# *A Theory of Constitutional Rights*

ROBERT ALEXY
translated by Julian Rivers

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*For*
*Georg Corbin*
*and*
*Julia*

# *Preface*

It can hardly be unusual for an author to take pleasure in the publication of his work in another language. But this general pleasure becomes a particular one when the book is translated by someone who is not only fully at home in both languages, but who has also completely mastered the subject-matter. I consider it a matter of the greatest good fortune to have found in Julian Rivers such a translator. I thank him not only for the fact that he has so beautifully recrafted this book, which first appeared in German in 1985, but also for his encouragement to write a new Postscript, in which I attempt, in response to some of my critics, to bring the book up to date on the current discussion.

R.A.

Kiel
October 2001

In preparing this translation, I have incurred a number of debts of gratitude. To Stanley Paulson, who first suggested that it would be a good idea; to John Louth at Oxford University Press, who enthusiastically adopted and has supported the project throughout; to my own Department of Law at the University of Bristol, whose enlightened study leave policy allowed me time free from teaching and administration to complete the work; to colleagues at Bristol, Oxford Brookes, and Kiel, who endured, and responded to, earlier versions of the sketchy integration of the *Theory of Constitutional Rights* into the British context; to friends who commented in detail on drafts of the text of that essay, in particular Trevor Allan, Patrick Capps, Aileen McHarg, Tonia Novitz, and Henrik Palmer Olsen; and finally, to Robert Alexy himself, whose lucid prose and patient explanations have made the work even more instructive and enjoyable than I ever anticipated. Responsibility for the remaining faults—and it is impossible to believe that there are not some—remains entirely my own.

J.R.

Bristol
October 2001

# *Abbreviations*

| | |
|---|---|
| ABlKR | Amtsblatt des Kontrollrats |
| AC | Law Reports Appeal Cases |
| AcP | Archiv für die civilistische Praxis |
| All ER | All England Law Reports |
| Am Phil Q | American Philosophical Quarterly |
| AöR | Archiv des öffentlichen Rechts |
| ARSP | Archiv für Rechts- und Sozialphilosophie |
| BAGE | Entscheidungen des Bundesarbeitsgerichts |
| BGH | Bundesgerichtshof |
| BGHSt | Entscheidungen des Bundesgerichtshofes in Strafsachen |
| BGHZ | Entscheidungen des Bundesgerichtshofes in Zivilsachen |
| BVerfGE | Entscheidungen des Bundesverfassungsgerichts |
| BVerwGE | Entscheidungen des Bundesverwaltungsgerichts |
| Cal L Rev | California Law Review |
| CLJ | Cambridge Law Journal |
| ČSAV | Československé Akademie Věd |
| DÖV | Die Öffentliche Verwaltung |
| DR | Decisions and Reports (European Commission of Human Rights) |
| DRiZ | Deutsche Richter-Zeitung |
| Duke LJ | Duke Law Journal |
| DVBl | Deutsches Verwaltungsblatt |
| ECHR | European Convention for the Protection of Human Rights and Fundamental Freedoms |
| ECR | European Court Reports |
| EHRLR | European Human Rights Law Review |
| EHRR | European Human Rights Reports |
| EuGRZ | Europäische Grundrechte-Zeitschrift |
| ICLQ | International and Comparative Law Quarterly |
| Ill LQ | Illinois Law Quarterly |
| IR | Irish Reports |
| Jahrb. d. Ak. d. Wiss. | Jahrbuch der Akademie der Wissenschaften |
| JBl | Jahresblatt |
| JöR | Jahrbuch des öffentlichen Rechts der Gegenwart |
| Jur Rev | Juridical Review |
| JuS | Juristische Schulung |

| | |
|---|---|
| JZ | Juristenzeitung |
| KB | Law Reports King's Bench |
| L Ed | Lawyers' Edition United States Supreme Court Reports |
| LGR | Knight's Local Government Reports |
| LQR | Law Quarterly Review |
| MLR | Modern Law Review |
| NF | Neue Fassung |
| NJW | Neue Juristische Wochenschrift |
| NVwZ | Neue Zeitschrift für Verwaltungsrecht |
| OJLS | Oxford Journal of Legal Studies |
| ÖZöR | Österreichische Zeitschrift für öffentliches Recht und Völkerrecht |
| Phil Q | Philosophical Quarterly |
| PL | Public Law |
| Proc Aris Soc | Proceedings of the Aristotelian Society |
| QB | Law Reports Queen's Bench |
| QBD | Law Reports Queen's Bench Division |
| SA | South African Law Reports |
| St Tr | State Trials |
| Tul L Rev | Tulane Law Review |
| US | United States Supreme Court Reports |
| VerwArch | Verwaltungsarchiv |
| VVDStRL | Veröffentlichungen der Vereinigung der Deutschen Staatsrechtlehrer |
| WLR | Weekly Law Reports |
| Yale LJ | Yale Law Journal |
| YBEL | Yearbook of European Law |
| ZGesStW | Zeitschrift für die Gesamte Strafrechtswissenschaft |
| ZSR | Zeitschrift für Schweizerisches Recht |

# A Theory of Constitutional Rights *and the British Constitution*

JULIAN RIVERS

Robert Alexy's *Theorie der Grundrechte* is a rational reconstruction of German constitutional rights reasoning. His primary subject-matter, the judgments of the German Federal Constitutional Court, represents one of the most resourceful bodies of constitutional rights case-law in the liberal democratic tradition.[1] So this work provides both a general introduction to a rich and interesting body of case-law and a theoretically attractive account of the structure of constitutional rights within liberal democracy.

The prime locus of constitutional rights in the United Kingdom is now the Human Rights Act 1998,[2] which gives further legal effect to the European Convention on Human Rights and Fundamental Freedoms. While discussion of the Act has been carried on in an explicitly comparative atmosphere,[3] the tendency, for obvious linguistic and cultural reasons, has been to look to other common law jurisdictions for guidance, in particular Canada and New Zealand. Attitudes towards the value of continental European jurisprudence in general, and German constitutional jurisprudence in particular, vary from the enthusiastic,[4] through the cautiously open,[5] to the positively sceptical.[6]

[1] A useful collection of the most important judgments can be found in *Entscheidungen des Bundesverfassungsgerichts: Studienauswahl*, 2 vols. (Tübingen: J. C. B. Mohr (Paul Siebeck), 1993). An English-language account of substantive German constitutional rights can also be found in S. Michelowski and L. Woods, *German Constitutional Law: The Protection of Civil Liberties* (Aldershot: Ashgate/Dartmouth, 1999).

[2] 1998 Chapter 42. The main provisions of the Act came into force on 2 Oct. 2000: Human Rights Act 1998 (Commencement no. 2) Order 2000/1851.

[3] See e.g. The Constitution Unit, *Human Rights Legislation* (London, 1996); R. Clayton and H. Tomlinson, *The Law of Human Rights* (Oxford: Oxford University Press, 2000). For a general account of the problems raised by this phenomenon, see C. McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights', OJLS 20 (2000), 499 ff.

[4] See Basil Markesinis, 'Privacy, Freedom of Expression and the Horizontal Effect of the Human Rights Bill: Lessons from Germany', LQR 115 (1999), 47 at 47: 'when it comes to balancing competing values, German jurists have, in my view, constructed one of the most sophisticated and rational systems that has ever been devised'.

[5] See David Feldman, 'The Human Rights Act 1998 and Constitutional Principles', Legal Studies, 19 (1999), 165 at 205; id., 'Human Dignity as a Legal Value—Part I', PL 1999, 682 at 698–9.

[6] See Lord Hoffmann, 'Human Rights and the House of Lords', MLR 62 (1999), 159 at

For there are, of course, a number of significant differences in the constitutional arrangements of both countries. The German catalogue of constitutional rights is unambiguously 'higher law', binding all three powers of the state. There is a separate constitutional court, whose judges are the guardians of the constitution, and whose powers can be invoked in defence of constitutional rights by affected individuals. Furthermore, Alexy himself expressly disavows any suggestion that he is creating a theoretical account of constitutional rights generally;[7] the task he sets himself is to rationalize one specific state's constitutional tradition. Nevertheless, there are ample grounds for the thesis that his theory is applicable more widely.

That thesis is made at least plausible by the formal abstraction and substantive openness of his theory. Key to the entire theory is the argument that constitutional rights are principles, and that principles are qualitatively different from rules, being optimization requirements relative to what is factually and legally possible. This feature of constitutional rights explains the logical necessity of the principle of proportionality and exposes constitutional reasoning as the process of identifying the conditions under which one of two or more competing principles takes precedence on the facts of specific cases. Perhaps the most contentious feature of the theory is its rejection of a notion of rights as anti-utilitarian 'trumps'[8] which can be identified in any other way than through a process of reasoning taking account of the arguments for and against constitutional protection.[9]

Alexy's theory is open to a range of possible substantive contents at a number of significant points. No distinction is drawn between individual rights and collective goods: both can be the subject-matter of optimization requirements. Constitutional rights need not be limited to the classic liberties, or defensive rights against public authorities: equality rights, rights to protection and procedure, and social rights are all conceivable as constitutionally protected rights. Nor need constitutional rights be limited to relationships between the individual and the state; the precise degree of third party, or horizontal, effect is also a matter of substance. Finally, the theory manages a (partial) reconciliation between democracy and human rights, once again, not in any substantive sense, but in showing how the structure of constitutional rights reasoning can be sensitive to both concerns. More or less latent in the original work, this reconciliation is developed at length in a discussion of legislative discretion in the Postscript.

Thus, from the perspective of the *Theorie der Grundrechte,* many of the distinguishing features of different constitutions are contingent, and transferability between systems is at least plausible. Whether it can ultimately be

159–60. For more general scepticism, see P. Legrand's self-explanatory, 'European Legal Systems are not Converging', ICLQ 45 (1996), 52 ff.

[7] 5 below.

[8] See R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 90 ff.

[9] 178–181, 210 ff. below.

successfully carried out depends on a detailed conceptual reconstruction of the constitution along these lines. Such reconstructions would require works at least as long as the original, but some preliminary points of contact can, at any rate, be established. That is what will be attempted in the context of the British Constitution in the remainder of this essay. To the extent that this argument succeeds, it is *likely* to apply, with some adjustments, to other common law jurisdictions as well. But of course, that, too, would require substantial reconstructive work.

## 1. HUMAN RIGHTS AND CONSTITUTIONAL RIGHTS

Is it correct to see the human rights set out in Schedule 1 to the Human Rights Act ('Convention rights') as *constitutional* rights? Undoubtedly, rights become constitutional because of their perceived substantive significance as expressions of an underlying political morality. But substantive significance alone does not secure legal recognition. Most obviously, certain rights are constitutional because they have a status which is higher in the hierarchy of legal norms than ordinary legal rights. This in turn gives rise to an expectation that they have relevance to the whole of law. Constitutional rights in Germany are constitutional in all three respects. They represent a rejection of Nazi ideology in favour of liberal democracy, they bind all three powers in the state, and, according to the long-standing case-law of the Federal Constitutional Court, they express an objective order of values which permeates the entire legal order.[10] However, the position under the Human Rights Act 1998 is, at first sight, far from clear. Convention rights are ultimately at the disposal of Parliament, since incompatibility with them does not affect the validity, continuing operation, or enforcement of any statutory provision in question.[11] They appear only relevant to statute law and the acts of subordinate public authorities, not to Parliament, the common law, or private individuals.[12] Arguably then, they have neither the status nor relevance necessary to justify calling them 'constitutional'.

Constitutions exist on a spectrum from the purely formal or procedural to the purely substantive.[13] Under Diceyan conceptions of parliamentary supremacy, the constitution of the United Kingdom is as near purely procedural as possible.[14] It is open to any content, so long as that content is made legal in a certain form, through certain procedures of Parliamentary legislation. There are no constitutional rights (except perhaps procedural rights

[10] Lüth Judgment, BVerfGE 7, 198 (205).
[11] Human Rights Act 1998 sect. 6(4).
[12] Sects. 6(3)(*b*), 3(1), and 6(1) respectively.
[13] See 349 ff. below.
[14] A. V. Dicey, *Introduction to the Study of the Constitution*, 10th edn. (London: Macmillan, 1959), 39–40.

to enforce the ordinary legislative process[15]), and the danger of this is that the legal system is open to unjust content. On the other hand, a constitution such as the German one which makes human rights enforceable as supreme law risks becoming purely substantive. All law becomes an outworking of the resolutions of competing constitutional rights and principles, resolutions which are reviewable for their correctness by the judiciary. The legislature ceases to have any autonomous law-making function, which renders the commitment to on-going democratic legitimacy practically meaningless. Clearly some sort of mediating solution is appropriate. The first solution is to conceive of constitutional rights as setting jurisdictional limits to legislative activity: the legislature can do as it pleases so long as it does not infringe certain definitive rights. The limits of these rights are absolute. The alternative is to conceive of constitutional rights as imposing extra procedural constraints on legislation which falls within their scope. The limits that rights impose are in that sense only relative, because they can always be surmounted in certain ways.

The absolute, or jurisdictional, view is supported by the fact that if there are constitutional rights at all, there must be some things the legislature cannot do by way of ordinary legislative process. However, such jurisdictional limits are rarely absolute in any full sense of the word; the constitution can always be amended. The relative, or procedural, view recognizes that it is not impossible for the legislature to limit constitutional rights; rather, extra procedural constraints are legally imposed if it wishes to do so. Such procedural constraints can be more or less restrictive. In Germany, the legislature is required to form special majorities and formally to amend an inconsistent constitutional text if it wishes to pass legislation incompatible with existing constitutional rights.[16] This is obviously a stronger form of obstacle than requiring a mere notwithstanding clause in ordinary legislation which infringes rights as in Canada.[17] And where the procedure for amending the constitution is highly complex, as in the United States, one

[15] The 'manner and form' argument holds that Parliament is limited in its composition and procedure: see I. Jennings, *The Law and the Constitution*, 5th edn. (London: University of London Press, 1959), 151 ff.; R. F. V. Heuston, *Essays in Constitutional Law*, 2nd edn. (London: Stevens & Sons, 1964), ch. 1; G. Marshall, *Constitutional Conventions* (Oxford: Oxford University Press, 1984), ch. 12. Heuston suggested that an injunction might issue to prevent the procedurally improper statute being brought into force. Although contrary to established orthodoxy (see *Pickin v British Railways Board* [1974] AC 765), the decisions of the House of Lords in the Factortame litigation (*R v Secretary of State for Transport ex p Factortame (no. 1)* [1990] 2 AC 85; *R v Secretary of State for Transport ex p Factortame (no. 2)* [1991] 1 AC 603) have made this suggestion less implausible. See also David Feldman's suggestion at fn. 30 below.

[16] Under art. 79 Basic Law an act to amend the constitution must do so expressly and requires two-thirds majorities in both houses of the legislature.

[17] See Canadian Constitution Act 1982 sect. 33(1) and (2). Under sect. 33(3) such legislation passes automatically out of force five years after being passed. The requirement repeatedly to renew incompatible legislation is, of course, another procedural constraint.

will admittedly tend to think more easily of constitutional rights as 'absolute' jurisdictional limits. But the distinction is better seen as one of degree. Even the so-called eternity clause[18] of the German Constitution, which protects core elements of human rights from constitutional amendment, can be seen as a procedural constraint which can be surmounted by an entirely new constituent act.

A further advantage of the 'relative' view is that it can explain the fact that both the German Basic Law and the European Convention permit certain legislative interferences within the scope of rights, but subject these to formal constraints, such as the requirement that they must be 'according to law'. Thus in practice constitutional rights give rise to a range of procedural obstacles to legislative and executive action depending on the extent to which that action departs from the presumptions of political morality expressed in the constitutional rights catalogue. It is these procedural constraints, beyond those implicit in the normal legislative process, which give constitutional rights their higher status, a status which is revealed whenever they conflict with norms of ordinary law and lead to an outcome which is different from the one which would have been reached in their absence.

Convention rights under the Human Rights Act are not 'absolute' jurisdictional limits, but they do give rise to procedural constraints. The weakest extra procedural obstacle of all can be found in the new interpretative rule of section 3. This requires that 'so far as it is possible to do so', legislation be 'read and given effect'[19] in a way which is compatible with Convention rights. Far from being 'deeply mysterious',[20] the section is phrased this way because of judicial attitudes to Convention rights prior to the Act. These supposedly required a two-stage analysis. First, an ambiguity in the statute had to be established; secondly, Convention rights could be used to determine the correct meaning.[21] Justification for this process could be found in the UK's dualist approach to international obligations.[22] The executive should not distort the judicial construction of legal meaning by entering into international agreements without submitting them to Parliamentary approval in the form of legislation. However, this two-stage process of reasoning should be contrasted with the position as regards

[18] Art. 79(3) protects the federal structure, participation of the *Länder* in the legislative process, and the principles set out in arts. 1 and 20 from constitutional amendment.

[19] The draftsman obviously shrank from inserting the requisite preposition: one can only give effect *to* something. Grammar triumphed towards the end of sect. 6(2)(*b*).

[20] See Geoffrey Marshall, 'Interpreting Interpretation in the Human Rights Bill', PL 1998, 167; id., 'Two Kinds of Compatibility: More about Section 3 of the Human Rights Act 1998', PL 1999, 377. See also Francis Bennion, 'What Interpretation is Possible under Section 3(1) of the Human Rights Act 1998', PL 2000, 77 at 88.

[21] *Salomon v Commissioners of Customs & Excise* [1967] 2 QB 116 at 143 (per Diplock LJ); *R v Secretary of State for the Home Department ex p Brind* [1991] 1 AC 696 at 747–8 (per Lord Bridge).

[22] See e.g. *Rayner (Mincing Lane) Ltd v Department of Trade* [1990] 2 AC 418.

'common law fundamental rights'. The courts in the United Kingdom have long accepted that certain rights are fundamental, in that they give rise to a process of strict statutory construction.[23] In determining the meaning of a statute in the light of common law fundamental rights, it is assumed that Parliament does not intend to authorize infringements of such rights unless the clear words of the statute make no other conclusion possible. The purpose of section 3 is thus simply to bring the situation as regards Convention rights into line with the existing role of common law fundamental rights.[24] The effect of both sets of rights is to place a procedural obstacle—albeit a minor one—in the way of Parliament's expression of legislative intent, by forcing it expressly and in detail to infringe the right in question. Conflicts between broad statutory rules and Convention rights are to be resolved in favour of the latter. Both Convention rights and common law fundamental rights can thus properly be called constitutional.

The system for dealing with primary legislation which cannot be interpreted in conformity with Convention rights, and which thus appears to the judiciary to be incompatible with those rights, confirms their higher status. The constitutional innovation of the declaration of incompatibility[25] empowers the judiciary to evaluate legislation against human rights standards and if necessary declare it incompatible with Convention rights. This fact alone implies a higher status. If the Human Rights Act were an ordinary statute, incompatibilities with other statutes would be resolved by way of the doctrine of implied repeal.[26] They are not. The Human Rights Act remains in force, and the incompatibility—whether the offending statute predates or postdates the Human Rights Act—is 'resolved' by formally declaring it. Thereafter, admittedly, the executive has a choice; it may either remove the offending law by the so-called 'fast track procedure'[27] or it may seek re-enactment of the legislation with the statement that in spite of the incompatibility, 'the government nevertheless wishes the House to proceed with the Bill',[28] or it may of course do nothing, in which case the unconstitutional law remains in force.[29] But the power of the judiciary to evaluate all law against the standards of Convention rights is clear.

It may be that the procedural constraints on Parliament infringing

[23] See e.g. *Chertsey UDC v Mixnam's Properties* [1965] AC 735; *Morris v Beardmore* [1981] AC 446; *Raymond v Honey* [1983] AC 1; *R v Secretary of State for the Home Department ex p Leech* [1994] QB 198 at 209; see also T. R. S. Allan, *Law, Liberty and Justice* (Oxford: Clarendon Press, 1993), ch. 4.

[24] *R v Secretary of State for the Home Department ex p Simms & O'Brian* [1999] 3 WLR 328 per Lord Hoffmann (obiter) at pp. 341–2.

[25] Human Rights Act 1998 sect. 4(2).

[26] *Vauxhall Estates Ltd v Liverpool Corporation* [1932] 1 KB 733; *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590.

[27] Human Rights Act 1998 sect. 10 and Schedule 2.

[28] Sect. 19(1)(*b*). Sect. 19 has been in force since 24 Nov. 1998: Human Rights Act 1998 (Comencement no. 1) Order 1998, 2882.

[29] Sect. 4(6).

Convention rights are not quite as weak as at first sight seems. David Feldman has suggested that the statement of compatibility or incompatibility supplied with each statute could be treated by the courts as a procedural necessity, meaning that failure to supply it would render the statute procedurally ultra vires.[30] But the real practical problem concerns situations in which the government fails to take action after a judicial declaration of incompatibility, either because it disagrees with the judiciary, considering the law in question to be compatible with constitutional rights, or because it wishes to see the law remain on the statute book notwithstanding its incompatibility. The first option is fundamentally inconsistent with the Separation of Powers, which requires the executive to defer to the judiciary on disputed questions of law; the second is procedurally improper, because the Human Rights Act provides a procedure for the enactment of laws incompatible with constitutional rights. The problem is that the Act appears explicitly to prevent the judiciary from requiring the executive to use the proper legislative procedure for incompatible legislation.[31] But although there is no remedy for an inactive government in this respect, there is at least a strong political expectation that one of the two appropriate courses of action will be followed, and the existence of a joint Parliamentary Committee on Human Rights will surely strengthen that expectation. In short, Convention rights are rights of a higher status, but with a very weak system of enforcement. It is thus appropriate to talk about constitutional rights in the United Kingdom.

## 2. CONVENTION RIGHTS AS SUBJECTIVE RIGHTS AND OBJECTIVE LAW

There is a familiar distinction within German jurisprudence between objective law and subjective rights (the adjectives being made necessary by the ambiguity of the word *Recht*). The distinction corresponds to one between norms on one hand and the positions or relations of legal persons on the other. As applied to the term 'constitutional rights', the distinction gives rise to two meanings, 'constitutional rights' in the sense of the legal positions of constitutional right-holders, and 'constitutional rights' as the label for

[30] 'The Human Rights Act 1998 and Constitutional Principles', Legal Studies, 19 (1999), 165 at 185. A more ambitious, and rather less plausible, extension of this argument would be that the formal executive statement of incompatibility is a procedurally necessary requirement for the validity of legislation the judiciary consider to be incompatible. Since the executive is hardly likely to make such a statement, this would destroy the purpose of the judicial declaration of incompatibility, which is designed *not* to affect the validity of legislation.

[31] On the assumption that the introduction of legislation into Parliament is a 'function in connection with proceedings in Parliament': see sect. 6(1) and (3). This may not be true in relation to unconstitutional Orders in Council: see S. Grosz, J. Beatson, and P. Duffy, *Human Rights: The 1998 Act and the European Convention* (London: Sweet and Maxwell, 2000), 75.

norms of a certain content, namely constitutional rights norms. The latter term may sound awkward, but it differs little from the term 'human rights law', which is common enough. Exactly how the distinction is to be drawn depends in large measure on one's concept of a (subjective) right.[32] In Chapter 4 Alexy considers the nature of subjective rights, and sets out a taxonomy of constitutional rights.

The distinction between subjective rights and objective law takes on practical significance in German constitutional doctrine as a result of section 93(1) no. 4*a* Basic Law, which establishes the constitutional complaint procedure.[33] This enables individuals who consider their constitutional rights to have been breached by a public authority (including a court or the legislature) to seek review of the relevant act before the Federal Constitutional Court. Such individuals have subjective constitutional rights in the fullest possible sense. This protection is often contrasted with 'merely' objective constitutional law, which might impose duties on state bodies, but which gives rise to no individual cause of action. Thus although it is clear that constitutional rights norms impose certain duties on the state with respect to foetuses, it is not clear that the foetus itself has subjective rights, in the sense of a power to bring proceedings (by a next friend) to enforce those duties.[34] The constitutional duty can only be enforced by procedures allowing state organs such as the opposition party in Parliament to test the constitutionality of legislation. Much of the debate about constitutional entitlements—protective rights, procedural rights, and social rights—which Alexy considers at length in Chapter 9 concerns whether they are rights in this sense, or only a matter of objective law.

The distinction between objective law and subjective rights is of the first importance under the Human Rights Act, because Convention rights are not unambiguously part of objective law. The only routes by which they enter the legal system is by the obligation to interpret legislation compatibly with them so far as it is possible to do so (section 3(1)) and a rule making it unlawful for public authorities to act incompatibly with them (section 6(1)). On a 'subjectivist' reading, both the interpretative provision of section 3 and the illegality provision of section 6 are all subject to the victim test of section 7.[35] This means that only victims of breaches of rights can argue for interpretations of legislation that are Convention rights-

[32] A problem which is still subject to vigorous jurisprudential debate. For the latest round, see M. H. Kramer, N. E. Simmonds, and H. Steiner, *A Debate over Rights* (Oxford: Clarendon Press, 1998).

[33] See Appendix; for a brief discussion of the procedural background, see J. Rivers, 'Stemming the Flood of Constitutional Complaints in Germany', PL 1994, 553.

[34] BVerfGE 39, 1; 88, 203. Note that one can still usefully talk about the constitutional rights of the foetus, so long as one remembers that this right does not include a power to bring enforcement proceedings.

[35] M. Supperstone and J. Coppel, 'Judicial Review after the Human Rights Act, EHRLR 1999, 301 at 308–9.

compatible or that acts of public authorities are unlawful; only they are Convention right-holders. On this account, the law has only been modified to the extent that there is a new overriding obligation not to breach subjective Convention rights. On an 'objectivist' reading, the correct interpretation of legislation or the lawfulness of an act of a public authority is a matter of general law, and so long as a party can surmount any procedural obstacles to get before a court, all Convention points can be raised and argued. This is the effect of the suggestion that as a public authority itself, a court has the duty to consider relevant Convention rights issues even if these are not raised by the parties.[36]

Both positions are problematic. To see section 3 as a *right* that all legislation be interpreted in a certain way would be an odd way to approach the problem of legal meaning. A statutory norm can only have one legal meaning; what that meaning is may be disputed—the linguistic meaning may be unclear—but the search is for *the* legal meaning.[37] The meaning of a statutory norm is a matter of objective law, and the issue of Convention-compatible interpretations can be raised *by anybody* whenever the meaning of a norm is in dispute. The idea that a norm might mean one thing when applied to one party and another when applied to another party breaches one of the most fundamental aspects of the principle of equality. On the other hand, if section 6 is objective law in the same sense, a party before the court in judicial review proceedings could argue that the executive act in question is unlawful not only because it infringes their own Convention rights, but also because it infringes quite different rights of somebody else. The attempt to exclude public interest groups from constitutional review proceedings may be retrograde given the current state of general administrative law,[38] but unless there is to be a subjective right to the Rule of Law there must be some limits to the (good) reasons individuals can give for

[36] Clayton and Tomlinson, *Law of Human Rights*, paras. 22.10–13. The authors appear not to draw the full implications of this at paras. 22.46–9. The important point is that standing for judicial review purposes cannot be considered in the abstract but only in relation to the matter to which the application relates (Supreme Court Act 1981 sect. 31(3) and *R v IRC ex p National Federation of Self-Employed and Small Businesses* [1982] AC 617). The issue is whether a party who is before the court for other reasons is permitted to argue a Convention point at all.

[37] Of course, the legal meaning will be expressed in a natural language, and the process of making connections between those words and the real world may not be reviewable. See *R v Hillingdon Borough Council ex p Puhlhofer* [1986] AC 484. In this context, the law–fact distinction can be explained by way of Frege's distinction between sense and reference. The legal meaning of a norm is its sense; how it relates to the real world is a matter of reference. See G. Frege, 'Sense and Reference', in P. Geach and M. Black (eds.), *Translations from the Philosophical Writings of Gottlob Frege* (Oxford: Blackwell, 1960).

[38] This is the effect of the 'victim test' under sect. 7(1). See I. Leigh and L. Lustgarten, 'Making Rights Real: the Courts, Remedies and the Human Rights Act', CLJ 58 (1999), 509 at 521–2. For various other critiques of the mismatch between Human Rights Act procedure and principles of ordinary administrative law, see D. Nicol, 'Limitation Periods under the Human Rights Act and Judicial Review', LQR 115 (1999), 216; D. B. Squires, 'Judicial Review of the Prerogative after the Human Rights Act', LQR 116 (2000), 572.

impugning acts of public authorities. In general, it is not unreasonable that those reasons should be self-regarding.[39]

In German constitutional thought, the problem becomes particularly acute in the context of the general right to liberty, which requires that all norms limiting liberty in any way be constitutionally justifiable. This means that in theory a person can seek review of practically any norm which applies to them. This in turn raises the spectre of the *actio popularis*, because in most cases, laws are only really constitutionally suspect because they breach the specific rights of a few people. It would be easy to use the general (subjective) right to liberty to overcome the procedural obstacles in the way of complaining to the constitutional court, but then rest the substance of one's complaint on the fact that the law is objectively unconstitutional because it breaches the rights of others. Alexy argues in Chapter 7 that a consideration of the constitutional rights of others must be excluded in such a context. The purpose of the constitutional complaint procedure is to vindicate the complainant's own rights, not objective constitutional law. In the British context, the obvious middle road between the two extremes, which fits well with the structure of the Human Rights Act in its close association of section 6 with section 7, is to suppose that the interpretative provision of section 3 is the route by which the general law is changed, while sections 6 to 9 make Convention rights enforceable as a matter of subjective right alone. The purpose of these latter sections is to enable victims of breaches of Convention rights to vindicate their own rights, either by judicial review, or as a defence to civil or criminal proceedings taken against them.[40] However, none of this prejudices any existing procedures to determine the general law as it is affected by section 3.[41]

Although attractive at first sight, even this solution is problematic. Such a distinction between objective law and subjective rights would make the precise route by which public law powers are 'read down' or rights 'read in' crucial. If an apparently broad statutory power is interpreted less generously to be compatible with Convention rights, then anyone can raise the issue, because it concerns the true legal meaning of the provision. If, however, the public authority in question is only prevented legally from making limited use of what is acknowledged to be a broad statutory power, because of the need to respect the rights of potential victims, then the point can only be raised by a victim of the broader use. This distinction is of no practical significance where the public authority has made over-extensive

[39] On the question of appropriate tests of standing, see J. Miles, 'Standing under the Human Rights Act 1998: Theories of Rights Enforcement and the Nature of Public Law Adjudication', CLJ 59 (2000), 133.

[40] Gordon Nardell, 'Collateral Thinking: the Human Rights Act and Public Law Defences', EHRLR 1999, 293.

[41] Clayton and Tomlinson, *Law of Human Rights*, paras. 22.46–9; Grosz *et al.*, *Human Rights*, 87. See also Human Rights Act sect. 11.

use of its power to the detriment of a person's Convention rights. Either way, the person suffering detriment is a Convention rights victim. By contrast, it is of great significance if a public authority has made under-extensive use of its power to the detriment of another individual's, or even public body's, non-Convention interests, and if that person wants to argue in the course of ordinary judicial review proceedings that the authority was not required by Convention rights to act as cautiously as it thought it had to. It is not just victims who have an interest in raising Convention points. The procedural restrictions of the section 6 route may thus have an unjustifiable, and irremediable, chilling effect on public authorities.

A particular instance of the potentially irremediable chilling effect can be found in the relationship between Convention rights and the common law. This is usually treated as part of the problem of horizontal effect, which will be considered below. But common law is also to be found in non-private law contexts, common law criminal offences being the most conspicuous example. The fact that the Act does not expressly regulate the relationship between Convention rights and the common law is often overlooked. However, it would be bizarre if the Convention were not relevant to judge-made law at least to the same extent as to statute law. The most obvious way of extending Convention rights to the common law is by way of the section 6 duty on all public authorities (including courts) not to act incompatibly with Convention rights. Thus, if a common law criminal offence is incompatible with the Convention, it is unlawful for the Director of Public Prosecutions to bring a prosecution, and unlawful for the court to convict.[42] But if the only person who can 'rely' on the Convention right is a victim, the courts ought to refuse to review a decision of the DPP not to prosecute made in a mistaken belief about the impact of Convention rights on the criminal common law.[43] Since such a refusal is practically inconceivable,[44] the proposed distinction between sections 3 and 6 is unsustainable.

The only satisfactory solution is thus substantially an 'objectivist' interpretation whereby anyone can raise the correct interpretation of statute law, the effect of Convention rights on the common law, and their effect on discretionary powers of public authorities in the course of legal proceedings. Proceedings under section 7, with all their constraints, are thus a separate and distinct cause of action in addition to existing ones. The problem of the *actio popularis*, or subjective right to the Rule of Law, can be

[42] Although since the compatibility of the common law with Convention rights is likely to be uncertain, it may be appropriate for the DPP to bring a prosecution and allow the court to determine the question. See *R v DPP ex p Kebilene* [1999] 3 WLR 972.

[43] Unless, of course, the victim of the crime could find a protective right in the European Convention giving rise to a constitutional duty to prosecute.

[44] The House of Lords in *R v DPP ex p Kebilene* [1999] 3 WLR 972 at 983, had no doubt that judicial review was available in principle for failure to prosecute.