

JUSTICE ANNUAL CONFERENCE – 25 YEARS OF THE HUMAN RIGHTS ACT
PROTECTING HUMAN RIGHTS: THE COMMON LAW AS THE STARTING POINT

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1. Introduction

For some time now, judges and academics have placed renewed emphasis on the common law as *a* – if not *the* – key source of human rights protection in our domestic law. Of course, that is not to diminish the statutory contribution of the Human Rights Act (“HRA”) to the development of the available mechanisms for protecting human rights or of the ever-developing Human Rights Convention in prescribing what those rights are. To the contrary, as Lord Reed pointed out in 2013 in *Osborn v Parole Board*, “the importance of the Act is unquestionable.”¹

I would not dispute that for one moment. I will, however, advance two points which may serve to put the acknowledgement of the Act’s and the Convention’s importance into its proper context. Firstly, when one considers the available modes for securing the protection of human rights in UK domestic law, the starting point must remain the common law, not the Convention articles themselves.² In short, it is the common law which usually provides the cause of action, even if the Act is there to ensure that those causes of action are Convention compliant. Moreover, although it has sometimes been said that the normative reach of the common law is more modest than that of the Convention,³ the common law in fact often affords the same (or sometimes even greater) protections,⁴ particularly in “horizontal” scenarios where private individuals seek to assert their human rights against one another. Secondly, I would suggest that it is precisely *because* the Act has enriched the scope of human rights protections available at common law over the past 25 years that we should not be unduly fearful about the common law’s ability to cope if, for example, the UK were to repeal the HRA or abandon the Convention. Such actions could not without much more specific

¹ *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115 [57] (Lord Reed).

² To this effect, see *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust* [2025] UKSC 15, [2025] 2 WLR 815 [87] (Lord Reed and Lord Briggs); *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455 [46] (Lord Mance).

³ Mark Elliott, ‘Beyond the European Convention: Human Rights and the Common Law’ [2015] 68(1) *Current Legal Problems* 85–117, 115.

⁴ *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455 [46] (Lord Mance): “In some areas, the common law may go further than the Convention [...].”

legislation possibly unravel the accumulation of principles and practical experience derived from 25 years of protecting human rights under the Act which the common law has already absorbed into its armoury.

[I shall begin by explaining in what sense the common law remains the first “port of call” for the protection of human rights in domestic law, before considering how the HRA has enriched the common law. And by ‘common law’ I include in this context Equity. I will then conclude with some brief reflections about the relative strength of Convention and common law rights].

2. The Common Law as the Starting Point

The notion that it is necessary to look *first* to the common law as the natural starting point when considering the protection of human rights in UK domestic law is by no means novel. The sentiment can be detected in some of the first cases raising human rights issues following the entry into force of the HRA, of which *R (Daly) v Secretary of State for the Home Department* in 2001 is a paradigm example.⁵ In *Daly*, the House of Lords had to decide whether a blanket policy introduced by the Home Secretary which required prisoners to be absent from their cells during routine searches for contraband, which included examining their correspondence with legal advisors, infringed “a basic right recognised both at common law and under the [Convention].”⁶ In holding that the policy unjustifiably infringed the prisoner’s right to legal professional privilege, Lord Bingham notably adopted an analysis which was premised almost exclusively on the application of common law principles. Indeed, only in the concluding paragraph of his judgment did he recognise that the same result might obtain if one applied Article 8 of the Convention instead.⁷

Lord Cooke went further still. At paragraph 30 of his concurring judgment, he stated:

It is of great importance, in my opinion, that the common law by itself is being recognised as a sufficient source of the fundamental right to confidential communication with a legal adviser for the purpose of obtaining legal advice. [...]. [S]ome rights are inherent and fundamental to democratic civilised society.

⁵ *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532.

⁶ *ibid* [2] (Lord Bingham).

⁷ *ibid* [23] (Lord Bingham).

*Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them.*⁸

Over twenty years later, this attitude largely continues to be displayed in the Supreme Court's observations on the point. For instance, in *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust* in 2023, Lord Reed and I noted at paragraph 87 of our joint judgment that "domestic causes of action are the means by which compliance with Convention rights...is normally secured."⁹ Moreover, senior judges have consistently recognised that notwithstanding the HRA's importance and galvanizing effect on the development of human rights protections at common law, it was neither the Act's purpose nor its effect to supplant, supersede or sideline the common law.¹⁰

3. Enrichment of Common Law

That said, in some instances, the values underlying Convention rights have inspired or even replaced the relevant legal conditions for the assertion of common law causes of action which protect human rights, and to that extent, Convention rights may be regarded as having enriched the common law. Arguably the most striking example of this is the development of the law of privacy.

Traditionally, the protection of privacy at common law has been piecemeal,¹¹ principally owing to English law's reluctance to adopt a general tort of breach or invasion of privacy.¹² Instead, the law protected "privacy interests" by employing a patchwork quilt of common law and statutory causes of action. As Lord Hoffmann recounted in *Wainwright v Home Office*,¹³ there are several common law and statutory remedies of which it may be said that one at least of the underlying values they protect

⁸ *ibid* [30] (Lord Cooke)

⁹ *Abbasi* (n 2) [87].

¹⁰ *Osborn* (n 1) [57]; *Kennedy* (n 4) [46]; *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2012] EWCA Civ 420; [2013] QB 618 [88] (Toulson LJ); Lord Toulson, 'Keynote address given at the Fundamental Rights Conference: A Public Law Perspective' (Fundamental Rights Conference, London, 10 October 2015) <www.liberty-human-rights.org.uk/publications/3-articles-and-speeches/index.shtml> accessed 28 October 2025: "It was not the purpose of [the Human Rights Act] to supplant, sideline or freeze development of the common law."

¹¹ *R v Khan (Sultan)* [1996] UKHL 14, [1997] AC 558, 583 (Lord Nicholls); Kirsty Hughes, A Common Law Constitutional Right to Privacy – Waiting for Godot? in Mark Elliott and Kirsty Hughes (eds), *Common Law Constitutional Rights* (Hart 2020) 97.

¹² *Malone v Commissioner of Police of the Metropolis (No.2)* [1979] Ch 344 (Ch); *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406; cf. *Malone v The United Kingdom* (1984) 7 EHRR 14.

¹³ *Wainwright* (n 12) [18]-[19] (Lord Hoffmann).

is privacy, for instance: common law torts such as trespass, nuisance, defamation and malicious falsehood, and the equitable action for breach of confidence. However, as Lord Hoffmann also recognised, there may be gaps where the courts consider that a remedy should be available in respect of a breach of privacy, but no such remedy currently exists.¹⁴

The case of *Kaye v Robertson* in 1991 provides a vivid example of the difficulties the courts faced in endeavouring to protect privacy interests prior to the HRA.¹⁵ Kaye, a well-known actor, had suffered a serious brain injury following an accident in which a piece of wood smashed through the windscreen of his car during a storm. While Kaye was recovering from surgery, journalists gained unauthorised access to his hospital room and proceeded to interview and take photos of him. The medical evidence before the court was that Kaye's health was such that he could not have consented to the interview, and indeed, he had no recollection of the journalists' visit merely fifteen minutes afterwards. In short, the journalists took a disgraceful advantage of his vulnerable state to get their scoop. However, since English law recognised no general cause of action for breach of privacy, the court could not grant Kaye a compensatory remedy in respect of the journalists' intrusion into the hospital room, nor could it grant an injunction to prevent the newspaper from publishing the story. The best the Court of Appeal could do was rely on the law of malicious falsehood to grant an injunction prohibiting the newspaper from implying that Kaye had permitted the photographs to be taken or given the interview voluntarily.¹⁶ Bingham LJ considered this a particularly regrettable result and stated that the case was a further illustration of "the failure of the common law of England and statute to protect in an effective way the personal privacy of individual citizens."¹⁷

Additionally, prior to the HRA, a similar lacuna could be observed in relation to the equitable action for breach of confidence. Historically, an action for breach of confidence could only be made out where there had been a pre-existing "confidential relationship" between the claimant and the defendant,¹⁸ although admittedly that

¹⁴ *ibid.*

¹⁵ *Kaye v Robertson* [1991] FSR 62 (CA).

¹⁶ Thomas Bingham, 'Should there be a law to protect rights of personal privacy?' [1996] 5 EHRLR 455-462, 457.

¹⁷ *Kaye* (n 15) 70 (Bingham LJ).

¹⁸ James Goudkamp and Donal Nolan, *Winfield and Jolowicz on Tort* (21st edn, Sweet & Maxwell 2025) [20-011].

requirement was somewhat relaxed over time.¹⁹ Importantly, however, the action did not depend on the personal nature of the information itself or the extent of its publication.²⁰ [Again, therefore, there was a perceived gap in the common law's ability to protect privacy interests – namely, where a person disclosed private information to another but had no pre-existing relationship with the recipient that could give rise to an obligation of confidence].

The enactment of the HRA and its effect of spurring the development of the common law,²¹ meant that such gaps were subsequently addressed. In *Campbell v MGN* in 2004,²² Lord Nicholls recognised that the cause of action for breach of confidence had firmly shaken off the requirement for an initial confidential relationship, and that the essence of the tort should now preferably be characterised as “misuse of private information.”²³ Since then, a growing body of case law has developed on the content and application of the relevant legal test to establish the tort, including some cases in the Supreme Court.²⁴

Here, the Act and the Convention articles have clearly made their mark on the common law. To succeed in an action for misuse of private information, it must firstly be established in substance that the claimant's right under Article 8 ECHR is engaged. In other words, the claimant must have had a reasonable expectation of privacy in respect of the information in question. Once this threshold is met, the court secondly engages in a “balancing exercise” (or proportionality analysis) in which it weighs the claimant's now common law and Article 8 right to privacy against other countervailing justifications – typically, the defendant's historic common law and Article 10 right to freedom of expression.

[Pausing briefly, I would offer two general observations. The first is a reminder that just as in other areas of domestic law where Article 8 is engaged,²⁵ a claimant pursuing an action for misuse of private information is still ultimately seeking to enlist the assistance of the common law. They do *not* assert rights conferred by the Convention

¹⁹ *ibid*; *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 (HL) 281.

²⁰ *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457 [44] (Lord Hoffmann).

²¹ *ibid* [11] (Lord Nicholls).

²² *ibid*.

²³ *ibid* [14] (Lord Nicholls).

²⁴ See, e.g., *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081; *Khuja v Times Newspapers Limited* [2017] UKSC 49, [2019] AC 161; *Bloomberg LP v ZXC* [2022] UKSC 5 [2022] AC 1158.

²⁵ See *Abbasi* [87]-[94].

articles directly. Moreover, as Lord Reed and I explained in *Abbasi*, a court would not be acting incompatibly with a Convention right (contrary to the duty imposed on it by section 6(1) HRA) by insisting that individuals seeking to assert their Convention rights should avail themselves of the domestic cause of action available to protect those rights, by suing in their own name.²⁶ Accordingly the common law remains the starting point in relation to the protection of human rights.]

[Nonetheless, my second observation is that this development of a tort of invasion of privacy, and the re-framing of the principles underlying equity's protection of confidence attest to the positive influence the HRA has had on the development of the common law. Prior to the Act the courts had already recognised the need to strengthen the protection of privacy interests, but perhaps felt that Parliament was the correct forum in which such change should be realised,²⁷ but the Act's introduction accelerated the adoption of a discrete (but still limited) privacy tort. The effect has been to bridge the perceived gaps in the common law's ability to protect privacy interests. Furthermore, the elements of the tort are now self-evidently imbued with the language and logic of the Convention articles, with the result that a person who brings a common law action for misuse of private information *effectively* asserts the rights conferred under Article 8 ECHR "horizontally" vis-à-vis another private individual. Crucially, this has bolstered the bite of the common law. Moreover, the effect would *not* be lost if the UK were to repeal the HRA or abandon the Convention, as the doctrinal import of the Convention articles has already been absorbed by common law by virtue of their incorporation into the relevant legal test to establish both the tort and the basis for equitable intervention.]

Another example of the beneficial absorption of Convention principles into the common law may be found in the principle of proportionality, particularly (but not only) in shaping public and administrative law thinking. As Professor Mark Elliott acknowledged writing in 2015, whereas around 25 years ago proportionality was considered by some to be "novel and dangerous," "the courts' experience of proportionality review under the HRA has served to normalize and demythologize it in a way that sits uncomfortably with its characterization as a European import that would

²⁶ *ibid* [89].

²⁷ See, e.g., *Kaye* (n 15) [66] (Gladewell LJ).

depart the UK's shores in the course of a process of de-Europeanization.”²⁸ Indeed, he recognises astutely that proportionality has been applied in human rights cases decided at common law such as *Daly*, which evidences the capacity of the proportionality principle to operate legitimately as a common law tool quite outside of cases purely concerning Convention rights.²⁹ Proportionality may now be found at work in other private law areas, such as shaping the remedy available in proprietary estoppel.³⁰ Nonetheless we are still a long way from any general recognition of proportionality in the public law sphere, e.g. as potentially replacing irrationality as a test for judicial review, because of its tendency to focus too much on the merits of administrative decision-making.³¹

4. Conclusion

To conclude, I note that there are admittedly some key differences in the relative strengths of common law and Convention rights. For example, the HRA provides for several protective mechanisms to ensure, as far as possible, that Convention rights are not overridden by conflicting legislation. Section 3 of the Act requires the courts (so far as possible) to read and give effect to legislation in a way that is compatible with Convention rights.³² By contrast, no similarly strong interpretative principle applies in relation to human rights secured at common law. Moreover, section 4 of the Act enables the court to make a declaration of incompatibility where primary legislation conflicts with a Convention right.³³ No analogous power exists at common law.

There is a legitimate concern that these types of statutory safeguards for human rights would be lost if the UK jettisoned the HRA. Yet, this does not mean that human rights also recognised as fundamental rights at common law would be entirely unprotected against legislative (let's say) over-enthusiasm. This is because the principle of legality requires, among other things, that if Parliament truly intends to derogate from common law fundamental rights, it must manifest that intention through express language or necessary implication. Viewed in this way, this principle of legality requires the courts to adopt an approach to the interpretation of statutes that is broadly

²⁸ Elliott (n 3) 101-102.

²⁹ *ibid* 103.

³⁰ *Guest v Guest* [2022] UKSC 27

³¹ *Keyu v SS for Foreign and Commonwealth Affairs* [2015] UKSC 69 at paras 131ff and 143.

³² Human Rights Act 1998, s. 3.

³³ Human Rights Act 1998, s. 4.

comparable to the approach under the HRA, although less radical in its practical application. This affords fundamental human rights recognised as such at common law a degree of protection, albeit one which is weaker than under the Act.

I will close by recalling a quote of Toulson LJ (as he then was), who said in 2012: “the development of the common law did not come to an end on the passing of the Human Rights Act 1998. It is in vigorous health and flourishing in many parts of the world which share a common legal tradition.”³⁴ I think he was right, but also that while the common law remains the first port of call for the protection of human rights in domestic cases, it has undoubtedly been enriched during the last 25 years of the HRA’s presence on the statute books.

³⁴ *R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court (Article 19 intervening)* [2012] EWCA Civ 420; [2013] QB 618 [88] (Toulson LJ).