

HORIZONTAL APPLICABILITY AND HORIZONTAL EFFECT

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INTRODUCTION: CONTROVERSY OVER “HORIZONTAL EFFECT”¹

The Human Rights Act 1998 gives circumscribed domestic effect to key rights of the European Convention on Human Rights and Fundamental Freedoms. While many aspects of this incorporation are not contentious, the degree to which the Act affects legal relations between private individuals² is controversial.

The Act gives effect to the “Convention rights”³ in two ways. First, “so far as possible”, all legislation must be interpreted “in a way which is compatible with the Convention rights”.⁴ If it cannot be so interpreted, the court may make a declaration of incompatibility.⁵ No reference is made to the status of the defendant, and it is widely agreed that this interpretative obligation applies irrespective of whether or not any party to the proceedings is a “public authority”.

Second, section 6(1) makes it unlawful for a “public authority” to act incompatibly with a Convention right. The victim of such an act may bring proceedings against the public authority or rely on the Convention rights concerned in any legal proceedings.⁶ If the court finds a violation, it “may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate”.⁷ Thus, where the defendant is a public authority, the Act itself can be relied on as a cause of action.

Section 6(3) provides that a “public authority” includes “a court or tribunal”. Thus, section 6(1) read with section 6(3) asserts that “[i]t is unlawful for a . . . [court] to act in a way which is incompatible with a Convention right”. Commentators, however, disagree about the extent to which this affects legal relations between individuals.

At one extreme, Sir William Wade holds that it follows that claimants need only plead that their Convention rights have been violated and, if the court agrees, it is required to enforce these rights.⁸ The Act itself creates new legal relations between individuals, where these do not already exist, though the courts have some discretion over their development. At the other extreme, Sir Richard Buxton declares that the

¹ Legal effect can be given to the rights purely vertically, whereby they have effect only against the state, or horizontally, whereby they have effect between individuals.

² Reference to “individuals” will refer to private individuals, unless otherwise stated.

³ These are listed in Schedule 1 of the Act; *viz.*, Articles 2–12 and 14 of the Convention, Articles 1–3 of the First Protocol, and Articles 1 and 2 of the Sixth Protocol. The phrase “the Convention rights” refers to these provisions as distinct from all the rights in the Convention, which we refer to as “the rights of the Convention”.

⁴ s.3(1).

⁵ s.4(2). Although a declaration of incompatibility does not affect the continuing force of legislation, it engages a remedial procedure (s.10).

⁶ s.7(1).

⁷ s.8(1).

⁸ See Wade (2000) 116 L.Q.R. 224. See also Wade, “The United Kingdom’s Bill of Rights”, in *Constitutional Reform in the United Kingdom: Practice and Principles* (eds. Beatson, Forsyth and Hare, 1998), pp. 59–68.

Act “does nothing to create private law rights”,⁹ and section 6(1) means “only that the courts should not withhold appropriate relief against public bodies”.¹⁰

There is a range of views between these two extremes.

Bamforth holds that the Act does not *require* horizontal effect to be given to the Convention rights except in relation to legislation (where s.3(1) operates).¹¹ However, he suggests that the courts have *discretion* to give effect to section 6(1) in the way envisaged by Wade.¹² Also, since the courts often reason by analogy between statutes and the common law,¹³ he argues that the application of the Act is likely to influence the development of the common law as such.¹⁴

Phillipson argues that section 6(1) creates *some* role for the Convention rights in litigation between private parties where the common law already operates, but does not create any new causes of action.¹⁵ Furthermore, section 6(1) merely imposes a duty on the court to take account of the *values* represented by the Convention rights; it does not give effect to the rights themselves.¹⁶

Clayton and Tomlinson contend that section 6(1) imposes a duty on the courts to develop the common law in ways *not incompatible* with the Convention rights.¹⁷ However, this obligation is purely negative.

The court is not *compelled* to develop the common law in line with the Convention rights wherever it has the opportunity to do so: 6(1) is a *prohibition* which enjoins the court from acting in a way which is inconsistent with Convention rights.¹⁸

Hunt maintains that section 6(1) also imposes a positive obligation on the courts to give effect to the Convention rights, constrained only by a bar on the creation of new causes of action.¹⁹ Where there is already law governing private relations, it must be applied and developed to achieve *compatibility* with the Convention, subject only to contrary primary legislation.²⁰

Raphael avers that the section 6(1) obligation is not constrained by a bar on creating new causes of action.²¹ He suggests, however, that it is constrained by pre-Act precedents (or at least those that are not obsolete).

⁹ Buxton, (2000) 117 L.Q.R. 34 at p. 65.

¹⁰ *ibid.*, p. 57. A similar conclusion is reached by Kentridge, “The Incorporation of the European Convention on Human Rights”, in Beatson, Forsyth and Hare eds., *supra*, n.8, pp. 69–71, at p. 70.

¹¹ See Bamforth (1999) 58 C.L.J. 159 at pp. 168–170.

¹² Bamforth contends that Wade’s position requires the court to be subject to clear sanction when it fails to act compatibly with the Convention rights: see Bamforth (2001) 117 L.Q.R. 34 at pp. 38–39.

¹³ Throughout this paper, we use “the common law” to refer to judge-made law, which includes the law of equity.

¹⁴ See Bamforth, *supra*, n. 12, at pp. 37 and 40.

¹⁵ Phillipson (1999) 62 M.L.R. 824.

¹⁶ Phillipson appeals to features of the Act, such as the continuing force of inconsistent primary legislation, and the absence of Articles 1 and 13 from the provisions explicitly given effect by the Act.

¹⁷ See Clayton and Tomlinson, *The Law of Human Rights* (2000).

¹⁸ *ibid.*, 235.

¹⁹ Hunt (1998) P.L. 423.

²⁰ Hunt is supported by Singh (1998) 6 E.H.R.L.R. 712 at p. 726 and Leigh (1999) 48 I.C.L.Q. 57 at p. 87, n. 126 (whose position is, in his words, “similar” to Hunt’s).

²¹ Raphael (2000) 5 E.H.R.L.R. 493.

OUTLINE OF OUR ANALYSIS

We argue that this controversy must be resolved in favour of full “horizontal effect”. Our argument is grounded in the contention that the rights of the Convention, understood conceptually, *apply* horizontally as well as vertically and that, in consequence, to give unqualified effect to them is to give horizontal *effect* to them.²² While the Act does not give unconditional effect to the Convention rights (because the rights are not to be given effect where legislation renders this impossible), we contend that this is the only restriction on the effect of the rights that the Act permits. Thus, unless the Act itself or other legislation expressly restricts effect to vertical effect, horizontal effect must be given.

Our first task is to distinguish “horizontal application” from “horizontal effect”. Next, we explain why the rights of the Convention apply horizontally. We then distinguish *mediated* from *unmediated* horizontal applicability, because some may contend that our argument supposes a thesis of unmediated horizontal applicability. We disagree, but just in case we are wrong about this we explain why we consider the thesis of unmediated horizontal applicability to be, in any event, superior. We then explain why (primarily as a result of s.3(1) viewed in the light of s.1 and the incorporation of Article 6(1)), section 6(1) of the Act must be interpreted so as to provide for full horizontal effect. Finally, we defend this conclusion against objections to full horizontal effect relying on the Act’s focus on “public authorities”, the absence of Articles 1 and 13 from the Act’s provisions, the alleged boundaries of the common law, statements given by the Lord Chancellor prior to the passing of the Act, and the contention that the Act does not incorporate rights of the Convention as such, but only their associated values.

THE CONCEPT OF A RIGHT IN THE CONVENTION

Horizontal applicability v. horizontal effect

The Act incorporates the rights of the Convention to at least some extent. What incorporation (to any degree) achieves depends on what the rights are rights to and against whom they are held *conceptually*, for this determines what has been incorporated (to the degree involved).

It is important to distinguish a right being held conceptually against other individuals from an individual having the power to enforce that right against other individuals. We contend that, *conceptually*, the rights (and freedoms) of the Convention are held by individuals not only against the State, but also against all individuals capable of acting in ways that interfere with their abilities to enjoy their rights. In other words, the rights of the Convention *apply* horizontally as well as vertically. More precisely, to say that the rights are horizontally *applicable* is to say that the fact that individual A has these rights modifies the actions or powers of other individuals B. These modifications are (at least) negative limits on the actions or powers of B; and limits are placed on B’s actions or powers by A having a right “R” if, as a result of A having R, *all other things being equal*, there is something that B has no right to do or have.

²² Buxton, *supra*, n. 9, does not address the issue in these terms. However, it seems to us that his analysis rests either on failure to distinguish horizontal applicability and horizontal effect or (more probably) on the thesis that the rights of the Convention only apply vertically.

On the other hand, for a right to be horizontally *effective* in a particular context, it must be recognised as or by a cause of action between individuals in that context.

Horizontal applicability does not mean that the rights may be enforced at Strasbourg directly against individuals. This is not the case.²³ Where actions of individuals interfere with an individual's right and the State does not render this unlawful or provide an effective remedy, the most that the individual can do at Strasbourg is bring an action *against the State* for failing to protect the right.²⁴ However, this is simply because the Convention is an international instrument and the Strasbourg Court is not a domestic court, and does not imply that the rights are not horizontally applicable.

The rights of the Convention are horizontally applicable

Articles 8(2), 9(2), 10(2), and 11(2) provide that the rights or freedoms of Articles 8(1), 9(1), 10(1) and 11(1) are subject to limitation or restriction for (*inter alia*) the protection of the rights or freedoms of others.²⁵ This entails that *all* the rights of the Convention are horizontally applicable.

The reason why this is so is that confinement of such clauses to Articles 8–11 does not mean that only the provisions of Articles 8–11 apply horizontally. This is because the rights and freedoms that apply horizontally (set limits) in paragraph (2) of these Articles are those of the Convention that are capable of conflicting with the right in paragraph (1) of each Article. So, for example, in Article 8(2), the rights and freedoms that limit B's right under Article 8(1) to respect for family and private life are any of A's rights and freedoms (viz., A's rights under Articles 2, 3, 4, 5, 6, 7, etc.—including A's right under Article 8(1)) that are capable of conflicting with B's Article 8(1) right. The fact that Articles 2, 3, 4, 5, 6, 7, etc., do not have sub-provisions comparable to Articles 8(2) to 11(2) signifies only that the former Articles have (to varying degrees) more limited restrictions than the latter.

Unmediated and mediated horizontal applicability

This is plain sailing, and it is only when we ask why the rights apply horizontally that the waters become choppy.

On the thesis of "*unmediated* horizontal application", A having a right "R" limits the actions or powers of B *because*, where A has R, B thereby *directly* incurs (at least) a negative duty not to interfere with A doing or having what the right is a right to whenever B is capable of acting so as to interfere with A's enjoyment of the benefits of A's right.²⁶ In other words, R is (at least) a negative claim-right against B, which implies that B acts culpably by acting contrary to what that right entitles A to have or do.

On the thesis of "*mediated* horizontal application", A having a right limits the actions or powers of B *entirely* as a function of positive duties of the State to give

²³ See Articles 19 and 34, and, e.g., the ruling of the Commission in *X v. United Kingdom* (1978) 8 D.R. 103 at p. 104.

²⁴ See further below.

²⁵ This interpretation is confirmed explicitly in relation to Article 10 by the Strasbourg Court in *Groppera Radio AG and Others v. Switzerland* (1990) 12 E.H.R.R. 321, para. 70 at p. 342.

²⁶ "Ought" implies "can", so horizontal applicability as well as effect is restricted to interactions in which individuals are capable of interfering with other individuals' enjoyment of their rights. This is to be understood throughout.

effect to A's rights (i.e., of positive claim-rights of A against the State), these positive duties owing nothing to individuals having claim-rights against other individuals.²⁷ While B acting contrary to A's rights is something that the State must prevent, B does not owe any *duty to A* not to act in this way. Only the State owes *duties to A*, and any *duties in relation to A* that B might incur by virtue of the State's duties to A are duties *to the State* not duties to A. Consequently, if B acts contrary to A's rights, B is (strictly speaking) not *violating* A's rights, merely acting inconsistently with B's duties to the State. This thesis has two forms. On the *weak* version, the limits set by A having a right merely restrict B's powers to act and do not impose duties (even indirectly) on B. On the *strong* version, the limits set extend to the imposition of duties (indirectly) on B.

Does our position on horizontal effect require the thesis of unmediated horizontal applicability?

Our central contention is that, given the concept of a right in the Convention, the way in which the Act incorporates rights of the Convention entails that they are given full horizontal effect. It might be thought that to show this we will need to establish the thesis of unmediated horizontal applicability.

This is not so, *provided that* the thesis of mediated horizontal applicability holds in its strong form, which recognises that individuals have *duties in relation to* each other's rights. For, whether these duties are purely functions of positive claim-rights of individuals against the State or functions of the State's positive duties to defend the (at least) negative claim-rights of individuals against individuals, will make no difference to the duties of the State to protect individuals' rights against the actions of other individuals. The horizontal applicability of a right is, in essence, a regulative idea, which provides the substantive reason why the Convention makes States liable at Strasbourg for not enabling individuals to obtain redress against individuals *when effective protection of their rights so requires*, and also why the Convention requires horizontal effect to be given domestically when the rights are incorporated. Required domestic effect is subject to various conditions specified by the Convention; but these apply to identical effect whichever conceptual thesis explains the State's duties.²⁸

²⁷ Mediated and unmediated horizontal applicability (which concern the concept of a right in the Convention) must not be confused with the German jurisprudential doctrine of "*mittelbare* and *unmittelbare Drittwirkung*". Clapham, *Human Rights in the Private Sphere* (1993), pp. 180–181, defines "*mittelbare Drittwirkung*" as the view that "values and principles surrounding constitutional fundamental rights are to be considered by the courts when they are deciding private law cases" and "*unmittelbare Drittwirkung*" as the view that "the rights themselves can be applied directly against private bodies in the courts". Applied to the horizontal *effect* of the Convention rights under the Act, the former is close to the view of Phillipson, *supra*, n. 15, whereas the latter characterises the views of Wade 2000, *supra*, n. 8, Raphael, *supra*, n. 21, and ourselves.

²⁸ This is consistent with the Court's position (as regards Article 8 at least) that whether the State's negative or positive obligations are engaged, the applicable principles are similar, *viz.*, "regard must be had to the fair balance to be struck between the interests of the individual and of the community as a whole" (*Kroon and Others v. The Netherlands* (1994) 19 E.H.R.R. 263, para. 31 at p. 283).

It is worth noting, with regard to Articles 8-11, that when paragraph (2) considerations justify non-enjoyment of the paragraph (1) right, this is not because the right is negated, but because it is overridden. This is because the paragraph (2) considerations are justifications for interference with the paragraph (1) rights. Consequently, that the number of cases where the Strasbourg Court has declared that the State has positive obligations is small, and that these are subject to restrictive conditions, is irrelevant to the issue of horizontal applicability. The Strasbourg Court is only interested in whether, *in the particular set of circumstances*, the State is to be held responsible for

Therefore, we need to show only that the Convention conceives of individuals as incurring *duties in relation to* each other's rights. However, since we consider that the view that the thesis of unmediated horizontal applicability is the better one, we will indicate why, just in case we are wrong that we do not need to establish unmediated horizontal applicability.

Under the Convention, individuals have at least duties in relation to each other, though the better view is that individuals have duties to each other

First, according to Article 17,

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Some commentators suggest that this imposes a duty on individuals to comply with the rights of the Convention.²⁹ However, "X has no right to do y" does not entail "X has a duty not to do y", for it is compatible with "X merely has no power to do y". Thus, it might seem that Article 17 establishes no more than that individuals are disabled from using their own rights to justify actions aimed at limiting others' rights to a greater extent than is provided for in the Convention, which is how the matter is treated at Strasbourg.³⁰

However, account must be taken of the fact that Article 17 refers to a trade-off between the rights of individuals to act in various ways and the rights of others that might thereby be affected adversely, asserting that this trade-off is governed by provisions of the Convention. These provisions are contained, most notably, in Articles 1, 13, 15, 16, 18, 8(2), 9(2), 10(2), 11(2), and 14—though the first five do not have any direct application to individuals. Hence, to understand what Article 17 implies, account must be taken of these provisions. We submit that Article 10(2) is decisive. This Article states that "since" the exercise of the freedoms involved in Article 10(1) "carries with it duties and responsibilities" it is subject to

such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, *for the protection of the reputation or rights of others* [our emphases], for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The duties that justify restriction of the exercise of the freedoms granted by Article 10(1) are duties of those who hold the right granted by Article 10(1) not to threaten or undermine the values to be protected by Article 10(2) (*viz.*, territorial integrity, public safety, public order, etc.) Since the rights of others is one of these values, Article

the fact that an individual cannot exercise his or her right or has had that exercise interfered with. Thus, it will only declare a positive obligation of the State when this is so *all things having being considered*, taking into account the margin of appreciation allowed to the States to assess such matters. It is not directly concerned with the matter in theory, with whether there is an obligation *all things being equal*.

²⁹ See, e.g., Drzemczewski, *European Human Rights Convention in Domestic Law* (1983), p. 220.

³⁰ See, e.g., *Lawless v. Ireland* (No. 3) (1961) 1 E.H.R.R. 15, para. 6 at p. 21. However, given that Strasbourg cannot enforce rights directly against individuals, it is difficult to see how else it could apply Article 17. Thus, Strasbourg practice cannot be taken to exhaust the *meaning* of Article 17.

10(2) states that those who hold the right under Article 10(1) have duties not to act contrary to the rights of others.³¹

Granted, Articles 8(2), 9(2) and 11(2) do not similarly specify that the rights of others impose duties on individuals that restrict the exercise of individuals' freedoms in relation to the rights granted by Articles 8(1), 9(1) and 11(1). However, to suppose that these rights are not also subject to limitation because of duties imposed on individuals not to act contrary to the rights of others, implies that any conflict between the right granted by Article 10(1) and one of these other rights must always be resolved in favour of the other right, which flies in the face of Strasbourg jurisprudence on such conflicts.³²

Secondly, there is the settled Strasbourg case law that States owe positive duties to individuals.³³ As we understand this, the Court and Commission recognise positive duties on the basis of

- (i) Article 1 of the Convention, which requires States to “secure to everyone within their jurisdiction the rights and freedoms” granted by Articles 2–18 of the Convention;³⁴
- (ii) the principle of effectiveness applied in many judgments of the Strasbourg organs,³⁵ which may be derived from the Preamble to the Convention, according to which the Convention “aims at securing the universal and effective recognition and observance of the rights therein declared”; and
- (iii) the Strasbourg Court’s view that to secure the rights effectively means to provide that rights holders are able to do or have what the right is a right to, given that other individuals are capable of acting in ways that will interfere with or prevent this.³⁶

On occasion, the Court and Commission have indicated that the State has a positive duty to impose legal duties on individuals to act in conformity with the rights

³¹ The Strasbourg Court places specific emphasis on this aspect of Article 10(2) where the freedom of the press is involved (so as to minimise the duties; see, e.g., *Lingens v. Austria* (1986) 8 E.H.R.R. 407, paras. 41–47 at pp. 418–421), when the person exercising the freedom of expression has a special status, such as being a serviceman (see, e.g., *Engel and Others v. The Netherlands (No. 1)* (1976) 1 E.H.R.R. 647, para. 57 at p. 669), and where the restriction is for the protection of morals (see, e.g., *Otto-Preminger Institute v. Austria* (1994) 19 E.H.R.R. 34, paras. 49–50 at pp. 57–58) (in principle, to reinforce or expand the duties). This does not, however, affect the general meaning of Article 10(2).

³² The Court holds that exceptions to the freedom of expression “must be narrowly interpreted and the necessity for any restrictions must be convincingly established” (*Observer and Guardian v. United Kingdom* (1991) 14 E.H.R.R. 153, para. 59 at p. 191).

That Article 17 implies at least duties in relation to others is supported by the view of the Commission in *Glimmerveen and Hagenbeek v. The Netherlands* (1979) 4 E.H.R.R. 260, para. 16 at pp. 266–267, that “the duties and responsibilities . . . [of Article 10(2)] . . . find an even stronger expression in a more general provision, namely Article 17”.

³³ Re Article 3, see, e.g., *A v. United Kingdom* (1998) 27 E.H.R.R. 611, para. 22 at pp. 629–630. Re Article 8, see, e.g., *X and Y v. The Netherlands*, (1985) 8 E.H.R.R. 235, para. 23 at pp. 239–240. Re Article 9 (via Article 10(2)), see *Otto-Preminger Institute v. Austria*, *supra*, n. 31, para. 47–48 at p. 56. Re Article 10, see, e.g., *X Ltd and Y v. United Kingdom* (1982) 28 D.R. 77, para. 11 at p. 82. Re Article 11, see, e.g., *Plattform “Ärzte für das Leben”* (1988) 13 E.H.R.R. 204, para. 32 at p. 210.

³⁴ See, e.g., *A v. United Kingdom*, *supra*, n. 33, para. 22 at p. 629.

³⁵ See van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998), pp. 74–76.

³⁶ See, e.g., *Airey v. Ireland* (1979) 2 E.H.R.R. 305, paras. 32–33 at p. 319.

of others.³⁷ Consequently, individuals have at least *duties in relation to* the rights of others. Indeed, insofar as reference is made to remedies for individuals “breaching” or “violating” the rights of others,³⁸ unless this is simply loose talk,³⁹ it implies the thesis of unmediated horizontal applicability.⁴⁰

Also implying unmediated horizontal applicability, the Commission has denied a complainant his Article 4(2) right not to perform forced or compulsory labour on the ground that he was under an obligation (as a lawyer) to respect the rights of others under Article 6(3)(c) (by providing legal assistance to them).⁴¹

Thirdly, it is arguable that Articles 8(2) and 13 both imply that individuals have at least duties in relation to each other. Article 8(2) states that there “shall be no interference by a public authority with the exercise of” the Article 8(1) right except under specified conditions. If it is supposed that the Convention only addresses public authorities then this seems redundant. According to Article 13,

Everyone whose rights and freedoms as set forth in this Convention *are violated* [our emphasis] shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Like Article 8(2), unless individuals can violate the rights of others, the specific reference to persons acting in an official capacity looks redundant. Furthermore, as we earlier intimated, unless this is loose talk, “violation” implies unmediated horizontal applicability.

Fourthly, Article 7(2) provides that the Article 7(1) right not to be held guilty of what was not a criminal offence under national or international law at the time, shall not prejudice the trial or punishment of any person for any act or omission which, at the time when it was committed, was criminal according to general principles of law recognised by civilised nations.

At least insofar as what is envisaged here (e.g., genocide) involves human rights violations, this implies that the Convention regards individuals as culpable for those violations, which implies duties to others.

Fifthly, attention to Article 14 read with the Preamble to the Convention provides good reason to think that the Convention operates with the thesis of unmediated horizontal applicability. The Preamble states that the aim of the Convention is to secure “universal” recognition of the rights of the Convention. By itself, this might be thought to be ambivalent, depending upon whether “everyone” covers “all individuals and groups as well as States” or only “all States, including their public authorities”. However, the Preamble also states that the Convention is to be viewed as

first steps for the collective enforcement of certain of the rights stated in the Universal Declaration [of Human Rights 1948].

³⁷ E.g., *X and Y v. Netherlands*, *supra*, n. 33, which concerns a complaint by a father in relation to sexual abuse of his mentally handicapped daughter by another person.

³⁸ See, e.g., *A v. United Kingdom*, *supra* n. 33, para. 22 at 629–630.

³⁹ Which it can hardly be when the requirement is to make actions criminal offences (see, *X and Y v. Netherlands*, *supra*, n. 33, para. 27 at 241). This point, arguably, conflicts with our claim that domestic horizontal effect is unaffected by whether the rights of the Convention apply horizontally in a mediated or unmediated way. However, to the extent that this is so, Strasbourg jurisprudence, by the same token, supports the thesis of unmediated horizontal applicability.

⁴⁰ Strictly speaking, a person who does not have a duty directly correlative to another’s right cannot breach this right, but can only interfere with the right-holder’s exercise of the right (with as much culpability as an earthquake when it destroys one’s property). When such interference is said to warrant a criminal penalty, the implication that the interferer has violated a duty owed directly to the victim is strong. The thesis of mediated horizontal applicability requires that the interferer has not acted wrongly when acting contrary to the right.

⁴¹ See application *X and Y v. Germany* (1978) 10 D.R. 224 at p. 230.

If this is taken seriously, and the interpretation of the Convention is subject to the criteria of the Vienna Convention on the Law of Treaties 1969⁴² (which provides that the terms of a treaty are to be interpreted “in their context and in the light of its objects and purpose”⁴³ and the preamble to a treaty is part of that context⁴⁴), then the way in which the Universal Declaration conceives of its rights is relevant. According to the Preamble of the Declaration, that instrument is

a common standard for all peoples and nations, to the end that every individual and every organ of society . . . shall strive . . . to promote respect for these rights and freedoms and . . . to secure their universal and effective recognition and observance. . . . among the peoples of the Member States themselves . . .

and Article 1 of the Declaration asserts,

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and *should act towards one another* in a spirit of brotherhood.⁴⁵

This implies that individuals have not only negative but positive claim-rights against individuals!⁴⁶

Against this backcloth, Article 14 of the Convention declares,

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with national minority, property, birth or other status.

Article 14 has two aspects. First, it may be viewed as a “primary” or “substantive” right (albeit a derivative one), alongside the rights enunciated in Articles 2–12. As such, it grants a right not to be discriminated against when enjoying the other rights of the Convention. However, if “other status” means “any other circumstances”, then Article 14 also says something *about* the other rights and is, as such, a “meta-right”. It then declares that the rights of the Convention are not possessed by virtue of one’s personal properties or social/interpersonal relations (including recognition or enforcement of the rights of the Convention in these relations), but simply by virtue of being human. It seems to follow that the rights of the Convention are, in concept, claim-rights possessed by all humans against all capable of respecting them.

This reading is supported by linking the Convention to the Declaration. Indeed, it is consonant with an appreciation of the wider origins of both the Declaration and the Convention. Davidson gets to the root of the matter when he says that “foremost” among the “recurring themes or concepts in human rights law”, which emanated from the American and French revolutions, is that human rights “are by nature inherent,

⁴² See, e.g., *Golder v. United Kingdom* (1975) 1 E.H.R.R. 524, para. 29 at p. 532.

⁴³ Article 31(1).

⁴⁴ See Article 31(2).

⁴⁵ Our emphasis.

⁴⁶ The International Covenant on Civil and Political Rights (ICCPR) (1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) are unambiguous on this point, asserting in their Preambles that

the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.

universal and inalienable: they belong to individuals simply because they are human beings and not because they are the subjects of a state's law".⁴⁷

To this it might possibly be objected that because the Convention is only taking "first steps" for the enforcement of some of the rights of the Declaration, it need not operate with the same concept of a right as the Declaration. However, to set out to implement "a right" according to a different concept from that employed by the Declaration is not to set out to implement a right of the Declaration at all.

OUR BASIC ARGUMENT FOR FULL HORIZONTAL EFFECT

Section 3(1) of the Act requires *all legislation*—by implication, *including the Act itself*—to be interpreted as compatible with the Convention rights *if it is possible to do so*.⁴⁸ The courts are interpreting the word "possible" extremely widely.⁴⁹ If there are two interpretations, one of which is (by the standard rules of statutory interpretation) very much more plausible than the other but not *certainly* correct, the other of which is highly implausible but nonetheless possible, section 3(1) requires interpretation in terms of the latter if this is necessary for legislation to be construed as compatible with the Convention rights. Consequently, when addressing ambiguity or legislative silence, the courts must seek to maximise the compatibility of any legislation (including the Act) with the Convention rights.

Section 1(1) defines the "Convention rights", which are "to be read with Articles 16 to 18 of the Convention", and section 1(2) states that the provisions listed in section 1(1) "are to have effect for the purposes of this Act, subject to any designated derogation or reservation (as to which see ss.14 and 15)". Since the Convention rights are to *have effect* for the purposes of the Act, any of the Act's purposes that require compatibility with the Convention rights must require effect to be given to the Convention rights. Thus, the Act's provisions must, subject only to possibility, be interpreted to give effect to the Convention rights.

The long title of the Act says that it is "[a]n Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights". This implies that what is meant by interpreting legislation to be compatible with the Convention rights is interpretation that gives effect to the rights of the Convention that are incorporated by the Act.

Now, since the rights of the Convention are, by their concept, horizontally applicable, it follows directly that to give effect to them is to make them horizontally effective. Since section 6(1) renders it unlawful for a court to act in a way that is incompatible with the Convention rights, it follows inescapably that the courts must *in all cases* before them give horizontal effect to the Convention rights, *unless* (per section 6(2)) this is prevented by primary legislation (including the Act itself) that cannot be interpreted in a way that renders it compatible with the Convention rights.⁵⁰ Thus, contrary to those who hold that section 6(1) must be interpreted narrowly so as

⁴⁷ Davidson, *Human Rights* (1993), p. 5.

As Article 1 of the Declaration makes clear, the quality that grounds possession of the rights is human dignity.

⁴⁸ See *R v. Lambert* [2001] UKHL 37; [2001] 3 W.L.R. 206. In this case, Lord Hope of Craighead and Lord Clyde, at least, accept the self-referring application of s.3(1).

⁴⁹ Taken literally, it means any conceivable or arguable meaning. (See Lester (1999) 20 Stat. L.R. 218, especially p. 223; and Hope (1999) 20 Stat. L.R. 185, at p. 187. See also *R v. A* [2001] UKHL 25, [2001] 2 W.L.R. 1546; and *R v. Lambert* [2001] UKHL 37; [2001] 3 W.L.R. 206.)

⁵⁰ "Primary legislation" is defined extremely widely in section 22(1), so as to include the elevation of Orders in Council to the status of primary legislation.

only to impose duties on the courts with regard to their own procedure,⁵¹ section 6(1) must *prima facie* be interpreted broadly to impose an obligation on the courts to give effect to the rights in actions between individuals.

Furthermore, Article 6(1) of the Convention, according to which,

In the determination of his civil rights and obligations . . . , everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal established by law . . .

is incorporated by the Act. Strasbourg case law has established that civil rights include all rights of individuals against individuals⁵² recognised by domestic law,⁵³ and that the right to a fair and public hearing encompasses the right to access to a court,⁵⁴ which must make a determination.⁵⁵ Given that the rights of the Convention apply horizontally, the Convention rights (Articles 2–12 and 14, etc.) are, by incorporation, made civil rights for the purposes of Article 6(1). Since section 1(2) of the Act requires effect to be given to the incorporated rights, if the courts are to act compatibly with the Convention rights then they must give horizontal effect to these rights. Consequently, if the Act is compatible with Article 6(1) (and there is no good reason to think it is not), the Act itself provides a cause of action for all the Convention rights.⁵⁶

This argument is best elaborated by responding to three arguments that have been presented against broad interpretation of section 6(1). The first argument holds that broad interpretation effectively undercuts the Act’s provisions about “public authorities”. According to the second argument, non-incorporation of Article 13 removes the feasibility of full horizontal effect. The third argument runs parallel to the second and points to non-incorporation of Article 1.

It should be clear from the outset that, given the effect that section 3(1) has on the interpretation of the Act itself, these objections can only succeed if they show that it is *impossible* to interpret section 6(1) broadly.⁵⁷ In addition, section 3(1) also provides a fail-safe if we are wrong that our argument does not require unmediated horizontal applicability. If the Convention does not actually compel the thesis of unmediated horizontal applicability, it is certainly consistent with it. Now, if we are wrong about the need for unmediated applicability, this implies that unmediated applicability

⁵¹ See Kentridge, *supra*, n. 10, at p. 70.

⁵² As we defined “a right held against individuals”, this does not discriminate between mediated and unmediated horizontal applicability.

⁵³ See *König v. Germany* (1978) 2 E.H.R.R. 170, para. 90 at p. 193 and para. 94 at p. 195.

⁵⁴ See *Golder v. United Kingdom*, *supra* n. 42, para. 36 at p. 536.

⁵⁵ See, e.g., *Sporrong and Lönnroth v. Sweden* (1982) 5 E.H.R.R. 35, para. 87 at p. 57.

⁵⁶ Recently, Lord Nicholls of Birkenhead, giving the judgment of the House of Lords in *Re S (children: care plan)* [2002] UKHL 10, para 71 stated,

Although a right guaranteed by article 8 is not *in itself* a civil right within the meaning of article 6(1), the Human Rights Act has now transformed the position in this country. By virtue of the Human Rights Act article 8 rights are now part of the civil rights of parents and children for the purposes of article 6(1). This is because now, under section 6 of the Act, it is unlawful for a public authority to act inconsistently with article 8.

Since, as he also noted, Strasbourg case law interprets “civil rights” “as directed essentially at rights which English law characterises as private law rights” (*ibid.*, para 73), is he not, at the very least, logically committed to our conclusion?

⁵⁷ It should be noted that the orthodox view that s.3(1) means that all legislation is to be interpreted as horizontally effective if this is possible, presupposes that the rights are, in concept, horizontally applicable, because requiring legislation to be interpreted as giving effect to the rights will not by itself entail horizontal effect if the rights are by their nature only vertically applicable.

protects more than mediated applicability. But the rights are fundamental. As such, we must exercise precaution to guard against denying individuals the degree of protection that they are owed. It follows that, if it is unclear whether unmediated or mediated applicability is the correct thesis, we must assume unmediated applicability. However, with section 3(1) in play this must be assumed not merely where it is unclear which of the competing theses is correct, but on condition that the thesis of unmediated applicability is merely possible.⁵⁸

Argument 1: Broad interpretation of section 6(1) is ruled out by those provisions drafted in terms of “public authorities”

Sections 6(1), 7(1), and 8(1) are drafted in terms of “public authorities”. At first sight, this suggests that the Act has little or no effect on private actions not involving a public authority. Phillipson, for example, argues that a broad interpretation of the section 6(1) obligation

would be startling indeed. It would mean that the apparent basic scheme of the HRA—to bind public authorities only and to provide procedures and remedies for this [sic.] purposes—would be radically undercut. The carefully worded definition of “public authority” in section 6 would become largely redundant and the HRA would effectively bind *both* public and private bodies to follow the Convention but—with no apparent justification for the distinction—make provision for proceedings and remedies in relation to the former only.⁵⁹

However, when the Act is read as whole, an alternative explanation appears. For a start, the Act prevents such reliance on sections 7 and 8, because section 11 states,

A person’s reliance on a Convention right does not restrict . . . (b) his right to make any claim or bring any proceeding which he could make or bring apart from sections 7 to 9.

Thus, the fact that these sections are drafted in terms of “public authorities” cannot affect any legal action arising as a result of the court’s obligation under section 6(1).

Moreover, the section 6(1) obligation can be read as requiring the courts to render the law compatible with the Convention rights *without ignoring the focus on “public authorities”*. The Act is merely more specific with regard to actions and remedies

⁵⁸ In this article, we pay no attention to the horizontal status of the rights in other countries that have incorporated the Convention. Because different countries incorporate the Convention with different qualifications not only on the legal force of the rights but also on their horizontal effect, it is not clear what can be learned from their doctrines (which, in any event, are not to be taken as logically sound by definition) without a degree of analysis that would require a book. As far as the horizontal applicability of the rights of the Convention is concerned, this is essentially a matter of what the Convention states. Although this is open to interpretation (including by the Member States), the only legally authoritative interpretation is that of the Strasbourg Court, so nothing of significance follows if Member States take a different view from our own. Our argument is, thus, confined to the particular features of the Act’s incorporation.

⁵⁹ Phillipson, *supra*, n. 15, at p. 828.

See also Keene L.J. in *Douglas v. Hello* [2001] Q.B. 967 at p. 1011–1012.

Whether this [s.6] extends to creating a new cause of action between private persons and bodies is more controversial, since to do so would appear to circumvent the restrictions on proceedings contained in section 7(1) of the Act and on remedies in section 8(1).

available against public authorities.⁶⁰ Interpreted in this way, judges are under a duty to act compatibly with the Convention rights, but have greater discretion as to the means of complying with this obligation in cases not involving public authorities. This is consistent with the historical reluctance of the courts to grant substantive remedies in judicial review actions against public authorities.

It must be emphasised that the section 6(1) obligation does not render the court an additional defendant in disputes between private parties. This would invite problems with regard to Article 6 of the Convention (as the right to a fair trial includes the right to a hearing by an impartial tribunal), the well established principle that judicial review is not available against the High Court, and the frequent absence of a prior court decision to appeal against (as an appeal must rest against some prior decision).⁶¹ Thus, while a court only acts lawfully if it acts consistently with the Convention rights, it is not itself the defendant in an action to enforce those rights.

According to Bamforth, this is “difficult to sustain”.⁶² However, is there not an analogy with the doctrine of precedent, which imposes a duty on lower courts to follow the decisions of higher courts (and in the case of the Court of Appeal, to follow its own decisions)? The doctrine of precedent does not render the court a potential defendant, and the failure of a lower court to abide by the doctrine does not give rise to an action for judicial review of the court’s decision (though it does provide grounds for appeal). Thus, unless the doctrine of precedent is objectionable on this ground, the section 6(1) obligation cannot be dismissed on the basis that “[t]he Act . . . makes no clear sanction available against a court for failure to act in accordance with the Convention rights under section 6”.⁶³

However, Bamforth adds,

Section 9 stipulates that “proceedings” may be brought in respect of a judicial violation of section 6 by way of appeal, judicial review, or in such other forum as may be prescribed by rules. However, section 9(2) makes clear that this does not affect any rule of law which prevents a court from being the subject of judicial review.⁶⁴

⁶⁰ E.g., damages that may be awarded against a public authority are limited by the principles of the Strasbourg Court (s.8(5), and see also the definition of “damages” in s.(6)). More strikingly (see s.7(5)), proceedings against a public authority must be brought within one year of the date on which the act complained of took place (subject to the court’s discretion to extend this period and any rule imposing a stricter period). A court decision on a dispute between private parties is not affected by these provisions.

⁶¹ See, e.g., Buxton, *supra*, n. 9, at p. 57; Bamforth, *supra*, n. 12, at p. 39; and Phillipson (1999) 62 M.L.R. 824, especially 828–829. The related argument that the s.6 obligation is subject to a bar on the creation of new causes of action is addressed below.

⁶² Bamforth, *supra* n. 12, p. 39.

⁶³ Bamforth, *supra*, n. 12, at pp. 38–39.

See also Bamforth, *supra*, n. 11, especially pp. 164–166; and Buxton, *supra*, n. 9, at 57. In any event, s.9(3) implies that, in certain circumstances, sanctions are available against the court, in the sense that the Crown could be liable in damages for the act of a court. This section states,

In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention [which covers the arrest or detention of a person in contravention of the Convention].

It follows that (a) damages in respect of a judicial act done in good faith may be awarded under Article 5(5); and (b) there is no limit on the damages that may be awarded in respect of judicial acts done in bad faith.

⁶⁴ Bamforth, *supra*, n. 12, at p. 39.

But this assumes that the section 6(1) obligation cannot be relied on unless the court is made an additional defendant in disputes between private parties. The broad reading of section 6(1) is, however, perfectly compatible with a careful reading of section 9. Section 9(1) refers to “[p]roceedings under section 7(1)(a) in respect of a judicial act,” and section 7(1) states,

A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

- (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
- (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.

It follows that a litigant can rely on sections 6(1) and section 7(1)(b) without invoking section 9. Just as absence of a clear sanction does not remove a lower court’s obligation to follow the doctrine of precedent, it does not remove the court’s section 6(1) obligation to give effect to the Convention rights.⁶⁵

Argument 2: Broad interpretation of section 6(1) is ruled out by the failure to include Article 13 in the Act

Article 13, according to which everyone has a right to an effective remedy before a national authority, is not a Convention provision listed in Schedule 1 of the Act.

Some commentators consider that this absence limits any obligation imposed on the court by section 6(1).⁶⁶ This is because, under its broad interpretation, section 6(1) gives more effect to Article 13 than does section 8(1) of the Act,⁶⁷ which asserts,

In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate

and section 8(1) exhausts the remedies created by the Act. Furthermore, during the Parliamentary debate,⁶⁸ the Lord Chancellor stated that if Article 13 was explicitly listed “[t]he courts would be bound to ask themselves what was intended beyond the existing scheme of remedies set out in the Bill.”⁶⁹ Moreover, according to Phillipson, the

transmutation of Article 13 into a section dealing only with public authorities [i.e., s.8], and the removal of the wording pointing to its availability even in cases of private infringements thus make it harder to sustain the argument that the courts have a duty to

⁶⁵ A related argument is raised by Phillipson’s question “how does the individual get his case to court in the first place?”: Phillipson, *supra*, n. 15, at p. 828. This question, which implies that the s.6 obligation cannot give rise to new causes of action, is addressed below.

⁶⁶ See, e.g., Leigh, *supra*, n. 20, at p. 80, n. 99.

⁶⁷ It is worth noting that the view that Article 13 is broader than s.8(1) supposes that Article 13 implies unmediated horizontal applicability or that what it means to say that a right is violated is merely that the right cannot be exercised as a result of actions of another; for if only public authorities can violate a right Article 13 is no broader than s.8(1).

⁶⁸ See below for analysis of the legal relevance of parliamentary statements.

⁶⁹ 583 H.L. Deb. 475 (18 November 1997).

try and offer redress for private rights violations through manipulating existing causes of action.⁷⁰

However, a careful reading of section 1 reveals that the Act actually requires domestic effect to be equivalent to that required by Article 13.⁷¹

First, according to section 1(1), the Convention rights must be “read with” Article 17, which by denying the State any right to use the Convention to destroy or limit the rights beyond what the Convention permits, implies that compliance with the rights of the Convention (of which the Convention rights are a subset) requires compliance with the provisions of the Convention. Article 13 is a provision of the Convention. Thus, action compatible with the Convention rights requires compliance with the requirements of Article 13.⁷²

To this it might be objected that Article 17 can only require Article 13 to be complied with if it is interpreted to mean that the State acts unlawfully if it gives less effect to the Convention rights than the Convention prescribes. However, if this is so, then the Act is self-contradictory, because section 3(2) specifies that incompatibility of legislation with the Convention rights does not affect its validity (in consequence of which section 4(6) specifies that a declaration of incompatibility by a court does not affect the validity of the incompatible legislation).

In response, it must be emphasised that we are not using Article 17 to claim that Article 13 is incorporated *as such*, which would require that an action for breach of Article 13 could be taken under the Act.⁷³ While we do claim that, by reference to Article 17, what Article 13 requires is made a requirement of *lawful* action under the Act; this is to claim only that it is made a requirement of acting compatibly with the Convention rights.⁷⁴ Since the requirement to act compatibly with the Convention rights per section 3(1) is subject to section 3(2), so too is the requirement to give effect to Article 17. Hence, section 3(2) (or s.4(6)) is not contradicted.⁷⁵

⁷⁰ Phillipson, *supra*, n. 15, at p. 838.

⁷¹ As we pointed out above, s.11(b) prevents s.8(1) being used to remove or limit actions that would otherwise be available. Thus, once it is established that Article 13 is given effect to indirectly, s.8(1) cannot be taken to prevent domestic effect being given to the Convention rights in terms of the provisions of Article 13.

⁷² This interpretation of Article 17 is entirely consistent with Strasbourg jurisprudence. As Cameron and Eriksson, *An Introduction to the European Convention on Human Rights* (1995) at p 111, state
The Convention organs have taken the view that, where they rule that a substantive right has not been violated, Article 17 has not been violated either, whereas where a violation has been found, it is unnecessary to proceed to consider Article 17.

This extends to the relationship between Article 13 and Article 17 (see the Court’s judgment of 10 May 2001, *Cyprus v. Turkey*, Application No. 25781/94, para. 206).

⁷³ We do claim, however, that (since there is no legislation that prohibits what Article 13 requires from being given effect) an action for not giving effect to one or more of Articles 2–12 and 14 to the extent required by Article 13 is provided by the provision that Articles 2–12 and 14 be read with Article 17 (which is equivalent to an action for violation of section 6(1) in its broad interpretation).

⁷⁴ This is parallel to Strasbourg case law, according to which Article 13 cannot be invoked independently from, but only in conjunction with, one or more of the rights of the Convention (see van Dijk and van Hoof, *supra*, n. 35, at p. 697).

⁷⁵ It is worth noting that, even if Article 17 were incorporated *as such*, were it not for s.3(2), there would be no contradiction with s.4(6). This is because s.4(6) could then be interpreted as saying merely that the courts have no jurisdiction to declare incompatible legislation to be invalid even though it is.

Now, according to Phillipson, the continuing force of incompatible primary legislation means the Convention rights do not have full horizontal effect.⁷⁶ For the rights to have full horizontal effect they need to be incorporated into domestic law as constitutional norms, violation of which would render even legislation void or invalid.

Phillipson, however, fails to distinguish two levels of “incorporation”. That the Convention rights are, by section 3(2), not incorporated with the force of constitutional norms (i.e., they do not take priority over all other domestic law, which is a matter of the legal force or weight with which the rights are given domestic effect), has no bearing on who has duties under the Act (which is a matter of what domestic effect is given to). All that follows from our analysis is that full horizontal effect is not given contrary to primary legislation.

Second, it should not be forgotten that Article 6(1) is incorporated. Given horizontal applicability, we have argued that this requires access to a court/tribunal in cases between individuals involving the Convention rights. Since section 1(2) requires effect to be given to the Convention rights, it follows that if the courts are to act compatibly with the Convention rights (per s.6(1)) then they must give full horizontal effect to these rights. As far as horizontal effect is concerned, the result is at least equivalent to what would be achieved by actual incorporation of Article 13.

Argument 3: Broad interpretation of section 6(1) is ruled out by failure to incorporate Article 1

Article 1 of the Convention (“Obligation to respect human rights”), which precedes Section I of the Convention (“Rights and Freedoms”), asserts

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

According to Phillipson, the Act has no equivalent of Article 1;

that is, it has no section which states that the main *purpose* of the HRA is to “secure” for those within the jurisdiction the rights and freedoms set out in the Convention.⁷⁷

and this weakens the State’s positive obligations.⁷⁸

Phillipson is mistaken. While Article 1 is not included in Schedule 1, section 1(2) requires the Convention rights to have effect, which means (in Convention jurisprudence) that they are to be secured to everyone.⁷⁹

In addition, Article 1 is a provision that specifies the effect that is to be given to the rights of the Convention. Since Article 17, as we have already seen, implies that it is a condition of acting compatibly with the Convention rights that effect be given to these rights to the extent required *by the Convention*, reading the Convention rights with Article 17 requires action compatible with the Convention rights to give effect to them in terms of Article 1.

⁷⁶ Phillipson, *supra*, n. 15, at p. 835.

⁷⁷ *ibid.*, p. 835.

⁷⁸ See *ibid.*, pp. 835–836. See also Buxton, *supra*, n. 9, at p. 54. Buxton mistakenly refers to Article 1 as a right of the Convention.

⁷⁹ See above.

The section 6(1) obligation, precedent, and the boundaries of the common law

Although section 6(1) imposes a duty on the courts to give effect to the Convention rights, this obligation is constrained by limitations on the court's powers.

According to Hunt, the section 6(1) obligation is constrained by a bar on the creation of new causes of action.⁸⁰ Accepting that the Act imposes “an unequivocal duty to act compatibly with Convention rights”, he holds its horizontal effect to be limited by the absence of any references to private individuals or organisations in the Act, and the need to distinguish between “legitimate judicial development of the common law and illegitimate judicial ‘legislation’”.⁸¹ Accordingly,

Law which already exists and governs private relationships must be interpreted, applied and if necessary developed so as to achieve compatibility with the Convention. But where no cause of action exists, and there is therefore no law to apply, the courts cannot invent new causes of action, as that would be to embrace full horizontality which has clearly been precluded by Parliament.⁸²

To this, Raphael has responded as follows.

[I]t is well established that the courts have the power to create wholly new causes of action, where no contrary negative precedent exists. If so, refusing to create a new cause of action when you have the power to do so would amount to “acting incompatibly” just as easily as would refusing to develop the law incrementally when that would be appropriate.⁸³

The essence of Hunt's claim is that the courts legislate if they give a cause of action without existing law, and that the courts may not legislate. Is Raphael saying that the courts, in fact, have the power to legislate? Or is he suggesting that “to create a new cause of action” where no negative precedent exists is not to legislate? We are not sure. However, it is clear that the courts have long had the power to recognise a cause of action “on the facts” where no such action is *explicitly* recognised in either statute or the common law. This power was even recognised alongside the procedural inflexibility of the long since abolished Forms of Action (writs). Although strict, and often resulting in the rejection of claims for trivial procedural defects, the old mechanism (whereby the plaintiff had to select the appropriate writ) still recognised the possibility of an action “on the case”, where the court effectively relied on the facts stated to create a new writ. The abolition of the Forms of Action⁸⁴ only removed the need to issue specific named writs; it did not remove this power from the courts.

⁸⁰ Hunt, *supra*, n. 19, at p. 442.

See also Ewing (1999) 62 M.L.R. 79, at p. 89; Singh, *supra*, n. 20, at p. 725; Clayton and Tomlinson, *supra*, n. 17, at p. 236–237; and Butler-Sloss P. in *Venables v. News Group Newspapers* [2001] 2 W.L.R. 1038 at p. 1049.

⁸¹ Hunt, *supra*, n. 49, at p. 441.

Markesinis (1999) 115 L.Q.R. 47, at p. 73, also relies on a distinction between “development” of the common law and “judicial legislation,” but declines to offer a view on the effect of this distinction.

⁸² Hunt 1998, 442. This follows the dissenting view of Kriegler J. in *Du Plessis v. De Klerk* 1996 (3) S.A. 850 on the effect of the South African Interim Constitution of 1993 on private legal relations.

⁸³ Raphael, *supra*, n. 21, at p. 504.

⁸⁴ By the Common Law Procedure Act 1852 and the Judicature Acts 1873–1875.

For example, in *Thomas v. National Union of Mine Workers*,⁸⁵ Scott J. held that unreasonable harassment of the right to use the highway for the purpose of going to work was tortious, despite not fitting into established tortious actions.

In our view, in cases such as *Thomas* and *Donoghue v. Stevenson*,⁸⁶ whether or not we say that the courts were creating new causes of action, they were not legislating. They were finding principles embedded in the existing law and applying these principles to settle the case. On such a basis, independent of the Act, the common law could probably give effect to the Convention rights, such as the Article 8 right to private and family life, which is arguably the Convention right given the least protection in domestic law.⁸⁷

However, if our basic argument is sound, then the courts have another basis for providing a cause of action for an invasion of privacy. The Act itself creates a legislative basis for this cause of action. As Cooper maintains, the Act

in effect, created a de facto common law cause of action, or a constitutional tort, and . . . to argue otherwise is an unsustainable fiction.⁸⁸

While it might on occasion be appropriate, for example, for the courts to enforce privacy on the basis of breach of confidence, or on general principles embedded in the law apart from the Act, this will not necessarily be the case. To the extent that breach of confidence does involve violation of privacy, the courts are required to enforce privacy via this route when it is invoked. Where, on the other hand it does not, there is no point in the courts trying to push square pegs into round holes.⁸⁹ The proper action is simply on the Act itself. The bottom line is that we need not disagree with Hunt *in principle*. He errs by failing to see that, in the light of the Act, there is no gap for the courts to fill by unauthorised legislative activity.

Another arguable limitation on the powers of the courts considered by Raphael is that the section 6(1) obligation is constrained by existing negative precedents that are inconsistent with the Convention rights,⁹⁰ because “[p]recedent is a rule of law that limits judicial power and is not merely a prudential influence on judicial practice”.⁹¹

⁸⁵ [1986] Ch. 20. Other examples could be added to those given by Raphael, *supra*, n. 21, at p. 504—*Wilkinson v. Downton* [1897] 2 Q.B. 57 is an obvious one.

⁸⁶ [1932] A.C. 562.

⁸⁷ Arguably, without the Act, such a development would have to rest with the House of Lords, as the Court of Appeal has recently re-affirmed the view there is no common law tort of invasion of privacy: *Home Office v. Wainwright* [2001] EWCA Civ 2081, *per* Mummery L.J. at para.39, *per* Buxton L.J. at para. 96.

⁸⁸ Quoted in Raphael, *supra*, n. 21, at p. 505.

⁸⁹ Traditionally, a relationship of confidence or trust is an essential element in a breach of confidence action. This is not necessary for a breach of privacy. Hence, if the law of confidence is to be used to protect privacy compatibly with Article 8, it will be necessary to stretch the notion of a confidential relationship by imputing it in circumstances where this was not previously thought appropriate. (This has, arguably, happened in *A v. B plc and Another* [2001] 1 W.L.R. 2341, where Jack J. ruled (see para. 56 at p. 2354) that sexual relationships outside marriage are inherently confidential). Ultimately it will be necessary to drop a confidential relationship as a necessary component of a breach of confidence action altogether (which is a necessary implication of the argument on behalf of the UK to the European Commission, which was accepted by the Commission) that English law potentially adequately protects privacy in an action for breach of confidence in *Earl Spencer v. United Kingdom* (1998) 25 E.H.R.R. CD 105, at pp. 117–118, which concerned publication of a telephoto photograph taken of Lady Spencer in the grounds of a clinic where she was being treated.

⁹⁰ See Raphael, *supra*, n. 21, at pp. 504–507.

⁹¹ *ibid.*, p. 504.

However, while the doctrine of precedent is indeed a rule of law limiting judicial power, the binding nature of pre-Act authorities that are incompatible with the Convention rights can be removed without abolishing the doctrine. As Raphael notes, it could be argued that the Act has

brought about a fundamental shift in the doctrine of precedent in the same way as has the supremacy of European Community law. Alternatively, since obsolescence is arguably one of the existing exceptions to *stare decisis*, the Act may have rendered previous precedents obsolete.⁹²

Raphael chooses not to arbitrate between these views. Referring to issues of legal certainty, he suggests that, in practice, the courts will be reluctant to go for full horizontal effect with the constraint of pre-existing negative precedents removed.

However, if our basic argument is correct, the courts have no discretion about recognising horizontal effect.⁹³ The Act has brought the rights into domestic law with full horizontal effect, and negative precedents can have no more force against this than they can against an Act of Parliament that expressly replaces them.

The section 6(1) obligation and the Lord Chancellor's parliamentary statements

During the Act's passage through Parliament, the Lord Chancellor made statements that Raphael⁹⁴ and Phillipson⁹⁵ suggest were drafted with the intention of influencing its subsequent interpretation. Following *Pepper v. Hart*,⁹⁶ parliamentary material must⁹⁷ be used as an aid to statutory interpretation where, in the words of Lord Browne-Wilkinson,

(a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear.⁹⁸

Many commentators invoke *Pepper v. Hart* with regard to the Lord Chancellor's parliamentary statements on horizontal effect. However, in our view, conditions (a) and (c) are not satisfied.

For condition (a) to apply to section 6(1), its effect must be ambiguous, obscure, or lead to absurdity. We have argued that this is not the case; the Act as a whole leaves no doubt that section 6(1) imposes an obligation on the court to give full effect to the Convention rights.⁹⁹

⁹² *ibid.*, p. 506.

⁹³ The Act does not prescribe when it is appropriate for the courts to give effect horizontally to the rights through existing causes of action, rather than on the basis of the Act itself. Nor does the Act specify the details of remedies available against individuals. These matters are clearly open to development by the courts using general principles of law (including the common law) so as to achieve just and equitable outcomes.

⁹⁴ Raphael, *supra*, n. 21, at p. 500.

⁹⁵ Phillipson, *supra*, n. 15, at p. 826.

⁹⁶ [1993] A.C. 593.

⁹⁷ See Steyn (2001) 21 O.J.L.S. 59, at p. 66.

⁹⁸ [1993] A.C. 593 at p. 640. This passage represents the *ratio*, as five of the other six Law Lords expressly agreed with the reasons given by Lord Browne-Wilkinson.

⁹⁹ Compare Clayton and Tomlinson, *supra*, n. 17, at p. 236, who argue that,

With regard to (c), the Lord Chancellor's statements are far from clear, not least because he appears to change his mind during the debate.¹⁰⁰ Early on, he declared that the Act

should apply only to public authorities, however defined, and not to private individuals. . . . Clause 6 does not impose a liability on organisations which have no public function at all.¹⁰¹

Later, Lord Wakeham, then the Chairman of the Press Complaints Commission,¹⁰² proposed an amendment to prevent the Act having any horizontal effect, which stated that section 6(1) did not apply “where the public authority is a court or a tribunal and the parties to the proceedings before it do not include a public authority”.¹⁰³ In rejecting this amendment, the Lord Chancellor declared,

We . . . believe that it is right as a matter of principle for the courts to have the duty of acting compatibly with the convention not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals.¹⁰⁴

These two statements conflict. This conflict can only be sensibly resolved (thereby extending *Pepper v. Hart*), by invoking the doctrine of implied repeal, so that only the later statement has authority.¹⁰⁵ Later statements, generally, clearly accept some form of horizontal effect, and that stated above is compatible with the full horizontality that we have argued for. Nonetheless, the Lord Chancellor also stated,

I would not agree with any proposition that the courts as public authorities will be obliged to fashion a law on privacy because of the terms of the Bill. That is simply not so. If it were so, whenever a law cannot be found either in the statute or as a rule of common law to protect a convention right, the courts would in effect be obliged to legislate by way of judicial decision to make one. If it were—in my view it is not—the courts would also have in effect to legislate where Parliament had acted, but incompatibly with the convention.¹⁰⁶

This is incompatible with our position if it is taken to mean that the Act itself does not create new causes of action against individuals. With respect, however, the Lord Chancellor's reasoning is confused. If, as we have argued, the Act requires the Convention rights to be protected, then the courts do not have to legislate to protect the Convention rights; they simply have to apply an Act of Parliament. Moreover, the Act expressly preserves the validity of incompatible primary legislation.

Using the Lord Chancellor's words to prevent the Act having full horizontal effect incurs other objections. Lord Steyn has argued, extra-judicially, that *Pepper v. Hart*

the obscurities in section 6 would entitle the court to examine on *Pepper v. Hart* principles the Parliamentary debates concerning the Human Rights Act.

¹⁰⁰ Lord Browne-Wilkinson accepted Lord Lester's submissions ([1993] A.C. 593 at p. 634), which he summarised as stating that “there could be no dredging through conflicting statements of intention with a view to discovering the true intention of Parliament in using the statutory words” (p. 631).

¹⁰¹ 582 H.L. Deb. 1231–1232 (3 November 1997).

¹⁰² As Leigh, *supra*, n. 20, at p. 57, poignantly notes, Lord Wakeham's involvement represents “a strange case of the quarry turned game-keeper turned poacher's lobbyist”.

¹⁰³ 583 H.L. Deb. 771 (November 24, 1997).

¹⁰⁴ 583 H.L. Deb. 783 (November 24, 1997).

¹⁰⁵ see Wade 2000, *supra*, n.8, at p. 223.

¹⁰⁶ 583 H.L. Deb. 785 (24 November 1997).

must be read narrowly if it is to avoid raising serious constitutional objections. He argues that the most defensible and principled justification of the decision “looks like an estoppel argument”,¹⁰⁷ as the government was trying to argue that the relevant statute should be interpreted against the taxpayer contrary to assurances giving in Parliament prior to its enactment. Although this was not the actual reasoning in *Pepper v. Hart*, Lord Steyn argues that the judicial decision ought to “confine its legal force to the material circumstances of the case”.¹⁰⁸ A failure to do so transfers an unacceptable degree of legislative power from Parliament to the executive. Thus, *Pepper v. Hart* ought to be confined “to the admission of ministerial assurances against the executive”.¹⁰⁹ If the courts were to adopt the position so powerfully presented by Lord Steyn, the consequence would be that the Lord Chancellor’s statements on the horizontal effect of the Act would have no force, as the executive will not be a party to a dispute over the court’s obligations under section 6(1) in private law disputes between individuals.

CONCLUSION

At first sight, the Human Rights Act appears to be confined to public authorities, but once full and proper account is taken of all the Act’s provisions—particularly sections 1 (implicating considerations based on Articles 6(1) and 17 in particular), 3, 6, and 11(b)—it becomes clear that the Act gives full effect to the Convention rights in all legal actions, subject only to clear and incompatible legislative provisions.¹¹⁰

As matters stand, the judiciary are, in general, showing great willingness to give horizontal effect to Convention rights.¹¹¹ However, even those who view themselves as under an obligation to do so, are reluctant to recognise a cause of action based directly on the Act.¹¹² If we are right, however, they are mistaken in this. Confronted with a claim that an individual has violated the right of another, the Act itself provides a cause of action, having created quasi-constitutional torts and the like for each of the rights. While the courts may, where appropriate, also give a remedy through existing causes of action, these might not always be appropriate, though when they are, these causes must be interpreted to render them compatible with the Convention rights.

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¹⁰⁷ Steyn, *supra*, n. 97, at p. 67.

¹⁰⁸ *ibid.*, 70.

¹⁰⁹ *ibid.*, 72.

¹¹⁰ While our conclusion supports that of Wade, our argument, unlike his, does not rely almost solely on a plain reading of s.6.

¹¹¹ See, e.g., *Douglas v. Hello*, *supra*, n. 59; and *R v. Lambert* [2001] UKHL 37; [2001] 3 W.L.R. 206.

¹¹² See, e.g., Butler-Sloss P. in *Venables v. News Group Newspapers* [2001], *supra*, n. 80, at p. 1049.

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