The Horizontal Effect of Human Rights after Brexit:

A Matter of Renewed Constitutional Significance

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Brexit, Human Rights Act, horizontal effect, direct effect, *Marleasing*, *Benkharbouche*

Abstract

This article examines the implications of Brexit for the application of human rights to disputes between private actors ('horizontal effect'). The presence of EU law within the domestic legal system had created a remedially more favourable environment for addressing human rights violations by private actors than the Human Rights Act, as it allowed the direct reliance on human rights against private actors in situations coming within the scope of EU law. Section 5(4) and Schedule 1(3) of the EU (Withdrawal) Act 2018 removed the added benefits of relying on EU law in horizontal disputes, thus raising the question of how domestic case law might now develop. This article puts forward a two-fold argument in this regard: first, in light of the Withdrawal Act's overarching purpose of continuity with the *status quo* until further repeal, it propounds a narrow reading of the aforementioned provisions. Secondly, it shows that there is an intricate, but so far under-appreciated, relationship between the unavailability of EU remedies and the development of indirect horizontal effect under sections 3 and 6 HRA, which could trigger a broader revival of horizontality in domestic human rights law

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1. Introduction

As Sedley LJ described it in *Douglas v Hello*, the application of human rights to disputes between private actors ('horizontal effect') under the Human Rights Act ('HRA') had been a 'matter of sharp division and debate amongst both practising and academic lawyers.'[1] Yet, over the last ten years, the legal significance of horizontal effect under the HRA largely subsided, due to the increasing influence of EU law. Of course, the Convention and EU law were not interchangeable sources of human rights protection, and the HRA remained relevant alone in situations in which the scope of EU law was not engaged.[2] In practice, however, there was significant jurisdictional parity between EU human rights law and the Convention in this field. The existence of EU secondary legislation in key areas of horizontal litigation, such as disputes over employment conditions, pensions, and data protection, brought these issues within the scope of EU law.[3] Reliance upon EU law increasingly took over developments in the field of the horizontal effect of human rights, for the following two reasons.

First, the entry into binding force of the EU Charter of Fundamental Rights ('EUCFR' or 'Charter') in 2009 codified and clarified the content of EU human rights, which had formerly been based on the vaguer notion of 'general principles of EU law'.[4] This showed that, in situations that fell within the scope of application of EU law, a broader set of rights were protected than under the HRA. The Charter included all ECHR provisions, but went further by enshrining additional protections in the field of social and economic rights,[5] as well as ECHR rights which have not been integrated in the HRA, such as the rights to an effective remedy

[1] *Douglas v Hello! Ltd* [2001] QB 967, para 128 (Sedley J).
[2] See, e.g., *McDonald v McDonald and others* [2016] EWSC 28.
[3] Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105, paras 19-23.
[4] Case C-144/04, *Mangold v Helm*, EU:C:2005:709.
[5] e.g. Articles 30 and 31 EUCFR, on the protection from unfair dismissal and the right to fair working conditions.

and to non-discrimination.[6] Secondly, EU law had a specific remedial benefit in the context of disputes between private actors. It allowed a more expansive form of horizontal protection of human rights than the HRA, as it permitted their direct invocation ('horizontal direct effect'), under certain conditions.[7] In turn, in situations where horizontal direct effect was possible, EU law enabled national courts to award an effective remedy within a private dispute, even in the presence of valid – but human-rights-incompatible – legislation. It thus offered a *judicial* resolution to disputes where the only option available under the HRA would have been a section 4 declaration of incompatibility.[8]

The UK's withdrawal from the EU re-opens a debate about how horizontal effect should be approached within domestic human rights jurisprudence in the future. Section 5(4) and Schedule 1(3) of the European Union (Withdrawal) Act 2018 ('WA'), as amended by the European Union (Withdrawal Agreement) Act 2020 ('WAA'), seemingly put an end to the benefits that reliance on EU law bore in horizontal disputes following the end of the Brexit implementation period ('IP') on 31 December 2020. The former provision removes the Charter from UK law. The latter prevents individuals from relying on EU fundamental rights directly, in order to have legislation or other conduct quashed or disapplied by UK courts.

The general implications of the Withdrawal Act for human rights have already been compellingly discussed in the academic commentary.[9] Nevertheless, the above provisions have

[6] Articles 47 and 21 EUCFR, respectively. On the one hand, the HRA has not incorporated Article 13 ECHR on the right to an effective remedy, while the UK has not signed Protocol 12 to the ECHR, which lays down a self-standing right to non-discrimination.

[7] Namely that the right is invocable 'as such', i.e. sufficiently precise without the need for further implementation: Case C-555/07, *Kücükdeveci v Swedex*, EU:C:2010:21, para 21; cf. Case C-176/12, *Association de Médiation Sociale ('AMS') v Union locale des syndicats CGT and Laboubi*, EU:C:2014:2, paras 45-49.

[8] The Strasbourg Court has previously found that the declaration of incompatibility does not in itself amount to an effective remedy: *Burden and Burden v UK*, Application No 13378/05, ECtHR 29 April 2008, paras 40-44.

[9] See, notably: T. Lock, Human Rights Law in the UK after Brexit' [2017] (Brexit Special Extra) P.L. 117; M. Markakis, 'Brexit and the EU Charter of Fundamental Rights' [2019] P.L. 82; J. Grogan, 'Rights and remedies at

a particular relevance to horizontal disputes, which has so far remained underappreciated.[10] Rather than being a niche subset of the domestic human rights jurisprudence affected by Brexit, a reading of these provisions informed by EU constitutional law shows that horizontal disputes are likely to be the main target of the removal of disapplication under Schedule 1(3) WA,[11] due to the technical operation of the doctrine of non-horizontality of directives.[12] Domestically, too, the correct interpretation of the availability of disapplication through horizontal direct effect is not just a matter of constitutional debate in general terms, but also one of potentially considerable consequences for litigants, especially at first instance. As Amos has noted, disapplication has been used extensively in the field of human rights by lower courts and tribunals.[13] Many of those courts and tribunals deal with human rights arguments primarily in horizontal disputes. For example, a term-specific search on BAILII reveals that approximately 68.5% of the cases that mention the Human Rights Act at the Employment Appeals Tribunal are disputes between private parties.[14] Thus, any lack of clarity about the continued availability of disapplication under EU law on the one hand, and about the limits of the horizontal effect of the HRA on the other, could present a large-scale challenge at this level.

This article aims to analyse the impact of the provisions of the Withdrawal Act for horizontal disputes and to imagine the ways in which horizontal effect might now develop, without the explicit possibility of direct effect, yet with its memory and implications still fresh in domestic

risk: implications of the Brexit process on the future of rights in the UK' [2019] P.L. 683; C. Barnard, 'So Long, Farewell, Auf Wiedersehen, Adieu: Brexit and the Charter of Fundamental Rights' (2019) 82 M.L.R. 350.

[10] Cf the compelling, but shorter analysis in: A. Young, 'Benkharbouche and the Future of Disapplication' UKCLA Blog 24 October 2017 at https://ukconstitutionallaw.org/2017/10/24/alison-young-benkharbouche-and-the-future-of-disapplication/ (last visited 25 November 2020).

[11] The Withdrawal Act also removes the possibility of state liability in damages under paragraph 4 of Schedule 1, but this issue falls beyond the scope of this paper.

[12] *Marshall v Southampton & South West Hampshire Area Health Authority (Teaching)* [1986] ECR 723.

[13] M. Amos, 'Red Herrings and Reductions: Human Rights and the EU (Withdrawal) Bill', UKCLA Blog 4 October 2017 at: https://ukconstitutionallaw.org/2017/10/04/merris-amos-red-herrings-and-reductions-human-rights-and-the-eu-withdrawal-bill/ (last visited 25 November 2020).

[14] Excluding both public authorities and employers with a statutory duty to respect human rights.

legal culture and in retained case law. It advances two main arguments: first, it propounds a narrow reading of the limitation of horizontal direct effect within the WA, as amended by the WAA. While Schedule 1(3) WA is phrased in *prima facie* broad terms, its interaction with other provisions and with the Withdrawal Act's overarching purpose of continuity suggest that it will have a much more restricted impact than previously assumed in the commentary.[15] Secondly, the article challenges the neat remedial dichotomy between EU human rights and rights incorporated through the HRA, which has so far been drawn in domestic case law.[16] It shows that, for as long as EU law allowed the direct assertion of human rights in addition to indirect means of embedding them into private disputes, the creative uses of indirect effect by domestic courts that could be identified in early HRA case law had become largely superfluous. However, the future unavailability of the option of horizontal direct effect could mark a period of renewed focus on the limits of section 3 interpretation in horizontal cases and on the protective qualities of the common law.

The article explores these arguments sequentially, in three parts: Part 2 introduces in greater detail the key concepts of direct and indirect horizontal effect and clarifies the remedial differences between EU law and the HRA in this field (Part 2.1). It then outlines the ways in which the provisions of the WA affect the EU dimension of horizontality (Part 2.2). Part 3 analyses the interpretive difficulties associated with the text of the Withdrawal Act in the field of horizontal effect and argues that both retained EU law (Part 3.1) and retained domestic case law (Part 3.2) are likely to limit the breadth of Schedule 1(3) in practice. Part 4 considers the broader impact of the unavailability of horizontal direct effect for domestic human rights law. After briefly explaining the domestic debate on the horizontal effect of the HRA (Part 4.1), it

[15] See the text to fn 9.
[16] *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs; Libya v Janah* [2017] UKSC 62, para 78.

suggests that the unavailability of disapplication could affect the boundaries of the interpretive duty under Section 3 HRA in the future (Part 3.2). Finally, this Part considers – albeit in outline – the potential of developing a domestic version of horizontality through the common law, based on the development of existing causes of action compatibly with human rights under Section 6(1) HRA and on an understanding of core common law rights, such as access to justice, as radiating across the domestic legal system (Part 4.3).

2. Understanding the Operation of Horizontal Effect

2.1. The remedial significance of the horizontal direct effect of EU fundamental rights for UK human rights litigation

Human rights can be invoked horizontally within private law directly or indirectly:[17] horizontal direct effect allows the invocation of a human right in a dispute with another private person because of the hierarchically superior legal status that national law ascribes to the right over legislation. In this case, the human right itself becomes the source of a remedy against another private actor (e.g. depending on the right, financial compensation, de-listing of private information, etc). The remedy ensues from the human right either immediately (where no relevant legislation exists) or after disapplying or quashing an incompatible legislative provision. Indirect horizontal effect works in a subtler way, albeit often resulting in the same outcomes for the litigants.[18] In this type of horizontal claims, the court interprets existing law in a human-rights-compliant manner. It thus takes over a remedial apparatus already present within the relevant legal system (e.g. under a statute or common law cause of action), but alters

[17] State-mediated forms of horizontal effect, such as protective duties, can also be viewed as a form of horizontal effect. However, as they do not result in a remedy within a private dispute, they are omitted from my analysis in this article. See, for a more detailed analysis of these concepts: E. Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (Oxford: OUP 2019), chapter 2.
[18] E. Engle, 'Third Party Effect of Fundamental Rights (*Drittwirkung*)' (2009) 5(2) *Hanse Law Review* 165, 169-70.

some of its parameters (e.g. its scope of application), in order to ensure compatibility with human rights.

As highlighted by the quotation that serves as an opening statement for this article, both the breadth and the form of horizontal effect were hotly debated in the early years of the Act.[19] But while further categorisations can be made regarding the typology of horizontal effect employed by UK courts under the HRA,[20] for the purposes of this article it is sufficient to conceptualise horizontal effect under the Act as 'indirect,' in that it rests upon interpretive and developmental methods, rather than allowing human rights to be used in a self-standing manner. More specifically, horizontality under the HRA has taken effect through interpretation compliant with human rights 'as far as possible' under section 3 HRA and through the duty of the courts as public authorities to develop the common law in accordance with human rights under section 6 HRA.[21]

Like the HRA, EU law also recognises human rights as horizontally applicable indirectly based on a duty of interpretation consistent with human rights as far as possible.[22] In cases where consistent interpretation is impossible, however, EU law is more favourable to claimants than the HRA, as it also entitles them to invoke a right directly against a private actor, provided that the right is sufficiently specific.[23] As noted in the introduction, this possibility is wide-ranging,

[19] See, e.g., M. Hunt, 'The "Horizontal Effect" of the Human Rights Act' (1998) P.L. 423; W. Wade, 'Horizons of Horizontality' (2000) 116 L.Q.R. 217; R. Buxton, 'The Human Rights Act and Private Law' (2000) 116 L.Q.R. 48; P. Morgan, 'Questioning the "True Effect" of the Human Rights Act' (2002) 22 *Legal Studies* 259; S.D. Pattinson and D. Beyleveld,'Horizontal Applicability and Horizontal Effect' (2002) 118 L.Q.R. 623; G. Phillipson and A. Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74:6 M.L.R. 878.
[20] For a detailed analysis of different types of horizontal effect under the HRA, see: A. Young, 'Horizontality and the Human Rights Act 1998' in K Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Oxford: Hart, 2007) 35.
[21] The question of horizontality has also arisen in relation to functional public authorities under section 6(3)(b) HRA, but this aspect is beyond the scope of this paper, as it was not impacted by EU horizontal direct effect.
[22] In EU law, this is known as the '*Marleasing'* principle of consistent interpretation: *Marleasing SA v La Commercial Internacionale de Alimencation SA* [1990] ECR I-4135.
[23] (fn 7).

as it is available even if the private actor had violated the relevant right because of reliance upon valid national law.[24] Combined with the supremacy of EU law, the existence of horizontal direct effect enables national courts to disapply domestic primary legislation, so as to render an effective remedy (e.g. sufficient compensation) available against a private actor.

The *Benkharbouche* litigation[25] provides the clearest example of how horizontal direct effect under EU law had strengthened the protection of human rights in private law disputes in situations where both EU law and the HRA were applicable. The two claimants in *Benkharbouche*, Ms Benkharbouche and Ms Janah, worked as a cook and domestic worker at the Sudanese and Libyan embassies in London, respectively. They were both dismissed without due process, and it subsequently transpired that they had not been paid the minimum wage, that they had not been offered paid annual leave, and that they had not been compensated for overtime. Ms Janah was additionally owed arrears of pay and had experienced racial discrimination and harassment in the course of her employment. Even though these facts were not in dispute, the two women were prevented from bringing claims for compensation against their employers, who enjoyed immunity under sections 4(2)(b) and 16(1)(a) of the State Immunity Act 1978 ('SIA'). For this reason, Ms Benkharbouche and Ms Janah invoked the right to a fair trial including access to court, which was protected under both Article 6 ECHR and Article 47 of the EU Charter of Fundamental Rights (hereafter 'EUCFR' or 'Charter'). The claimants argued that this right had a binding effect on all actors, both public and private, so that domestic courts could proceed to hear the claim and award compensation for violations of labour law.

[24] *Mangold* (fn 4); Case C-684/16, *Cresco v Achatzi*, EU:C:2019:43.
[25] *Benkharbouche* (fn 16).

The Supreme Court partly agreed. The SIA could not be interpreted in conformity with human rights under section 3(1) HRA, since its purpose was to exclude jurisdiction entirely. As such, no legal remedy was available under the HRA.[26] By contrast, the Supreme Court found that Article 47 EUCFR enjoyed horizontal direct effect, so that the relevant provisions of the SIA had to be disapplied. This rendered compensation payable for the elements of the case that related to the application of EU law under the Working Time and Race Equality directives, which made up the largest part of the case. As Lord Sumption put it:

> a conflict between EU law and English domestic law must be resolved in favour of the former, and the latter must be disapplied; whereas the remedy in the case of inconsistency with article 6 of the Human Rights Convention is a declaration of incompatibility.[27]

Benkharbouche provoked a range of reactions. Some commentators felt that it was overly 'timid', in that its reliance on EU law allowed the courts to avoid the deeper conceptual questions about the horizontal effect of human rights in the UK,[28] while for others it amounted to a 'problematic' case of judicial usurpation of Parliamentary sovereignty.[29] Regardless of where one stands on that spectrum, though, the case offered a telling illustration of the ways in which the principles of supremacy and direct effect of EU law had affected the remedial position of individuals seeking to employ human rights in private litigation prior to the UK's withdrawal from the European Union. EU fundamental rights are especially hard-shelled,

[26] The Supreme Court did make a section 4 declaration of incompatibility to prompt Parliament to bring the statute in line with Article 6 of the Convention. At the time of writing in April 2021, the SIA has not yet been amended.
[27] *Benkharbouche* (fn 16), para 78.
[28] K. Ziegler, 'Immunity versus Human Rights: The Right to a Remedy after *Benkharbouche'* (2017) 17 H.R.L.R. 127, 148.
[29] Judicial Power Project, '50 Problematic Cases' at http://judicialpowerproject.org.uk/wp-content/uploads/2016/05/JPP-50-Cases-4.pdf (last visited 10 March 2021).

requiring that the court seized of the dispute provide an effective remedy. This can be contrasted with ECHR-based remedies, which can be more remote and uncertain due to the HRA's contingency on executive/legislative acquiescence in situations where the interpretive duty is unavailable.[30] From a claimant's perspective, then, the use of horizontal direct effect under EU law was a more secure way of enforcing human rights than the HRA in situations where both options were present, while also entailing less cumbersome litigation, since a remedy would be recognised as integral to the private dispute.

2.2. The bearing of Schedule 1(3) WA and Section 5(4) WA on horizontal disputes

While the term 'horizontal direct effect' is not explicitly mentioned in the Withdrawal Act, at least two of its provisions, Section 5(4) WA and Schedule 1(3) WA, bear immediate relevance to horizontal disputes. They will be analysed in turn.

As Takis Tridimas and Lady Arden have recently highlighted, whereas the possibility of disapplication existed irrespective of the Charter for fundamental rights that were general principles (which are retained under section 5(5) WA), UK courts started using disapplication more actively after the Charter's entry into binding force.[31] This is because the concept of general principles lacks the clarity of a codified list of rights[32] and is associated with a period of terminological inconsistency in the human rights case law of the CJEU, during which various terms, such as 'particularly important principle,' had been used in lieu of the term 'general principle', in fields such as working conditions and sexual orientation

[30] C. Neenan, 'Is a Declaration of Incompatibility an Effective Remedy?' (2000) 5(4) *Judicial Review* 247, 248. See also *Burden and Burden v UK* (fn 8).
[31] T. Tridimas and Lady Arden, 'Limited but not Inconsequential: he Application of the Charter by the Courts of England and Wales' in M. Bobek and J. Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Oxford: Hart 2020) 331, 338-9.
[32] C. Barnard, 'Evidence to the HL EU Select Committee', para 192 at https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/130/13009.htm (last visited 25 November 2020).

discrimination.[33] The use of the concept of general principles in the WA could thus disadvantage claimants seeking to rely on these typically horizontal rights, either due to out-of-date interpretations of their status in the government's right-by-right analysis[34] or because of a general lack of clarity over that status in EU law before the entry into force of the Charter. For example, in cases such as *Bauer*, *Max-Planck*, and *CCOO*, the CJEU recently affirmed Article 31 of the Charter on the right to fair and just working conditions including paid annual leave against various private employers.[35] These provisions were thought not to concretise general principles in the government's right-by-right analysis.[36] The fate of provisions which do not have a strong grounding in EU law, such as associational rights, appears even more uncertain.[37]

But while the removal of the Charter is 'not inconsequential' in respect of the horizontal effect of human rights,[38] its implications mainly concern the clarity and breadth of the rights that may be subject to horizontal direct effect, rather than restricting that possibility as such. It is Schedule 1(3) WA that targets horizontal effect in more precise terms. It states:

> (1) there is no right of action in domestic law on or after [IP completion] day based on a failure to comply with any of the general principles of EU law.
>
> (2) No court or tribunal or other public authority may, on or after [IP completion] day—

[33] L. Pech, 'Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in *Römer* and *Dominguez'* 49:6 C.M.L.Rev. (2012) 1841, 1857. See further: Editorial comments, 'Horizontal Direct Effect – A Law of Diminishing Coherence?' (2006) 43(1) C.M.L.Rev. 1; P. Craig, 'The CJEU and *Ultra Vires* Action: A Conceptual Analysis' (2011) 48(2) C.M.L.Rev. 395.
[34] HM Government, 'Charter of Fundamental Rights of the EU Right by Right Analysis', 5 December 2017 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/664891/05122017_Charter_Analysis_FINAL_VERSION.pdf (last visited 25 November 2020).
[35] Joint cases C-569/16 and C-570/16, *Stadt Wuppertal v Bauer and Willmeroth v Broßonn*, EU:C:2018:871; Case C-684/16, *Kreuziger v Land Berlin and. Max-Planck-Gesellschaft*, EU:C:2018:874; Case C-55/18, *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank*, EU:C:2019:402.
[36] (fn 34).
[37] Grogan (fn 9) 695-9.
[38] Tridimas and Arden (fn 31), 331.

> (a) disapply or quash any enactment or other rule of law, or
>
> (b) quash any conduct or otherwise decide that it is unlawful,
>
> because it is incompatible with any of the general principles of EU law.

Schedule 1(3) was added to the Act due to an understanding of disapplication as 'alien to our legal system.'[39] Yet, as Alison Young has noted, the logic of this provision is not entirely clear: over the last two decades, 'what might once have seemed controversial has become run of the mill'[40] and the WA does not consistently attempt to remove disapplication from other aspects of retained EU law.[41] In fact, sections 3-4 WA preserve disapplication for directly retained EU law insofar as it pertains to pre-existing statute.[42] Schedule 1(3) is thus only concerned with disapplication/quashing as a result of actions based on the general principles of EU law – and while fundamental rights are not the only general principles that EU law recognises,[43] they are the only general principles that have given rise to disapplication/quashing *in their own right*, i.e. in the absence of other directly effective provisions. Moreover, while Schedule 1(3) obviously seeks to exclude disapplication based on EU fundamental rights at large and not just in horizontal cases, a reading of this provision that is informed by EU constitutional law clarifies that disapplication based on fundamental rights is relevant primarily in the horizontal context.

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[39] Secretary of State for Exiting the European Union, 'European Union Withdrawal Bill: Letter to the Rt Hon Dominic Grieve MP' (11 September 2017) at http://data.parliament.uk/DepositedPapers/Files/DEP2017-0533/SoS_DExEU_to_Dominic_Grieve_-_EU__Withdrawal__Bill.pdf (last visited 25 November 2020); Department for Exiting the European Union, 'Legislating for Exiting the European Union', Cm 9446, March 2017 at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf (last visited 25 November 2020).

[41] Young, 'Benkharbouche and the Future of Disapplication' (fn 10); see also A. Young, 'Fundamental Common Law Rights and Legislation' in M Elliott and K Hughes (eds), *Common Law Constitutional Rights* (Oxford: Hart, 2020) 223.

[42] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); *R (on the application of HS2 Action Alliance Limited) (Appellant) v The Secretary of State for Transport and another (Respondents)* [2014] UKSC 3.

[43] See further T. Tridimas, *The General Principles of EU Law* (Oxford: OUP 2006) 3–7.

More specifically, Schedule 1(3)(2) WA clearly removes the possibility of relying on a general principle in respect of private conduct that follows a human-rights-incompatible statute, as in *Benkharbouche*. It goes further by also preventing courts from quashing public or private rules or conduct because of reliance on the general principles of EU law, such as where there is no specific statutory protection (e.g. under the common law). But the meaning of the exclusion of a 'right of action' in Schedule 1(3)(1) is more contentious. This disentanglement of the right of action based on the general principles of EU law (which is not retained) from the general principles themselves (which are retained) was extensively questioned during the parliamentary progress of the Act and the Commons' Select Committee on the Constitution had specifically suggested its abrogation from the final text due to lack of clarity.[44] Nevertheless, the distinction was maintained in the wording of Schedule 1(3)(1) and could now prove to be instrumental in defining the limits of the exclusion set out therein.

Whereas rights stemming from directives can be retained insofar as they entail a 'vertical' duty,[45] they never had the capacity to produce horizontal direct effect in EU law and did not give rise to an independent 'right of action' against private parties in their own right in the absence of a general principle.[46] The exclusion in Schedule 1(3) can thus be understood as applying to disputes in which a general principle (e.g. non-discrimination or the right to an effective remedy) *created* a right of action that would not otherwise exist.[47] In practice, this is only the case for horizontal disputes brought within the scope of EU law through directives,

[44] House of Lords Select Committee on the Constitution, 'European Union (Withdrawal) Bill' 9th Report of Session 2017-19, 29 January 2018, HL Paper 69, para 120 at https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/69/6902.htm (last visited 25 November 2020).
[45] Withdrawal Act, Explanatory notes, para 60.
[46] *Marshall* (fn 12).
[47] *Mangold* (fn 4); *Kücükdeveci* (fn 7), para 21.

such as *Benkharbouche*. In these cases, horizontal direct effect ensues from fundamental rights *qua* general principles 'as such' and not from the provisions of the directive.[48]

The reasons for the above choice of wording in Schedule 1(3), combined with section 5(4) WA, are not immediately apparent, particularly when cast against the broader aim of continuity that the Withdrawal Act serves.[49] This aim is clearly stated in the Explanatory notes of the Act as being 'to provide a functioning statute book on the day the UK leaves the EU. As a general rule, the same rules and laws will apply on the day after exit as on the day before.'[50] As Part 3 goes on to show, an attempt to reconcile this overall objective of the Withdrawal Act with section 5(4) and Schedule 1(3) thereof results in two conclusions about the interpretation of these provisions. First, continuity of rules indicates that horizontal direct effect will remain relevant through the operation of retained EU law, read in the light of the general principles (Part 3.1). Secondly, other stipulations made in the Act, such as the commitment to domestic precedent enshrined in section 6 WA and Schedule 8(39) WA, necessitate a narrow and strictly prospective reading of Schedule 1(3) WA, so as to retain their meaningfulness (Part 3.2).

3. The hidden possibilities of horizontal direct effect in the interpretation of the Withdrawal Act

3.1. Horizontality in retained EU law

The above analysis has shown that the restriction set out in Schedule 1(3) is a very specific one, as it is a settled point of EU law that the right of action created by the general principles is exercised only where there is no other right of action through a provision that acts as a *lex*

[48] Opinion of AG Bot in Joined Cases C-569/16 and C 570/16, *Bauer* (fn 35) paras 74-76; cf *AMS* (fn 7) paras 45-49.
[49] M. Brenncke, 'Statutory Interpretation and the Role of Courts after Brexit' (2020) 25:4 E.P.L. 637, 654.
[50] Withdrawal Act, Explanatory notes, para 10.

specialis for the general principle.[51] In all other situations, general principles have an interpretive value, but they do not form the 'basis' of an individual's 'right of action', as Schedule 1(3) would require. This means that horizontal direct effect could be largely maintained for the time being, despite the broad wording of Schedule 1(3).

For example, the key case in the field of privacy, *Vidal-Hall v Google*,[52] concerned the disapplication of legislation based on the horizontal direct effect of Articles 7 and 8 of the Charter (the rights to private life and private data, which would now be subsumed under the general principle of data protection). At the time when the case was decided, these rights were further detailed in the Data Protection Directive,[53] so that the Schedule 1(3) exclusion would have applied to future actions. However, as this Directive was superseded by the General Data Protection Regulation[54] in 2018, both vertical and horizontal direct effect remain unaffected (unlike directives, Regulations enjoy direct effect in both vertical and in horizontal cases).[55] Similarly, in line with Article 4 of the Withdrawal Agreement (as implemented by section 5 WAA), direct effect is maintained for the rights detailed therein, which include non-discrimination on grounds of nationality[56] and some economic and social rights, such as collective bargaining and action.[57] While 'horizontal direct effect' is not specifically mentioned

[51] See, e.g., Case C-498/16, *Schrems v Facebook*, EU:C:2018:37; see also A. Ward, 'The Impact of the EU Charter of Fundamental Rights on Anti-Discrimination Law: More a Whimper than a Bang?' (2018) C.Y.E.L.S. 32, 42. Ward points out that the Court has been keen to maintain references to Treaty provisions, such as Article 157 TFEU, rather than converting them to references to fundamental rights.
[52] [2015] EWCA Civ 311.
[53] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281/31, 23.11.95.
[54] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, OJ L119/1, 4.5.2016.
[55] Case C-253/00, *Antonio Muñoz y Cia SA and Superior Fruticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd* [2002] ECR I-7289.
[56] Articles 12 and 23 of the Withdrawal Agreement.
[57] Article 24 Withdrawal Agreement.

in the Withdrawal Agreement (or the WAA), this type of rights-granting provisions of international agreements have previously enjoyed both vertical and horizontal direct effect.[58]

EU fundamental rights are also likely to continue to be invoked directly against private parties through domestic interpretations of the retained rights-granting provisions of the Treaties. For example, whereas a right of action based on the general principle of equality would be excluded by Schedule 1(3), this provision does not affect 'equal pay for male and female workers' – a protection which is directly derived from Article 157 TFEU. This provision has already been given a broad meaning by the CJEU, which has found that Article 157 encompasses equal pay for work of equal value,[59] as well as sex discrimination due to gender reassignment.[60] Additionally, as section 5(5) WA obliges domestic courts to interpret retained directly effective provisions in the light of the general principles, these provisions could have the potential of being further reshaped through domestic litigation, so as to comprise some of the excluded aspects of horizontal direct effect.

For instance, a clear link can be made between Article 157 TFEU and the general principle of equality, as Article 157 was explicitly listed as a legal basis for the Equality Directive in its preamble[61] and the CJEU has already found that the provision 'is a particular expression of the general principle of equality, which prohibits comparable situations from being treated differently unless the difference is objectively justified'.[62] In turn, the general principle of

[58] Case C-438/00, *Deutsche Handballbund v Kolpak* [2003] ECR I-4135. See further S. Gáspár-Szilágyi, 'The Horizontal Direct Effect of EU International Agreements: Is the Court Avoiding a Clear Answer?' (2015) 49:2 *Legal Issues of Economic Integration* 93.
[59] Case C-624/19, *K and others v Tesco stores*, ECLI:EU:C:2021:429, para 26.
[60] Case C-13/94, *P v S and Cornwall County Council*, EU:C:1996:170, para 19; crucially, however, Article 157 TFEU does not extend to sexual orientation discrimination: Case C-249/96, *Grant v South-West Trains Ltd*, EU:C:1998:63.
[61] Preamble to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.
[62] *Tesco* (fn 59), para 27; see also Case C-381/99, *Brunnhofer*, EU:C:2001:358, paras 27-28.

equality could acquire a gap-filling function for protected characteristics covered by the Directive, which would otherwise be caught by the exclusion of horizontal direct effect in Schedule 1(3). The extent to which courts would be prepared to employ general principles as interpretive tools would thus be a crucial factor in assessing the continued availability of direct horizontal effect.

It should be noted that such a reading of the general principles into retained EU law would not amount to a judicial re-writing of the Withdrawal Act, but to a necessary exercise of building coherence in the remedial expectations of victims of human rights in like cases. For example, it is impossible to overlook that, if it were interpreted literally, the Withdrawal Act would result in unprincipled distinctions in the remedies afforded for the same right to different classes of victims: while it allows compensation to be claimed directly against an employer for sex-based discrimination (an issue previously covered by the Treaty provision), it does not allow such claims to proceed on the basis of, e.g., sexual orientation (issues previously covered by the Directive). In the absence of the possibility of relying on fundamental rights as general principles of EU law through *Benkharbouche* actions, on the one hand, and of having interpretive questions referred to the CJEU, on the other, it will be necessary for domestic courts to redefine the contours of retained provisions through the general principles of EU law, both in order to ensure that retained EU law does not become fossilised and, crucially, to prevent aberrations from arising within the domestic level of protection of human rights.[63] To do so would be consistent with the broader purpose of the Act to retain pre-existing rules until or unless they are modified by the legislator.

[63] The goal of maintaining coherence in the protection of human rights was specifically mentioned in *Bull v Hall* [2013] UKSC 73, para 29 (Lady Hale).

3.2. Maintaining the precedential value of retained domestic case law

The second reason for reading narrowly the exclusion of horizontal direct effect through the general principles of EU law in Schedule 1 WA stems from retained domestic case law. Section 6(3) WA stipulates that questions about the 'validity, meaning or effect of retained EU law' should be decided not only in accordance with the general principles of EU law, but also 'in accordance with any retained case law'. Retained case law is detailed in section 6(7) WA and includes 'retained domestic case law', i.e.:

> any principles laid down by, and any decisions of, a court or tribunal in the United Kingdom, as they have effect immediately before exit day and so far as they—
> (a) relate to anything to which section 2, 3 or 4 applies, and
> (b) are *not excluded by section 5 or Schedule 1*' (emphasis added).

It is unclear from the wording of this provision whether it seeks to retain domestic case law such as *Benkharbouche* at all and, if so, how courts (and particularly lower courts) ought to use it, since sections 6(4) and 6(5) state that only higher courts can depart from retained case law. This issue is not further clarified in the Explanatory notes for the above provisions.[64] It is also not addressed by section 26 WAA, which further details the interpretation of retained EU law. It can safely be assumed, however, that the above limitation is not intended to be read as altogether striking out of the precedent case law that had used the horizontal direct effect remedy, since cases like *Benkharbouche* and *Vidal-Hall* have served as authorities in wider areas of domestic law, which it is not the Withdrawal Act's purpose to amend.[65] This is confirmed by the transitory provision made in Schedule 8(39), which states that the limitations

[64] Withdrawal Act, Explanatory notes, para 117.
[65] See, e.g., the use of *Benkharbouche* in cases such as *London Steamship Owners' Mutual Insurance Association Ltd v Spain* [2020] EWHC 1920; and the reliance on *Vidal-Hall* in *Gulati & Ors v MGN Limited* [2015] EWCA Civ 1291.

set out in Schedule 1(3) do not 'affect proceedings begun within the period of three years beginning with exit day', as long as they do not relate to the quashing or disapplication of an Act of Parliament.[66] Further, Schedule 1(3)(2), i.e. the remedial bar on disapplication/quashing 'does not apply in relation to any decision of a court or tribunal, or other public authority, on or after exit day which is a necessary consequence of any decision of a court or tribunal made before exit day or made on or after that day by virtue of this paragraph.'[67] Thus, Schedule 8(39) further reduces the breadth of the Schedule 1(3) exclusion. While it provides that disapplication/quashing become unavailable immediately for Acts of Parliament or three years after Brexit for secondary legislation, it still requires courts to apply EU law fully, including by disapplying legislation, if this is a 'necessary consequence' of an earlier decision.[68]

It follows from the need to reconcile Schedule 8 with Schedule 1(3) and sections 5 and 6 WA that it would be erroneous to assume that *Benkharbouche* actions will cease to exist because of the Act, as suggested in the early commentary on the WA.[69] Rather, as Paul Craig has noted, it is clear that 'the courts are instructed to decide questions as to the validity of any retained EU law in accordance with retained case law and retained general principles of EU law, the assumption being that the issue can arise on or after exit day.'[70] Craig's analysis points towards a distinction between case-law-based actions and wholly new ones, which offers a workable way of understanding the maintenance of the otherwise lost powers flowing from direct effect, where these are a 'necessary consequence' of a pre-Brexit decision. However, the extent of the relationship of a new case with *Benkharbouche* and its progeny could become a significant problem for courts seeking to determine the available remedies.

[66] Withdrawal Act, Schedule 8(39)(5). This provision is further clarified in the Explanatory notes, para 211.
[67] Withdrawal Act, Schedule 8(39)(6).
[68] Withdrawal Act Explanatory notes, para 410.
[69] See text to fn 9.
[70] P. Craig, 'Constitutional Principle, the Rule of Law and Political Reality: The European Union (Withdrawal) Act 2018' (2019) 82 M.L.R. 319, 337.

Even though *Benkharbouche* itself may be thought to be confined to a niche faction of employees working for employers immune from suit in domestic courts, other cases in this field highlight that the relationship between Schedules 1(3) and 8 and section 6(7)(b) WA could have wider implications for the legitimate expectations of private actors hoping to rely on earlier case law, particularly in the field of employment and pensions. *Walker v Innospec* provides a good illustration of the potential scale of these implications.[71] The case concerned discrimination on grounds of sexual orientation in the calculation of private pension entitlements, contrary to the Equality Directive. In implementing the Directive, the Equality Act 2010 had allowed for the calculation of survivor pensions on equal terms since 5 December 2005 (the day on which section 1 of the Civil Partnership Act 2004 came into force). Schedule 9(18) of the Equality Act excluded periods worked prior to the above date from the pension entitlement. The Supreme Court found that this exclusion was contrary to the Equality Directive, which gave further expression to the general principle of equality, and which could be relied upon directly against a private actor, such as Mr Walker's employer (*Innospec*). The Supreme Court therefore disapplied paragraph 18 of Schedule 9 of the Act and ordered an especially potent remedy: that pension entitlements be recalculated with retrospective effect. It is thus undeniable that, to ensure compliance with the general principle of equality, the *Walker* case had very significant – and not necessarily predictable – repercussions for employers contributing to private pension funds, for the administration of those funds and, of course, for couples affected by Schedule 9, for whom it meant increased financial security in retirement.

The schema set up by the WA would *prima facie* suggest that Schedule 1(3) WA excludes any future disapplication of Schedule 9 in *Walker* based on the general principle of equal treatment,

[71] [2017] UKSC 47.

but that it does not exclude the reasoning relating to the interpretation of non-discrimination on grounds of sexual orientation. Yet, at the time of writing, Schedule 9 of the Equality Act has not been modified and remains in force. Crucially, due to the fact that the provision could be disapplied under EU law, the Supreme Court did not go on to decide whether a declaration of incompatibility should also be made under section 4 HRA.[72] An important question thus arises as to how courts, and particularly lower courts and tribunals, should treat the pre-existing disapplication of Schedule 9 of the Equality Act in a case like *Walker*, if the issue arises again in the future.

Imagine, for example, that another company is sued by one of its employees, based on facts identical to the *Walker* scenario. Since Schedule 1(3) clearly states that 'no court or tribunal or any other public authority' may disapply legislation or otherwise quash private conduct for incompatibility with the general principles, any future reaffirmation of *Walker* would appear to be prohibited by Schedule 1(3) and section 6(7) WA. But it is precisely in such an action, as nothing short of a 'necessary consequence' of the earlier case, where the transitory provision in Schedule 8(39)(6) could be expected to step in. Inability to rely on previously affirmed remedies in such a case would incentivise abuse of law, thus compromising the goal of continuity that the Withdrawal Act projects. More specifically, if earlier findings of disapplication could not be upheld in court in virtually the same scenario and regarding the same provisions, a self-interested private actor would not just escape a penalty, but they would acquire an interest in repeating past violations of human rights so as to trigger further litigation and start benefitting from the new remedial restrictions, contrary to the presumption against

[72] Ibid, para 75. Unlike *Benkharbouche*, it is not clear that a declaration would have been issued on this point, as non-discrimination in respect of pension entitlements is an aspect of the Strasbourg Court's case law which is less protective than EU law: *Aldeguer Tomás v Spain*, App. No.35214/09, judgment of 14 June 2016.

interference with the claimants' vested rights.[73] A natural reading of Schedule 8(39)(6) would be that it is intended to target such an eventuality.

A more intricate question arises regarding the *degree* of similarity with earlier case law that would render a new decision a 'necessary consequence' of an earlier one. For example, is it a 'necessary consequence' of an earlier decision that the provision must be disapplied, even in a different factual scenario, but concerning the same provisions? Since disapplication amounts to setting aside the legislation, rather than striking it down entirely, domestic courts would require clarity as to whether formerly disapplied provisions should now be applied in cases raising different facts (and, indeed, precisely how different those facts ought to be). Equally, it is unclear whether the future disapplication of provisions that were not previously disapplied but are analogous to formerly disapplied provisions could be considered a 'necessary consequence' of the earlier case law. Examples from the case law of lower courts illustrate that a broader meaning could be ascribed to the 'necessary consequence' formulation in Schedule 8(39)(6), which is not clear from the provision itself or from the Act's Explanatory notes.

For instance, while in *Benkharbouche* the Supreme Court disapplied sections 4(2)(b) and 16(1)(a) of the SIA 1978, this case was extensively relied upon in *Buttet v Ambassade de France*, where section 4(1)(a) SIA had been challenged instead. The employment tribunal found that an obiter comment made in *Benkharbouche* that, unlike section 4(1)(a), section 4(1)(b) would have been justifiable constituted 'a high hurdle' for the employment judge, who 'would need a strong basis for finding otherwise'.[74] As such, while it is debatable whether the case was decided solely on the basis of *Benkharbouche*, the Supreme Court's decision had

[73] *Wilson and others v Secretary of State for Trade and Industry* [2003] UKHL 40, paras 193ff (Lord Rodger).
[74] *Buttet v Ambassade De France Au Royaume Uni,* Case 2204921/2012 (22 August 2019), para 107.

more than just a persuasive effect on the judge's reasoning. Similarly, the Employment Appeals Tribunal considered itself bound by the reasoning in *Benkharbouche* in a case not concerned with state immunity at all, but with the immunity of an international organisation (the European Patent Organisation), as the same rationale applied regarding jurisdiction.[75] While, on the facts of these cases, *Benkharbouche* was relied upon to support a decision not to disapply, rather than to do so, they both highlight that the loyal application of precedent by domestic courts and tribunals could trigger the 'necessary consequence' test mentioned in Schedule 8(39)(6) in a range of comparable circumstances, which are not clearly captured by the terms of that provision.

On the whole, by retaining the commitment to earlier domestic case law but purporting to exclude the remedies associated with it, the Withdrawal Act appears to make the perilous assumption that courts will be able to 'remove the egg from the omelette', as Peers aptly puts it.[76] The interaction between the different provisions is likely to force domestic courts, and particularly the lower courts and tribunals first hearing horizontal disputes, into complex and unpredictable attempts to remove or disregard aspects of earlier case law, while at the same time trying to ensure that the broader structure of which that case law forms part does not altogether disintegrate. As the foregoing analysis has shown, both the intended interaction between Schedule 1(3) and section 6(7)(b) of the Act and the saving of future cases that are a 'necessary consequence' of earlier ones leave much to be desired in terms of clarity and internal consistency. For this reason, it would be beneficial if the aforementioned provisions were amended and clarified before they become the subject of litigation. Yet, if the interpretive task were to fall on the courts, a distinction could be drawn between a form of *passive*

[75] UKEAT 0081_15_1307 (13 July 2016), para 33.
[76] S. Peers, 'The White Paper on the Great Repeal Bill: Invasion of the Parliamentary Control Snatchers', EU Law Analysis Blog 31 March 2017, at: http://eulawanalysis.blogspot.com/2017/03/the-white-paper-on-great-repeal-bill.html (last visited 25 November 2020).

disapplication, i.e. between actions based on either previously disapplied or comparable legislation or facts, and wholly new claims, i.e. cases in which precedent would have had a merely persuasive influence, rather than determining the outcome immediately or by direct analogy. This would strike a tentative balance between the Act's overarching purpose of continuity and the retention of domestic case law, on the one hand, and its removal of disapplication through horizontal direct effect, on the other.

4. Gone but not forgotten? The residual effects of EU fundamental rights on horizontal effect in the UK

4.1. Re-opening the debate about the horizontal effect of the Human Rights Act

The analysis in Part 2 of this article has indicated that the EU doctrine of horizontal direct effect has not yet altogether disappeared from UK law as a result of Brexit legislation. Nevertheless, it remains essential to consider whether a similar remedial framework could eventually emerge through other aspects of UK human rights jurisprudence, for two reasons. First, it cannot be denied that the Withdrawal Act excludes prospective actions of the kind encountered in *Benkharbouche* and *Walker*, at least to the extent that these do not relate sufficiently closely to the provisions disapplied in this line of case law or form part of other directly effective aspects of retained EU law. Any reduction in the level of protection of rights in such cases could only be filled by domestic human rights law. Secondly, even if the impact of Schedule 1(3) ends up being limited in practice, it is still likely that increasing value will start to be placed on domestic law in judicial reasoning. Already before Brexit, the Supreme Court had emphasised the need to develop a coherent approach between areas covered by EU law and the operation of the same rights in areas not envisaged by it.[77] Today, the need to look at non-EU case law is clearer still,

[77] *Bull v Hall* (fn 63) para 29 (Lady Hale).

with the High Court having recently highlighted in *Polakowski* that 'any legal question involving rights or obligations said to be derived from EU law should now be approached in the first instance through the lens of domestic law.'[78] The key question that follows from the foregoing discussion, then, is whether the relationship that developed between indirect effect and direct effect over the last few years should be considered an accurate representation of the operation of horizontality in the UK, more generally.

As noted earlier, horizontality under the HRA takes effect indirectly, through the consistent interpretation of statute under section 3 HRA and through the incremental development of the common law, under section 6 thereof. The possibility of direct horizontal effect had been specifically considered by the JCHR as a potential amendment in its report on the replacement of the HRA with a Bill of Rights.[79] In its analysis, however, the JCHR had found that, for reasons of constitutional design, indirect horizontal effect through sections 3 and 6 HRA should be maintained instead.[80] After evaluating in depth the operation of the Supreme Court's case law in this field and the comparative merits and demerits of different models of horizontality, such as the South African model (which comprises a wide-ranging principle of horizontality similar to that pursued by EU law, including the direct effect variant), the Committee was satisfied that indirect effect was being used by domestic courts in a manner that was 'substantially the same' as 'sensible' constructions of direct effect.[81] This was thought to remove the need for explicit protection of human rights in horizontal disputes through direct effect.[82] It was thus recommended that any eventual amendment to the Act keep the same

[78] *Polakowski & Ors v Westminster Magistrates Court & Ors* [2021] EWHC 53 (Admin), para 18.
[79] Joint Committee on Human Rights, 'A Bill of Rights for the UK?', Twenty-ninth Report of Session 2007-08, HL Paper 165-I, HC 150-I, paras 286-295 at https://publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf, (last visited 11 March 2021). NB: While another review of the HRA is underway at the time of writing, the question of horizontal effect is not a central feature thereof.
[80] Ibid, 286-295.
[81] Ibid, 291.
[82] Ibid, 292.

indirect horizontal effect model,[83] although the Committee would have more explicitly included horizontality in the wording of both section 3 and section 6 HRA.[84]

Today, the JCHR's findings of interchangeability of the notions of direct and indirect effect present as a stark contrast to *Benkharbouche*. Yet its analysis remains doctrinally convincing. Indirect effect is overwhelmingly preferred across national constitutions in Europe[85] and some of the most far-reaching constitutional constructions of horizontal effect employ this variant. In Germany, for instance, human rights have an absolute 'radiating effect' on all legal disputes, even though they are not used as a self-standing basis for private litigation.[86] Different constructions of horizontality are thus outcome-neutral in principle, provided they are employed in their full expression by the judiciary.[87] In light of this, it is worth asking: should Lord Sumption's clear demarcation of the two types of horizontality in *Benkharbouche*, with direct effect flowing only from EU law, and indirect effect from both EU law and the HRA, be thought to result in an immediate loss of effective protection in situations where the state has either not legislated to protect, or has poorly protected human rights from violation by private actors?

The two following subsections suggest that the *Benkharbouche* line of case law should not necessarily be read as attacking the potential breadth of horizontality within domestic law altogether but, rather, as expressing a *contextual preference* for horizontal direct effect, where that possibility is available. In the absence of that possibility, however, the conceptual roots of section 3 HRA in the *Marleasing* principle could provide the basis for a broad principle of

[83] Ibid, 293.
[84] Ibid, 294-295.
[85] A. Colombi Ciacchi, 'Judicial Governance in European Private Law: Three Judicial Cultures of Fundamental Rights Horizontality' (2020) 28:4 *European Review of Private Law* 931.
[86] *Lüth* – BverfGE 7, 198 (1958).
[87] R Alexy, *A Theory of Constitutional Rights* (tr J Rivers, Oxford: OUP, 2002) 358; Engle (fn 18).

indirect effect through statutory interpretation. Similarly, unpacking the relationship between EU horizontal direct effect and horizontality under the common law shows that the latter may be able to host both incremental forms of indirect horizontality under section 6, as well as stronger expressions of that principle, when justified by the domestic commitment to core common law rights. In keeping with the findings of the JCHR, therefore, indirect effect could still provide interchangeable protection with direct effect in the majority of cases for rights falling within the remit of the HRA and, in the limited circumstances where common law rights provide more extensive protection, even beyond it.

4.2. Parity between the *Marleasing* principle and section 3 HRA

As Bamforth has noted, section 3 HRA is the main avenue through which private actors can be held to account for violations of human rights in the UK.[88] Whereas Parliament could have restricted the duty to interpret statute compatibly with human rights to cases where the state is involved, it chose not to do so. Reinterpreted statutes under this provision have thus allowed human rights to influence a variety of horizontal disputes, such as private housing contracts and the provision of goods and services.

The idea of indirect horizontal effect (the '*Marleasing'* principle)[89] is also significant for EU fundamental rights. The use of indirect effect has been strengthened over the last decade, with the CJEU having used it as the first step of the EU horizontality method, before reliance on direct effect is considered.[90] The reason for this methodological preference is that indirect effect offers national courts a greater degree of procedural autonomy than direct effect, as it leaves them free to decide the parameters of interpretation and the ensuing remedies (provided

[88] N. Bamforth, 'The True "Horizontal Effect" of the Human Rights Act 1998' (2001) 117 L.Q.R. 3.
[89] *Marleasing SA v La Commercial Internacionale de Alimencation SA* [1990] ECR I-4135.
[90] Case C-282/10, *Dominguez v Centre informatique du Centre Ouest Atlantique*, EU:C:2011:559; Case C-441/14, *Dansk Industri (DI) v Rasmussen's Estate*, EU:C:2016:278.

they are effective), based on the existing national law. Crucially, in its more recent case law, the CJEU has expressly allowed national courts to determine *whether* indirect effect or direct effect should be employed.[91] A turn towards indirect horizontal effect has thus not only been the CJEU's way of filling gaps in its own horizontal direct effect jurisprudence over the years,[92] but also a way of responding to challenges by national courts more hostile to horizontal direct effect, including the German Constitutional Court and Danish Supreme Court.[93] In light of this, it is essential to consider why the horizontal direct effect of EU human rights offered the markedly different outcomes before domestic courts that the Supreme Court highlighted in *Benkharbouche*, as well as to understand the conceptually inherent (albeit not jurisdictionally apparent) relationship between consistent interpretation in EU law and the interpretative duty set out in section 3 HRA.

The crucial difference between other EU member states and the UK[94] was that not only direct effect but, as Brenncke notes, the *Marleasing* principle itself had extended the 'ordinary canons' of statutory interpretation employed by UK courts, as opposed to forming part of those canons independently of EU law.[95] This was evidenced already in early cases concerning the use of consistent interpretation, such as *Litster* and *Pickstone.*[96] In *Pickstone* – an equal pay dispute with a private employer – the House of Lords implied an entire phrase into the 1983

[91] Ibid; See also Case C-414/16, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung*, EU:C:2018:257.
[92] See, e.g., Joint Cases C-397/01 to C-403/01, *Pfeiffer et al v Deutsches Rotes Kreuz*, EU:C:2004:584; Case C-212/04, *Adeneler and Others v Ellinikos Organismos Galaktos* (ELOG) [2006] ECR I-6057.
[93] *Honeywell*, BVerfGE 126, 286 (Az: 2 BvR 2661/06); Danish Supreme Court, Case 15/2014, judgment of 6 December 2016.
[94] This somewhat stark generalisation can be further broken down into different families amongst the Member States. However, the UK was unique in its combination of the unavailability of strong forms of constitutional review, employment of interpretation only in cases of ambiguity, and strongly dualistic stance towards international law. See, for a fuller discussion: Colombi-Ciacchi (fn 85).
[95] *Gilham v Ministry of Justice* [2019] UKSC 44, para 39 (Lady Hale). See further Brenncke (fn 49) 653.
[96] *Litster v Forth Dry Dock and Engineering Co Ltd* [1988] UKHL 10; *Pickstone v Freemans Plc* [1988] UKHL 2. NB: These cases predate the *Marleasing* ruling (fn 89), but rely on its immediate precursor in Case 14/83, *Von Colson and Kamann v Land Nordrhein – Westfalen* [1984] ECR 1891.

Equal Pay Regulations, which had permitted a woman to claim equal pay for work of equal value only where no man was employed in exactly the same position, so as to render the protection of equal pay effective.[97] The Court's approach was based on an examination of the purpose of the legislation and a presumption of compliance with Treaty obligations. First, the Court found that 'Parliament cannot possibly have intended such a failure'[98] as to enact a right which could not meaningfully be claimed and, secondly, 'whilst on the face of them unequivocal, [the Regulations] are reasonably capable of bearing a meaning which will not put the United Kingdom in breach of its Treaty obligations.'[99] In a similar vein, in *Litster,* the House of Lords took a purposive view of compensation following a collective redundancy, imposing on the transferee of the company the duty to pay compensation for unfair dismissal. This was done to ensure that the employees' right not to be dismissed prior to the company's transfer, as expressed in the (then) Business Transfers Directive 77/187/ EEC, did not become simply 'illusory'.[100]

The principle of consistent interpretation as it stemmed from these cases and, subsequently, by the *Marleasing* case itself, became the foundation for section 3 HRA, which codified it as the key interpretive method for human rights questions in the UK, even beyond the remit of EU law.[101] As is widely known, in *Ghaidan v Godin-Mendoza*, Lord Nicholls noted that 'the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear.'[102] Crucially,

[97] *Pickstone* (fn 96), para 12 (Lord Templeman): 'as between the woman and the man with whom she claims equality'.
[98] Ibid, para 3 (Lord Keith).
[99] Ibid, para 19 (Lord Oliver).
[100] *Litster* (fn 96) para 23 (Lord Oliver).
[101] T. Endicott, *Administrative Law* (4th edn, Oxford: OUP, 2018) 83.
[102] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, para 30 (Lord Nicholls).

> the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation so as to make it Convention compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation.[103]

Still, Lord Nicholls also highlighted in *Ghaidan* that the section 3 duty is limited, as 'Parliament cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation.'[104] Lord Nicholls, Lord Steyn and Lord Rodger all accepted that there would be occasions when the courts could not adopt a compatible interpretation (as opposed to issuing a section 4 declaration of incompatibility), and further expressed concern over the use of section 3 in cases that would embroil the courts in policy choices beyond their remit, or where a consistent reading would have severe practical implications.[105]

Ghaidan v Godin-Mendoza illustrates that, while indirect effect might have been constitutionally preferable to direct effect in other jurisdictions, its application by UK courts raised complex questions about the limits of the interpretative power, which did not readily find answers within domestic jurisprudence. For example, in the case law of the German

[103] Ibid, 32.
[104] Ibid, 33.
[105] Ibid, paras 33-35 (Lord Nicholls); para 49 (Lord Steyn); and para 115 (Lord Rodger).

Constitutional Court, horizontality had been justified by the constitutional commitment to an 'objective order of values' with human dignity at the apex.[106] This can be contrasted to the approach in *Ghaidan,* which ultimately still sought to achieve fidelity to statute, albeit recognising the possibility of deducing parliamentary intent constructively, rather than textually. Two questions follow from this, which are crucial to the future development of horizontality in the absence of the possibility of EU direct effect. First, how might the conceptual parallelism between EU consistent interpretation and section 3 HRA influence the interpretation of what amounts to a 'fundamental feature' of legislation and of how legislative intent may be inferred in the future? Secondly, could the existence of alternatives to the 'far-reaching and unusual' interpretive duty reduce the courts' willingness to employ section 3?

With regard to the first question, domestic courts have so far maintained that the *Marleasing* and section 3 HRA obligations are conceptually aligned. This is exemplified by *IDT Card Ltd*, while in the context of the horizontal effect of human rights the parity between *Marleasing* and section 3 HRA was addressed most extensively in *Vidal-Hall.*[107] These cases assume the principles set out in *Ghaidan v Godin-Mendoza* as the relevant standard on the limits of 'possible' interpretation in horizontal cases, for ECHR and EU issues alike. Lady Arden's ruling in *IDT*, which concerned the breadth of the *Marleasing* principle, provides a thoughtful starting point. Lady Arden relied on *Ghaidan* as the main authority

[106] In German case law, the 'radiating effect' that human rights have on other areas of law through judicial interpretation was considered justified by the constitutional commitment to an 'objective order of values' with human dignity at the apex: *Lüth* (fn 86 above) 205-207. See, for further analysis: J. Matthews, *Extending Rights' Reach* (New York: OUP, 2018) 47-90.

[107] *HMRC v IDT Card Services Ireland Ltd* [2006] EWCA Civ 29; *Vidal-Hall* (fn 52 above). See also *Vodafone 2 v HMRC* [2009] EWCA Civ 446, paras 68-70 (Longmore LJ); *SAS Institute Inc v World Programming Ltd* [2010] EWHC 1829 (Ch), para 163 (Arnold J).

> as to what is "possible" as a matter of statutory interpretation. The similarities in this regard between interpretation under section 3 of the 1998 Act and under the *Marleasing* principle are illustrated by the fact that Lord Steyn traced the origin of the interpretative obligation in section 3 to the *Marleasing* case and that both Lord Steyn and Lord Rodger in their speeches relied on (inter alia) the *Litster* case as demonstrating that the court could read in words in order to interpret legislation under section 3(1) of the 1998 Act. In those circumstances, in my judgment, the guidance given by the House of Lords in that case as to the limits of interpretation can also in general be applied to when the limits of interpretation under the *Marleasing* principle arise for consideration.[108]

Conversely, after referring to *Ghaidan* and *IDT* in detail, in *Vidal-Hall* the Court of Appeal found that 'by analogy with the approach to section 3 of the HRA, the court cannot invoke the *Marleasing* principle to adopt a meaning which is "inconsistent with a fundamental feature of the legislation": […] So too the jurisprudence of the […] CJEU recognises that when transposing a directive a Member State may choose not to implement it faithfully.'[109] It was for this reason that the Court did not go on to read down sections 13(2)(a) and (b) of the Data Protection Act ('DPA') in order to comply with the protection of privacy enshrined in Article 8 of the Charter (now subsumed under the general principle of data protection). As the Court found that Parliament had 'deliberately' chosen to limit compensation to cases of economic loss and this was an 'important element' of the overall scheme of compensation provided by the legislation, consistent interpretation would amount to further extending *Ghaidan*, rather than merely following it.[110]

[108] *IDT* (fn 107) para 85.
[109] *Vidal-Hall* (fn 52), para 88.
[110] Ibid, paras 91-92.

Both of these cases suggest that it may be instructive to look to the way in which the *Marleasing* duty has been employed in horizontal disputes that had not benefitted from horizontal direct effect at the EU level to identify the limits of possible interpretation. It is noteworthy that the principle of consistent interpretation has been most expansively used in this type of cases. For example, in *Pfeiffer*, the CJEU found that consistent interpretation required courts to treat the 'whole body of rules of national law' as a potential source of a compatible reading, rather than sectionally reviewing the legislation in question.[111] It was held that a national court should do 'whatever lies within its jurisdiction' to comply with the maximum working hours set out in the Working Time Directive, including modifying explicit numerical thresholds on working time, provided that evidence for doing so could be found in other legislation.[112]

As Lady Arden had noted obiter in *IDT*, domestic courts have not engaged in detail with the limits of the *Marleasing* duty and, particularly, with its rendering in *Pfeiffer*.[113] Nevertheless, as the interpretive duty under EU law and the HRA was based on a unitary standard, the unavailability of direct effect could be considered similarly capable of influencing the limits of indirect effect under the HRA. Thus, even though disapplication might have been a more appropriate *available* alternative in *Vidal-Hall*, the Court of Appeal might have been prepared to examine the limits of indirect effect more closely in the absence of that possibility, e.g., by assessing the effect of the considerations noted in *Pfeiffer* on the scope of the interpretive duty, such as the relevance of other legislation in establishing parliamentary intent. Furthermore, whereas it is true that the CJEU's approach recognises a limit to consistent interpretation, the Court in *Vidal-Hall* arguably read that limit too narrowly. Unlike both the House of Lords in

[111] *Pfeiffer* (fn 92), para 118.
[112] Ibid.
[113] *IDT* (fn 107) para 91.

Pickstone and the CJEU in *Pfeiffer* and *Wagner Miret*,[114] the Court of Appeal in *Vidal-Hall* did not recognise that the limit of consistent interpretation is shaped by a presumption that, in selecting the most appropriate means of transposing international obligations into national law, Parliament must have intended fully to comply with those obligations.

Cases where horizontal direct effect was possible could thus be criticised for rather hastily dismissing the possibility of indirect effect. A reading of *Ghaidan* alongside *Pfeiffer* might have made it possible for the Court in *Vidal-Hall* to reach the same outcome through interpretation *or* through disapplication, rather than *only* through the latter avenue. Since the national legislation in *Vidal-Hall* (the DPA) aimed to protect private data, with compensation amounts being consequential to violations of privacy, rather than being the DPA's principal objective, reliance on *Pfeiffer* might have justified reading the Act down as allowing greater flexibility in terms of compensation levels. While an increase in compensation clearly had practical implications for private actors, so that one of the stated limits of *Ghaidan* was at play, these implications were of a limited character: they concerned the extent of financial loss for data controllers, rather than their wrongdoing in the first place, and were confined to a small group of actors who had unfairly processed information (mainly search engines), as opposed to raising broader policy considerations affecting a large class of private persons. A similar case could be made for the ruling in *Walker*. In *Pfeiffer*, the CJEU had found that exclusions from rights must be construed narrowly and must be strictly necessary.[115] As the 'fundamental feature' of the legislation in *Walker* was equality-protective, reading words down to give effect to that protective intent could have been (but was not) considered in that case, in contrast with the House of Lords' earlier approach in *Pickstone* and *Litster*.

[114] Case C-334/92 *Wagner Miret* [1993] ECR I-6911, para 20. *Pfeiffer* (fn 92), para 112.
[115] *IDT* (fn 107) paras 52-54.

The reason for the domestic courts' confident reliance on horizontal direct effect and comparatively quick dismissal of the indirect effect mechanism could be that disapplication through horizontal direct effect remained clearly marked out as a doctrine that operates casuistically,[116] and is used by domestic courts within the scope of EU law only. By contrast, the expansive use of the *Marleasing* principle in horizontal cases raises both important considerations about legal certainty and legitimate expectations (as direct effect does), but also more holistic questions about the constitutional balance in the UK. As Lady Hale noted in *Clyde & Co LLP and another (Respondents) v Bates van Winkelhof,* just like direct effect, 'it is a little more difficult to assess whether and when [consistent interpretation] is necessary in order to […] *afford one person a remedy against another person which she would not otherwise have had*'[117], compared to vertical cases. At the same time, the incorporation of the *Marleasing* duty into section 3 HRA integrated into domestic law what be seen as an uncomfortable distortion of the true meaning of statute, as the price to be paid for justice in the individual case.[118] For this reason, in *IDT*, Lady Arden had suggested that 'if there is a choice of method or result […], the court should adopt that which involves least change from the domestic legislation given its normal meaning.'[119] Yet, now that the choice of horizontal direct effect has been removed for future actions, precise assessments of the outer limits of *Marleasing*/section 3 HRA are likely to become unavoidable.

[116] As noted in Part 3.2 above, disapplication sets aside the legislation in the concrete case, but does not affect its validity per se.
[117] [2014] UKSC 32, 44, emphasis added.
[118] A. Kavanagh, 'What's so weak about "weak- form review"? The case of the UK Human Rights Act 1998' (2015) 13:4 ICON 1008, 1028.
[119] *IDT* (fn 107) para 91.

It is too early to tell whether a shift towards a broader understanding of the limits of indirect horizontal effect is already taking place.[120] Nevertheless, some recent case law appears to support a broader stance towards the interpretive duty. For example, while the High Court in *Hughes* disapplied a specific numerical threshold set in the Pensions Act because it had a discriminatory effect that contravened EU law,[121] in all other respects it was able to read into the Act words that extended the liability of the Board of the Pension Protection Fund.[122] Interestingly, while the court referred to EU law in respect of the remedies employed, its assessment of discrimination rested upon Article 14 ECHR in conjunction with Article 1 of Protocol 1, rather than upon an EU-specific standard, thus suggesting a continuing, and possibly deepening, parity between *Marleasing* and section 3 HRA. A further example of such a tendency is *Sarnoff v YZ*[123] - a case forming part of a civil action against Harvey Weinstein. The main issue there was whether a disclosure order could be made against a person not residing in Great Britain, since Rule 31 of the Employment Tribunal Rules 2013 stated that a tribunal 'may order any person in Great Britain to disclose documents or information.' This raised questions over access to court and the due process of the domestic proceedings. While it is grammatically clear that 'in Great Britain' in the Rules refers to the location of the person against whom a disclosure order is made, the tribunal judge found:

> I would not go as far as to disapply the words "in Great Britain" in rule 31, if the literal construction were the only permissible one. But I would accept the invitation of the claimant to adopt an alternative and more sensible and just construction - in line with

[120] It should be noted in this regard that there is systematic empirical evidence which shows that courts have tended not to use section 3 expansively so far: Justice, 'Annex 1 to Justice's Response to the Call for Evidence to the Independent Human Rights Act Review', March 2021 at https://sqe-justice.s3.eu-west-2.amazonaws.com/wp-content/uploads/2021/03/09152051/Annex-to-response-to-IHRAR-call-for-evidence-JUSTICE.pdf (last visited 16 March 2020).
[121] *Hughes and others v The Board of the Pension Protection Fund* [2020] EWHC 1598 (Admin), para 147.
[122] Ibid, para 229.
[123] *Sarnoff v YZ*, UKEAT/0252/19, 6 May 2020.

> the *Marleasing* principle - if I can do so without crossing the line that separates interpreting legislation from rewriting legislation.
>
> […] In my judgment, the words "in Great Britain" in rule 31 must be taken to refer to the location of the employment tribunal making the disclosure order, not to the location of the person against whom the order is made.[124]

If affirmed on appeal (pending at the time of writing), this case could be indicative not just of a potentially renewed potency of the *Marleasing/*section 3 principle in general, but also of an increasing preparedness on the part of lower courts to utilise the interpretive duty more extensively in the absence of the possibility of disapplication.[125] This could be useful in limiting the need for further appeals, which could increase in view of the fact that lower courts do not have the right to make a declaration of incompatibility.[126]

Finally, in appreciating the broader future potential of section 3 HRA in this field, it is essential to briefly consider the relationship between subsequent interpretation of statute and past use of horizontal direct effect in similar circumstances. As already highlighted in part 3.2 above, lower courts rely not only on the specific remedial aspects of the horizontal direct effect case law, but also on its broader normative direction. This is not only relevant as a textual point regarding the availability of disapplication based on retained case law, but also because this

[124] Ibid, paras 68-69.
[125] Amos (fn 13).
[126] Similar uses of the interpretive duty by tribunals can be further seen in: *Blackburn (t/a Cornish Moorland Honey) v Revenue and Customs Commissioners* [2013] UKFTT 525 (TC); *O'Kane v Revenue and Customs Commissioners* [2013] UKFTT 307 (TC); and, more broadly: *NA v Secretary of State for Work and Pensions* [2019] UKUT 144 (AAC); *Pierhead Drinks Ltd v Revenue and Customs Commissioners* [2019] UKUT 7 (TCC); *C v Governing Body of a School* [2018] UKUT 269 (AAC); *Fessal v Revenue and Customs Commissioners* [2016] UKFTT 285 (TC); *PML Accounting Ltd v Revenue and Customs Commissioners* [2015] UKFTT 440 (TC); *Nas & Co Ltd v Revenue and Customs Commissioners* [2014] UKFTT 50 (TC); *Jhuti v Royal Mail Group Limited* [2017] 7 WLUK 777; *Pallet Route Solutions Ltd v Morris* [2013] 10 WLUK 324.

case law sends a clear signal about how legislation ought to be interpreted prospectively. For instance, in *London Steamship Owners' Mutual Insurance Association Ltd v Spain,* the High Court relied extensively upon the broader intention of the Supreme Court's ruling in *Benkharbouche,* which was that the SIA should be interpreted compatibly with Article 6 ECHR as far as possible (despite the fact that the Supreme Court had not found this to fall within the limits of 'possible' under section 3 in that case).[127] Drawing confidence from the Supreme Court's indication of how the Act should be interpreted, the High Court found that section 3(3)(c) SIA could 'comfortably be read as covering the pursuit by legal proceedings of a contractual claim under a contract of insurance' through its normal meaning, so that there was no need to engage in a strained reading at all, as opposed to a choice amongst different possible readings.[128] Thus, while one cannot overstate the difficulty posed by an expansive rendering of indirect horizontal effect at higher level courts, as summarised by Lady Hale in *Clyde & Co,*[129] concerns over the imposition of unforeseen duties on private actors through section 3 HRA could be mitigated to some extent by the fact that horizontality will be primarily operationalised in lower and, often, specialised courts and tribunals. Once the general outlook of the legislation has been set out at a higher level, these courts will be much more alive to the prevalent dynamics of the legislation and the expectations of the parties in different fields of private law, so that they are likely to be capable of assessing effectively the remedial impact of horizontal effect through interpretation in a specific context.

Overall, it must be acknowledged that it is not possible to predict the future use of the interpretive duty in horizontal cases with accuracy and the above examples should – for now – be viewed only as indications of a *tentative* direction in cases where alternative options are

[127] *London Steamship Owners' Mutual Insurance Association Ltd v Spain* (fn 65), paras 97-99.
[128] Ibid, para 98.
[129] (fn 117).

unavailable, rather than amounting to a recognition of a fuller principle of horizontality based on the indirect effect of human rights. Moreover, the body of law relevant in a given case (EU law or the ECHR) may influence the interpretative attitude of national courts (e.g. teleological or textual), so that the conceptual parity between the *Marleasing* duty under EU law and section 3 HRA need not ultimately result in a seamless assumption of the same limits or interpretive possibilities in respect of both sources of rights protection. Still, by highlighting the emphasis that domestic courts had previously placed on EU horizontal direct effect in situations where they perceived the use of indirect horizontal effect as overly expansive, the above analysis suggests that the limits of indirect horizontal effect will henceforth need to be delineated more clearly in domestic human rights jurisprudence. Inspiration for this exercise could be drawn from analogous cases previously encountered in EU law, such as *Pfeiffer*, or from earlier domestic cases, such as *Pickstone* and *Litster*. While these cases may not remain jurisdictionally relevant after Brexit, they will continue to form the legal context within which the section 3(1) HRA duty was shaped.

4.3. Horizontality and the development of the common law

In addition to using consistent interpretation as far as possible under section 3 HRA, courts and tribunals are designated as public authorities under section 6(3)(a) HRA. As such, in line with section 6(1) of the Act, the courts must – as Laws LJ put it in *Pro-Life Alliance* – 'develop, by the common law's incremental method, a coherent and principled domestic law of human rights.'[130] Space does not permit an exhaustive account of the potential of the common law to embed human rights within disputes between private parties, so that the following analysis aims simply to introduce two avenues through which, subject to further judicial development,

[130] *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2002] 2 All ER 756, paras 33-34.

the common law could step in to protect individuals in situations where the horizontal direct effect of EU fundamental rights previously provided a remedy. At a first stage, the development of the right to privacy will be used as an example of the interchangeability between horizontal direct effect under EU law and indirect horizontal effect through the common law. At a second stage, this section suggests that core common law rights, such as access to justice, might be viewed as potential justifications for a more autonomous principle of horizontality based on the 'radiating effect' of such rights across domestic law.[131]

As Phillipson and Williams have noted, the only 'constitutional constraint' present in the case law on section 6 HRA is that no new causes of action can be created on the basis of human rights.[132] Rather, reliance on those rights must always be technically premised upon an already recognised common law cause of action.[133] While this model does not allow for the invocation of the Convention's provisions in their own right, the limits of judicial incrementalism are fluid and have been shown not to result in substantively different outcomes to direct effect in certain fields, such as privacy, as evidenced in several high-profile cases on this topic, including *Douglas v Hello,*[134] *Campbell v Mirror Group,*[135] and *AMP v Persons Unknown*.[136] The *Campbell* case, in particular, offers a useful illustration of both the strength of horizontality under section 6 HRA and of its generally overlooked causal relationship with the presence of EU law alternatives.

[131] On the concept of 'radiating effect' see the text to fn 106 and R. Brinktrine, 'The Horizontal Effect of Human Rights in German Constitutional Law: The British debate on horizontality and the possible role model of the German doctrine of "*mittelbare Drittwirkung der Grundrechte*"' (2001) 4 EHRLR 421
[132] Phillipson and Williams (fn 19).
[133] Ibid.
[134] (fn 1).
[135] *Campbell v MGN* [2004] UKHL 22.
[136] [2011] EWHC 3454.

In her lawsuit against the Mirror Group, 1990s supermodel Naomi Campbell had asked for damages both for breach of confidence and for unfair processing of her private information under section 13 DPA, following the Daily Mirror's publication of a story about her drug addiction together with an unauthorised photo of her near the entrance of a Narcotics Anonymous meeting. As is widely known, the House of Lords ruled in Ms Campbell's favour, because the equitable wrong of breach of confidence had to be developed in line with Article 8 ECHR and the courts' duty to observe it under section 6(1) HRA. It was held that, because of the application of Article 8 ECHR, the common law had developed so as to comprise two actions: breach of confidence on the one hand, and misuse of private information on the other, with general breaches of the right to privacy being anchored on the latter claim.[137]

But while *Campbell* showed that the HRA had provided the common law with a renewed impetus for protecting human rights in disputes between private actors, hindsight allows the remark that the case could have developed very differently if it had arisen a few years later. At the time when *Campbell* was decided, it was not clear that EU law could provide a more effective remedy than breach of confidence through the horizontal direct effect of privacy and data protection, because the CJEU had not yet decided *Mangold* (the judgment that established the horizontal direct effect of fundamental rights qua general principles of EU law).[138] As such, at first instance, it was not considered essential to distinguish the two claims remedially[139] and the Court of Appeal interpreted the public interest exemption in section 32 DPA without assessing the underpinning right to privacy.[140] By the time it reached the House of Lords, Ms Campbell's main claim rested upon the interpretation of the requirements of breach of

[137] *Campbell* (fn 135), paras 13-22 (Lord Nicholls).
[138] (fn 4).
[139] [2003] QB 633, 64.
[140] [2002] EWCA Civ 1373, para 128.

confidence. The House of Lords decided not to consider the DPA aspects at all, as it found that these would stand or fall along with the main claim.[141]

However, if *Campbell* had arisen after the possibility of disapplication through horizontal direct effect had been established, the claimant would have been able to rely directly on the right to private life and private data as a general principle of EU law, because the publication of her photos amounted to the processing of personal data under the terms of the Data Protection Directive (which the DPA was implementing). Like the claimants in *Vidal-Hall*, therefore, it would have been far simpler for Ms Campbell to use the EU fundamental right in order to have section 32 DPA read down or disapplied at first instance, rather than advancing the more innovative common law argument about breach of confidence that ultimately gained her case its academic notoriety. It is thus partly a matter of good fortune that the more distinctive, common law vision of horizontality based on section 6 had some opportunity to develop in the early years of the HRA, before the possibility of horizontal direct effect through EU law established a clearer prospect of success for the claimant.

The above analysis illustrates that the common law has operated as a viable alternative to horizontal direct effect, at least in certain areas of human rights law. In the field of private data, in particular, EU law and the common law have displayed significant remedial cross-fertilisation in recent years. In *Gulati*, the High Court (subsequently affirmed by the Court of Appeal) developed the rules for compensation under the tort of misuse of private information based on the principles set out in *Vidal-Hall*.[142] Whereas the latter case related to the breadth of the compensatory model offered by the DPA against private parties, the former utilised

[141] *Campbell* (fn 135), para 32 (Lord Nicholls).
[142] *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch), paras 138-159.

Vidal-Hall as authority for the extension of compensation in the context of a pure case of misuse. In turn, in *Lloyd v Google*, the reasoning in *Gulati* was extended back to the DPA, thereby confirming that damages under the Act could account for distress alone without the need to show pecuniary loss, in the same way as for cases of misuse of private information.[143]

Nevertheless, it would be problematic to associate the development of the common law as it emerged in respect of the right to privacy with a fully expressed or holistic doctrine of horizontality. While the common law has served as a 'conduit for the fulfilment' of privacy[144] - a tendency that can also be observed in a limited manner in relation to the right to property[145] - its relationship with other protections, such as the freedom of association[146] and non-discrimination,[147] has been much more limited. It would also be unrealistic to expect the common law to protect fundamental employment rights (such as the protection from unfair dismissal and the right to fair working conditions, enshrined in Articles 30 and 31 EUCFR, respectively). UK courts have tended to view employment rights as separate from the Convention and, in *Johnson*, the House of Lords specifically refused to 'construct a common law remedy' for unfair dismissal.[148] Of course, as Bogg has influentially argued, the common law could expand in this direction when unfair employment terms are combined with breaches of other Convention rights.[149] For example, this could be the case in instances where a dismissal

[143] *Lloyd v Google* [2019] EWCA Civ 1599, para 70.
[144] R. Masterman and S. Wheatle, 'A common law resurgence in rights protection?' (2015) 1 E.H.R.L.R. 57, 64.
[145] T. Allen, 'A Constitutional Right to Property?' in M. Elliott and K. Hughes (eds), *Common Law Constitutional Rights* (Oxford: Hart, 2020) 71, 84-89. Note, however, that the right to property is not necessarily conceptualised as a right to housing or as comprising protection from eviction, and such arguments have not found favour with the courts in recent years: *McDonald v McDonald* (fn 2).
[146] G. Phillipson, 'Searching for a Chimera? Seeking Common Law Rights of Freedom of Assembly and Association' in M. Elliott and K. Hughes (eds), *Common Law Constitutional Rights* (Oxford: Hart, 2020) 141, 166.
[147] C. O'Cinneide, 'Equality: A Core Common Law Principle, or 'Mere' Rationality?' in in M. Elliott and K. Hughes (eds), *Common Law Constitutional Rights* (Oxford: Hart, 2020) *Constitutional Rights* (Oxford: Hart, 2020) 167, 177.
[148] *Johnson v Unisys Limited* [2001] UKHL 13, para 58 (Lord Hoffman). See further A. Bogg, 'Common Law and Statute in the Law of Employment' (2016) 69:1 C.L.P. 68.
[149] Bogg, ibid, 102. See, for a practical argument in this regard: D. Cabrelli and J. Dalton, 'Furlough and Common Law Rights and Remedies', UK Labour Law Blog, 8 June 2020 at:

is challenged as a result of unauthorised monitoring or where home-working requirements (e.g. working in front of a live camera), thus engaging privacy and the peaceful enjoyment of one's home. However, the present state of development of common law horizontality under section 6 HRA does not permit more than informed speculation in this regard. This begs the question of whether broader arguments about the potential of the common law to act as a basis for the domestic protection of human rights could be relevant to horizontal disputes.

As Elliott has noted, having been emboldened by the obligation of courts to act compatibly with human rights under section 6(1) HRA, rights and principles that are 'dead centre' in the common law could serve as the basis of yet-unacknowledged forms of constitutional review.[150] In theory, this argument is not limited to any one common law right or principle. However, it is worth exploring it by reference to the right of access to justice in this article, for three reasons: first, access to justice can serve as a procedural vehicle for the effective protection of other rights;[151] secondly, access to justice and, more specifically, access to court, is already squarely protected in the common law; [152] and, finally, it has been given horizontal direct effect before domestic courts through EU law.[153] It is thus worth considering whether the common law could provide a meaningful alternative ground for the protection of such a right in situations where EU law is no longer available.

As noted earlier, the *Benkharbouche* judgment was criticised for relying on EU law, instead of coming to the same outcome by affirming the 'fundamental nature of the substantive right to a

https://uklabourlawblog.com/2020/06/08/furlough-and-common-law-rights-and-remedies-by-david-cabrelli-and-jessica-dalton/ (last visited 11 November 2020).

[150] M. Elliott, 'Beyond the European Convention: human rights and the common law' (2015) 68 C.L.P. 85, 115.

[151] S. Wheatle 'Access to Justice: From Judicial Empowerment to Public Empowerment' in M. Elliott and K. Hughes (eds), *Common Law Constitutional Rights* (Oxford: Hart, 2020) 49, 63.

[152] P. Sales, 'The Common Law Context and Method' (2019) L.Q.R. 47, 65.

[153] *Benkharbouche* (n 16).

remedy in English law.'[154] There are strong merits to this critique. The absence of any conceptual linkage between the domestic tradition on access to justice and the *Benkharbouche* case was particularly puzzling, considering that *Benkharbouche* was handed down only two months after *UNISON* – a ruling where the Supreme Court had emphasised the interchangeability of the right of access to justice under the common law and under Article 47 of the Charter.[155] Still, as Wheatle notes, while access to justice is a doctrinally advanced aspect of human rights in the common law, it has traditionally been affirmed as a 'negative' protection and has not given rise to positive duties.[156] This could explain why a case like *Benkharbouche* was argued – and thereby decided – entirely based on EU horizontal direct effect. Being invoked within a horizontal dispute, *Benkharbouche* would have required the courts to build precisely the protective function heretofore lacking in this area – a step that is not explicitly considered under the current formulation of the HRA.[157] Thus, the possibility of disapplication through EU direct effect allowed the courts to avoid exploring the implications of a potential conflict between the common law and the SIA.

Nevertheless, one could imagine the outcome of a case like *Benkharbouche* being reached through the common law, too, in the absence of the EU option. This is supported by the fact that, whilst arrived at *via* EU law, the domestic courts' use of horizontal direct effect in *Benkharbouche* was largely autonomously determined: the CJEU had never previously had the opportunity to clarify whether the right to an effective remedy had a horizontal dimension, and no other court in the EU had made that finding at the time of the ruling.[158] Even though there

[154] K. Ziegler, 'Immunity versus Human Rights: The Right to a Remedy after *Benkharbouche'* (2017) 17 H.R.L.R. 127, 148.
[155] *R (UNISON) v Lord Chancellor* [2017] UKSC 51,para 78 (Lord Reed).
[156] Wheatle (fn 151) 49, 64-66.
[157] In its report on this issue (fn 101) para 294, the JCHR had recommended that protective duties be explicitly added to any future revision of section 3.
[158] The issue was first decided at the EU level a few years later, in Case C-414/16, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung*, EU:C:2018:257, para 49, which confirmed the Supreme Court's finding that Article 47 EUCFR enjoyed horizontal direct effect.

was some EU case law about the right to an effective remedy before the case was decided,[159] there was no consistent line of authority regarding the criteria for assessing different rights as candidates for direct horizontal effect.[160] There was no authority at all at the EU level regarding reliance upon this right in cases involving diplomatic missions, more specifically. In this sense, rather than being the necessary consequence of the horizontal direct effect of EU law, the judgment appears more convincingly justifiable when understood as the brainchild of a long list of domestic authorities,[161] which was rendered during a period of resurgence of common law human rights, with effective judicial protection at its heart.[162]

Of course, it is one thing to suggest that a common law right could further support a human-rights-compatible interpretation of statute and quite another thing to argue that a common law right could build equivalent protection to direct effect in a situation such as *Benkharbouche*. However, assuming that the above case law is, albeit implicitly, premised upon a form of radiating effect of core common law rights (or principles) 'whose existence would not be the consequence of the democratic political process but would be logically prior to it,'[163] it is likely that the intensity of this radiating effect would be greater in cases where the essence of a core common law right or principles is abrogated.[164] Indeed, access to justice could be considered a particularly good example of a right where the case law provides indications that *significant*

[159] Case C-33/76, *Rewe-Zentralfinanz v Landwirtschaftskammer für das Saarland,* EU:C:1976:188.
[160] See, e.g., *AMS* (fn 7).
[161] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115*; R v Secretary of State for the Home Department, ex p Anderson* [1984] QB 778; *R (Jackson) v AG* [2005] UKHL 56; *R (Evans) v Attorney General* [2015] UKSC 21; *R (UNISON) v Lord Chancellor* [2017] UKSC 51; *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.
[162] Masterman and Wheatle (fn 144) 57; Sales (fn 152) 65.
[163] *R v Lord Chancellor, ex parte Witham* [1998] QB 575, para 581 (Laws J).
[164] Writing extra-judicially, the President of the CJEU has justified the use of expansive indirect and direct forms of horizontal effect at the EU level based on the 'essence' of fundamental rights: K. Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' (2019) 20:6 G.L.J. 779. For a broader analysis of intervention based on the essence of rights, see: P. Thielbörger, 'The Essence of International Human Rights' (2019) 20:6 G.L.J. 924.

incursions may attract a greater degree of scrutiny. In finding the fees imposed for accessing employment tribunals unlawful in *UNISON*, Lord Reed had explained, based on common law reasoning, that 'even where primary legislation authorizes the imposition of an intrusion on the right of access to justice it is presumed to be subject to an implied limitation, […that] the degree of intrusion must not be greater than is justified by the objectives which the measure is intended to serve.'[165] The primacy of judicial protection is further supported by cases such *Privacy International*, where an ouster clause resulting in an absolute exclusion of jurisdiction was considered void. As Alison Young has noted, the Supreme Court's reasoning in this case is highly reminiscent of the logic of disapplication through direct effect.[166] Young carefully nuances this point by emphasising that the domestic case law on judicial protection does not concern mere incursions on rights, but their complete elimination.[167] This argumentation could, however, logically apply to other types of disputes, including disputes between private actors, where these give rise to the same concern over the non-accessibility of judicial protection.

Thus, the unavailability of EU law options in the future could have two consequences for horizontal effect under the common law. First, a revival of *Campbell*-type argumentation regarding the incremental development of existing causes of action in the light of human rights could be expected. Secondly, recasting cases such as *Benkharbouche* as instances where a core common law right was entirely excluded in private litigation could eventually allow a more autonomous justification of indirect horizontal effect to emerge, which would be ingrained in the panoply of constitutional values beyond parliamentary sovereignty – most notably perhaps,

[165] *UNISON* (fn 155), para 88.
[166] Young (fn 40), 230-232.
[167] Ibid, 230-231.

in the commitment to the rule of law, which the common law jurisprudence posits as 'the ultimate controlling factor on which our constitution is based.'[168]

5. Conclusion

The status of horizontal direct effect was not made clear in either the Explanatory notes or in the commentary surrounding the Withdrawal Act, despite its significant implications for victims of human rights violations, for courts handling private law cases, and for the broader coherence of the domestic human rights jurisprudence. This article has advanced two arguments to address this issue, which were drawn from an analysis of the Withdrawal Act and from domestic case law on sections 3 and 6 HRA. The first argument was that the exclusion of horizontal direct effect in the Withdrawal Act must be read narrowly, in line with the Act's broader purpose of continuity and respect for precedent. The second argument was that the absence of an explicit possibility of horizontal direct effect under EU law could result in a renewed uptake of stronger forms of indirect horizontality under the HRA, as part of domestic courts' interpretation of statute under section 3 and of their role in ensuring that private law is developed in keeping with human rights under section 6 HRA.

In trying to shed light upon the remaining possibilities of horizontality, the purpose of this article has not been to deny the serious problem of remedial regression that could arise from the provisions of the Withdrawal Act. For many fundamental rights, and especially for fundamental employment rights and protections against discrimination that have no equivalent in the HRA, the possibility of horizontal direct effect had clarified and strengthened the domestic level of protection, following a wave of promising litigation at the EU level. The

[168] *AXA General Insurance Ltd and Others v The Lord Advocate* [2011] UKSC 46, para 51 (Lord Hope) and *Jackson* (fn 161) para 107 (Lord Hope). See further Young (fn 40).

complexity and breadth of the topic has meant that important questions about the desirability or correctness these developments had to be reserved for future comment and discussion. Nevertheless, by highlighting the textual and the conceptual residue that horizontal direct effect leaves on domestic human rights law, the foregoing analysis has attempted to show that the progressive disentanglement from EU law could at least serve as a stimulus for reassessing the limits of and justifications for a judicial obligation to protect human rights in all domestic legal disputes, including disputes between private parties.