching the conclusion that the apparently wide power to prescribe fees did not empower the Lord Chancellor to make an order that would in effect exclude some people from being able to go to court at all, because they could not afford it, Laws J considered case law, going back at least to the time of the First World War, which established what he described as a "constitutional right": see e.g. *In re Boaler*.[30] He treated the citizen's right of access to the courts as one that could not be cut down without clear statutory words.

Laws J rejected the submission for the Lord Chancellor that there was no issue of *vires* that arose in this case at all. He said that:

> "that submission would be good in a context which does not touch fundamental constitutional rights. But I do not think that it can run here. Access to the courts is a constitutional right; it can only be denied by the government if it persuades Parliament to pass legislation which specifically – in effect by express provision – permits the executive to turn people away from the court door."[31]

[29] Now the Senior Courts Act 1981.
[30] [1915] 1 KB 21.
[31] At p. 586.

Twenty years later, in *R (Unison) v Lord Chancellor*,[32] a similar result was reached by the Supreme Court in relation to the very high fees which were imposed to bring proceedings in the Employment Tribunal. *Witham* was among the earlier decisions cited by Lord Reed in *Unison*. His review of the earlier authorities also included *R v Secretary of State for the Home Department, ex p. Leech*,[33] a decision of the Court of Appeal of England and Wales, and *R (Daly) v Secretary of State for the Home Department*,[34] a decision of the House of Lords. The particular reason why this line of authority is interesting is that, as Lord Reed explained in *Unison*, those cases had refined the *vires* principle a little further and in effect introduced something akin to the principle of proportionality into domestic law, even before the HRA. He said:

> "Even where a statutory power authorises an intrusion upon the right of access to the courts, it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question."[35]

Turning to application of that principle to the particular context of the imposition of fees to bring legal proceedings, Lord Reed said:

> "it is clear that the ability of litigants to pay a fee is not determinative of its proportionality under the Convention. That conclusion supports the view, already arrived at by the common law, that even an interference with access to the courts which is not insurmountable will be unlawful unless it can be justified as reasonably necessary to meet a legitimate objective."[36]

The principle of reasonableness

The experience of gay men and women in the UK's armed forces provides a salutary lesson to anyone who thinks that the common law before the HRA was sufficient to protect the

[32] [2017] UKSC 51, [2020] AC 869.
[33] [1994] QB 198.
[34] [2001] UKHL 26, [2001] 2 AC 532.
[35] At para 80.
[36] At para 89.

fundamental rights of people in this country. In recent memory it was the policy of the armed forces that anyone who was found to be gay would be compulsorily discharged. This policy was challenged in judicial review proceedings brought against the Ministry of Defence in the mid-1990s. This was of course before the enactment of the HRA and so the ECHR could not be given direct effect in domestic law. The proceedings failed in the domestic courts but eventually succeeded in Strasbourg. The judgment of Sir Thomas Bingham MR in the Court of Appeal is famous for its recognition that, even in the absence of a written charter of rights such as the ECHR, the principle of reasonableness, or rationality, in domestic public law was a flexible one that would take account of the impact on human rights. He accepted that:

> "The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable …"[37]

But in the result the Court concluded that the "high" threshold of irrationality had not been crossed. As the Master of the Rolls noted, the policy was supported by both Houses of Parliament and by those to whom the Ministry properly looked for professional advice.[38]

In contrast, the European Court had no hesitation in concluding that the policy breached the right to respect for private life in Article 8: see *Smith and Grady v United Kingdom*[39] and *Lustig-Prean and Beckett v United Kingdom*.[40] Very significantly, the Court also found, in *Smith*, that there was a breach of the right to an effective remedy in national law, in Article 13 of the ECHR.

The Court re-affirmed certain fundamental principles about Article 13, which are of importance in the present context, as to the ability of the common law to protect fundamental human rights. The Court said that, while Article 13 does not require incorporation of the ECHR

---

[37] See *R v Ministry of Defence, ex p. Smith* [1996] QB 517, at 554.
[38] At p. 558.
[39] (1999) 29 EHRR 493.
[40] (1999) 29 EHRR 548.

or a particular form of remedy, what it does guarantee is the availability of a remedy at national level to enforce the "substance" of Convention rights "in whatever form they may happen to be secured in the domestic legal order."[41] Having considered the approach that the domestic courts had taken, including the flexible standard of irrationality which had been set out by Sir Thomas Bingham MR, the Court reached the conclusion that the threshold was nevertheless "placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention."[42] In other words, the pre-HRA standard of irrationality did not comply with the right to an effective remedy for arguable breaches of Convention rights which is guaranteed by Article 13.

More recently, one can detect the well-established public law principle of rationality, or reasonableness as I would prefer to call it, beginning to give effect to the protection of fundamental rights in the common law. By way of example, I would mention the decision of the Investigatory Powers Tribunal (of which I was then the President) last year in *Al-Hawsawi and Another v Security Service and Others (No 2)*.[43] In that case the HRA was not available to the complainants because they had never been within "the jurisdiction" of the UK for the purposes of Article 1 of the ECHR, and therefore for the purposes of the HRA. Nevertheless, the Tribunal was able to fashion a principle for the protection of the fundamental right not to be tortured in the common law by means of the public law principle of reasonableness.

In *Al-Hawsawi*, the IPT distinguished the law on the death penalty which had been considered by the Supreme Court in *R (Elgizouli) v Secretary of State for the Home*

[41] At para 135.
[42] At para 138.
[43] [2025] UKIPTrib 11, [2026] 2 All ER 71.

Department.[44] The IPT noted[45] that, in *Elgizouli*, Lord Reed had stressed that, although the common law could be said to recognise a "right to life", attracting "the most anxious scrutiny", it "might more aptly be described as a *value* to which the courts attach great significance when exercising their supervisory jurisdiction".[46] Lord Reed said that the authorities do not "vouch the existence of a *right* in the sense in which that term is used in the law of obligations" (emphasis added).

In contrast, having reviewed the history of the common law's abhorrence to torture, the IPT said:

> "We consider that the issue and reasoning in *Elgizouli* are distinguishable from the present context. Although we would not wish in any way to diminish the high value which the common law attaches to human life, the death penalty was not unlawful at common law, as torture has been for centuries."[47]

On that foundation, the IPT was able to deploy the public law concept of reasonableness and enunciate the following principle:

> "The passive receipt of information obtained by torture abroad was not, without more, unlawful. But the respondents must not actively encourage its obtaining—for example, by supplying questions when they knew or ought reasonably to have known that torture was being used."[48]

In this way, one can see a very real manifestation of the vibrancy of the common law to protect a fundamental right, without the need to rely on the HRA.

(3) The development of the common law since the HRA

The so-called "horizontal" application of the HRA

[44] [2020] UKSC 10, [2021] AC 937.
[45] At para 71.
[46] See *Elgizouli*, at paras 175-176 (emphasis added).
[47] At para 72.
[48] At para 62.

The final topic which I want to touch on in this lecture is the protection of fundamental rights in the common law even in the context of relations between private individuals and corporate entities, in other words where the defendant is not a public authority. As is well known, section 6 of the HRA makes the Convention rights directly applicable only as against a "public authority" within the meaning of the HRA. This expressly includes courts and tribunals.

As Lord Briggs noted in his lecture to Justice last year, a significant development in the common law (including for this purpose principles of equity) since the HRA has been how the law of breach of confidence has morphed into a tort of misuse of private information. Furthermore, this is a tort which is actionable against private entities and so is not confined to public authorities. The leading authority is *Campbell v MGN Ltd*.[49] Although he dissented in the result, Lord Nicholls of Birkenhead set out the relevant principles,[50] as subsequent authority has confirmed. He said: "In this country development of the law has been spurred by enactment of the [HRA]."[51] But it was not made explicit why this should be so, given that the HRA only binds public authorities and the case concerned an action against a privately owned newspaper. Lord Nicholls disavowed the suggestion that it is because courts, being public authorities themselves, are required to develop the common law in this way.[52]

The principles were summarised more recently by the Supreme Court in *ZXC v Bloomberg LP*.[53] Lord Hamblen and Lord Stephens JJSC said:

> "In the seminal decision of the House of Lords in *Campbell v MGN Ltd* … it was recognised that the values enshrined in articles 8 and 10 had become part of the cause of action for breach of confidence and that in relation to private

[49] [2004] UKHL 22, [2004] 2 AC 457.
[50] At paras 17-20.
[51] At para 11.
[52] For an early analysis of what the inclusion of courts in the definition of public authorities might entail for the development of the common law, see M Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] Public Law 423; and R Singh, 'Privacy and the Media after the Human Rights Act' [1998] EHRLR 712, republished in R Singh, The Unity of Law (2021, Hart), p. 211.
[53] [2022] UKSC 5, [2022] AC 1158.

> information 'The essence of the tort is better encapsulated now as misuse of private information' – see the judgment of Lord Nicholls of Birkenhead at para 14. This is a distinct cause of action from breach of confidence. …"[54]

The task of a court is to ask first whether the claimant had a reasonable expectation of privacy and, if so, whether that interest is outweighed by the competing Article 10 interest in freedom of expression. Neither right has automatic precedence.

As I have mentioned, in *Campbell* the House of Lords did not in terms explain how the enactment of the HRA required the development of a tort of unlawful use of private information; and the courts have since declined to grapple overtly with the jurisprudential question of whether the Convention rights have "horizontal" effect. But it has been suggested that this may be beneficial in that repeal of the HRA would not lead to a reversal of this development of the common law. For example, Prof. Jane Wright has said:

> "The new tort of misuse of private information has been achieved by absorbing the values of Article 8 into the common law and does not stem from any particular interpretation of section 6 of the HRA. This means that the new body of legal principles is unlikely to be vulnerable to a repeal of the HRA … The new tort … was not born of the HRA and will therefore not die with it."[55]

Although it could be argued that the combination of (i) the notion of positive obligations in the ECHR and (ii) the inclusion of courts within the meaning of a "public authority" in section 6 of the HRA explain (at least implicitly) what must have been the juridical basis for the development of the new tort, Prof. Wright persuasively argues that this cannot be right. This is because the ECHR does not itself stipulate which branch of the state must secure protection for a Convention right where a positive obligation falls on the state. As a matter of international law the breach is committed by the state as a whole. The European Court does not concern itself with the internal

---

[54] At para 45.
[55] J Wright, Tort Law and Human Rights (2nd ed., 2017, Hart), p. 270.

constitutional arrangements which a state adopts. So, in the context of misuse of private information, if the law had remained as it was after *Kaye v Robertson*, and there had been no cause of action available to Naomi Campbell, there might have been a breach of the ECHR but that could have been remedied by Parliament. A breach of a positive obligation in the ECHR does not mean that the domestic courts have done anything wrong. As Prof. Wright puts it:

> "A failure to develop the action for breach of confidence would have meant that English law was not compatible with the ECHR, not that English courts had failed to act compatibly with the ECHR since there is nothing in the jurisprudence to require English *courts* to act to protect that right." (Emphasis in original)[56]

In his lecture to Justice last year, Lord Briggs made this further important point. Since the Convention right to privacy has had an influential effect on developing the common law, this effect would not be lost, he suggested, if the HRA were to be repealed or even if the UK were to leave the ECHR system, since:

> "the doctrinal import of the Convention articles has already been absorbed in the common law by virtue of their incorporation into the relevant legal test to establish both the tort and the basis for equitable intervention."

What of the future?

That said, in his conclusion, Lord Briggs recognised that the common law will not always be as powerful in its ability to protect human rights than the HRA would be, for example the principles of statutory interpretation in section 3 and the possibility of making a declaration of incompatibility in section 4. He recognised that the principle of legality requires the courts to adopt an approach to the interpretation of statutes that is "broadly comparable" to the

[56] At p. 274.

approach under the HRA and that this "affords fundamental human rights recognised as such at common law a degree of protection, albeit one which is weaker than under the Act."

In his blog 'Public Law for Everyone', Prof. Mark Elliott welcomed Lord Briggs's lecture but also suggested that some caution is needed in this context. In particular, he suggested that, if in the future the UK leaves the ECHR system, there will no longer be the international law "underpinning" for human rights protection in domestic law:

> "For instance, if a court performs interpretive surgery on an Act of Parliament pursuant to its duty under section 3 of the HRA, Parliament, as a matter of domestic law, is free to (in effect) reverse what the court does … the same is true if a court performs comparable interpretive surgery pursuant to the common law principle of legality. The crucial difference, however, [is that] Parliament is disincentivised to reverse HRA-derived judicial interpretation, because taking such a step would almost inevitably put the UK in breach of its obligations under the Convention and would risk subsequent adverse judgement in Strasbourg."

I would myself add this observation: in practice it is quite rare for the courts to have to engage in either the use of section 3 of the HRA or the making of a declaration of incompatibility under section 4. By far the greatest number of cases concerning human rights which come before the courts concern not the compatibility of primary legislation but the lawfulness of acts of the executive. The common law, it seems to me, would in principle have a significant role to play in judicial review of executive action, in this context based upon principles of human rights protected by the common law itself.

Conclusion

I would suggest that, while the development of the common law in the ways I have outlined in this lecture is to be welcomed, it is by no means clear that the common law can always provide protection of fundamental rights in the absence of a statute like the HRA. For example, there will not necessarily be a cause of action giving rise to remedy in damages, in

contrast to the availability of compensation under section 8 of the HRA. By and large, breaches of public law principles do not give rise to an action for damages.

Furthermore, it is a fundamental principle of the UK's constitution that Parliament can override the common law and, accordingly, it would not be possible to issue a declaration of incompatibility in respect of primary legislation, in contrast to what is permissible under section 4 of the HRA.

One difficult area, it seems to me, will be what to do about situations which are governed not by the common law as such but by other legislation, for example the Employment Rights Act 1996 or the Equality Act 2010, where section 3 of the HRA has had a powerful impact on developing the interpretation of those other pieces of legislation in such a way as to give some indirect horizontal effect to Convention rights, such as the right to privacy and the right to freedom of expression in the context of employment relations.[57] It remains to be seen, however, if the repeal of the HRA or departure from the Council of Europe would lead to a change of direction in the interpretation of those other pieces of legislation – but that would probably be a subject worthy of a lecture in its own right.

For now, what, I think, we can say with some confidence is that the concept of fundamental rights is well established in the common law and there is every reason to think that this development will continue in the incremental way that is the hallmark of the common law.

[57] See *X v Y* [2004] EWCA Civ 662, [2004] ICR 1634, at para 57, where Mummery LJ referred to section 3 as enabling the blending of the requirements of the unfair dismissal legislation with the protection of employees' rights under Article 8 of the ECHR; and the recent, authoritative survey of the relationship between the Equality Act and the HRA in *Higgs v Farmor's School* [2025] EWCA Civ 109, [2025] ICR 1172, at paras 81, 84 and 92 (Underhill LJ).