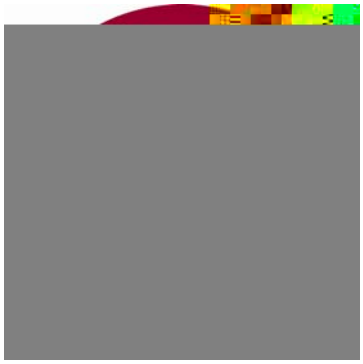

Utility and Rights in Common Law Reasoning: Rebalancing Private Law Through Constitutionalization

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reasoning, must now seek to rebalance its treatment of individual interests and collective goals, or, in the words of my title to rebalance considerations of utility and rights, by incorporati


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discussions about the social consequences of the rules of private law. In short, analysis and discussion of legal principles could be sharply distinguished from arguments about policy and politics.

These foundations in natural law and natural rights, though useful underpinnings for justifying this interpretation of reasoning in private law, were never essential to its legitimacy and effectiveness. It was possible to insist that private law contained implicitly a coherent scheme of rights and principles, even though this scheme might not correspond to any particular moral or ethical theory. Instead, fidelity to the scheme could be justified as both constituting the necessary respect for prior political decisions to establish stability and social order and as satisfying the need to secure the legitimacy of the legal system by ensuring its coherence and basis in respect for rights. It is this position of respect for 'law as integrity', without being tied to a particular moral theory, which Ronald Dworkin articulates so effectively.[4]

THE COLLECTIVIST TIDE OF THE TWENTIETH CENTURY

It has been widely noted, however, that during the last half century or more, private law reasoning has not remained strictly faithful to this model of law as integrity. Lawyers and judges have increasingly invoked collectivist considerations in their legal reasoning. These considerations might be described as policy, or social consequences, or efficiency considerations. Whatever the label given to these arguments, their crucial characteristic is that they invoke collective welfare considerations as relevant factors in the determination of private law issues and disputes. No longer is private law confined to questions of principle and individual rights. Lawyers and judges began to argue for a particular legal conclusion by reference to the desired outcome for the community or society as whole from the possible different rulings.

Consider one well-known example of this phenomenon: *McLoughlin v O'Brian*.[5] The issue in the case concerned recovery in the tort of negligence for personal injuries. These took the form of emotional shock suffered by a mother on seeing her husband and four children in hospital a few hours after they had been gravely injured or killed in a car accident. Following some not entirely clear precedent decisions, the trial judge had denied recovery for emotional shock to the mother on the ground that she had not been present at the scene of the accident. The Court of Appeal upheld this decision, but it was reversed by the House of Lords. In both of the appeal courts, several of the judges not only considered the precedents and general principles of the law of negligence but also assessed what

[4] R. Dworkin, *Law's Empire* (London: Fontana, 1986).
[5] [1983] 1 AC 410, HL, reversing [1981] QB 599, CA.

they called policy considerations. They considered, for in

insist that legal reasoning always involved significant political choices because the underlying principles were indeterminate in meaning and contradictory in values.

Although these ideas of the Legal Realists and the Criti

narrower account of the role of regulation runs hand in hand with some justified, though in my opinion exaggerated,[9] scepticism about the power of regulation to reverse the outcomes of markets. It is questioned, for instance, whether consumer protection measures really help consumers, or merely induce traders to find more ingenious methods of evading risks whilst increasing prices and harming consumers. Or, in other examples, whether rent controls and minimum wages actually increase rents and suppress wages in the long run, thereby creating exactly the opposite effect to that intended by the legislature.[10] This scepticism about the effectiveness of social regulation leads to doubts about whether such measures should be preserved.

We should not permit these American efforts to minimise the use of regulation today to obscure its profound historical role in shaping economy and society in the twentieth century. Whether misconceived or not, governments attempted in the twentieth century to use regulation to correct distributive outcomes produced by markets, whether or not those markets were defective or failing. Employment law, for instance, sought to provide workers with mandatory protections even though the labour market worked competitively with only minor frictions and problems of information asymmetry. The purpose of this social regulation was mostly to reverse the outcomes produced by private law. Freedom of contract produced terms of employment that seemed to construct brutal hierarchies and opportunities for exploitation. Employment regulation responded in various ways: by setting minimum standards, by providing protection against abuse of power in the workplace, and by enabling workers to improve their bargaining power in the market. This social regulation was not primarily correcting market failure,[11] but deliberately reversing the outcomes produced by the system of rights established by private law. It challenged the implicit values and ideology of the system of private law by curtailing its positive freedoms fk.62.7 fr400.18221 Tw 11.5.m(0t.p52

evident in the 1960s and 1970s, when the courts began to consider the protection of consumers as an appropriate role for private law even in the absence of relevant social regulation. In tort law, the social policy ambition of providing a method for compensating every individual who suffered personal injuries in accidents, first represented in special statutes regarding the workplace containing workmen's compensation schemes, gradually infused the application of the law of tort to a wide range of situations where injuries occurred. Lawyers began to discuss the proper scope of the tort of negligence less in terms of rights, fault, and responsibility, and more in terms of securing fair levels of financial support and economic security to all those who had suffered a personal injury resulting from the hazards and accidents of modern living.[12]

In some common law jurisdictions, at some particular moments, the impact of the influence of social regulation on private law reasoning was so strong that it might be fairly said that private law collapsed into some kind of policy analysis. The legal rules and principles were almost completely abandoned in favour of another kind of discourse. Often economic analyses might be presented, but invariably lawyers also paid close attention to factors that economists call 'equity' or lawyers might call fairness, good morals, good faith, reasonableness, or justice. But, in my opinion, those instances where courts and lawyers ignored legal principle and concentrated exclusively on policy analysis were rare.

The traditional legal reasoning of priva1.52 287.07791 472.75701.79a5MC /j11.52 0 0 11.ces7444.22 28

traditional terms of principles and rules, the consequences of different policy choices are used to determine the exact shape of legal doctrine.

This hybrid reasoning can be observed, for instance, in the leading English case concerning wives as sureties for their husband's business loans, *Barclays Bank plc* v *O'Brien*.[13] In giving the sole judgment, Lord Brown-Wilkinson presents a section entitled 'Policy considerations', which commences with acknowledging the source of his knowledge about the effects of private law regulation from the 'large number of cases of this type coming before the courts in recent years'. Having considered this evidence, he describes the regulatory policy in these terms:

It is easy to allow sympathy for.03909 Tm(terms:)TjE92.56341 590.59837 Tm(hy fo43ETEM7011.m

references to rights and principles, the evolution of the law in this case is openly determined by economic and social policy considerations.

It may be objected that I am saying nothing new here. It may be said that judges have always considered policy even if they did not mention it explicitly. Of course, that


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version of legal reasoning that has come to the fore in recent decades might lose sight of this crucial insight that formed the foundation of the systematic development of private law in the nineteenth century. To that extent, the critics of the use of policy arguments in private law have a valid point.

Yet, I do not believe that the way forward in private law reasoning is to revert to the exclusive use of narrow doctrinal argument. That would betray the achievements of the twentieth century in acknowledging explicitly that private law must simultaneously look both to the individual interest in positive freedom and the collective interest in securing general welfare, recognising that sometimes these considerations will exist in tension with each other.

Instead, I suggest that to the extent that a rebalancing between the collective and individual interest may be required in the reasoning processes of private law, it can be achieved by the means of inserting fundamental rights discourse into private law as another layer in the reasoning process. This process, which is known in Germany as the 'constitutionalization of private law', involves private law reasoning directly engaging with the norms or standards of the discourses of constitutional rights and liberties. Shortly, we will need to

the bank's right to a fair and public hearing before deprivation of its rights, as demanded by Article 6 of the European Convention of Human Rights, had effectively been restricted. These interferences with the rights of the bank could only be justified if they satisfied the test of proportionality. The Court of Appeal reached the further conclusion that the interference was disproportionate, with the upshot that section 127(3) of the Consumer Credit Act 1974 was declared incompatible with fundamental rights, and the bank was entitled to retain its £6,900 plus costs.[19]

In order to defend the statute and its protection for consumers, the Secretary of State launched a successful appeal to the House of Lords. The precise ground for the decision was that the Human Rights Act 1998 did not have retrospective effect, so could not apply to transactions entered into prior to its coming into effect in 2000. On the substantive points, however, the House of Lords offered the opinion that indeeppl


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of government to see if it satisfies exactly the laws of contract, property, and tort. There are good reasons why the law has evolved distinct functional subsystems such as public and private law. These different branches of the law have co-evolved with different types of human activity. The rules and normative standards have been developed separately to solve the distinct co-ordination problems and risks of abuse of power.

The new task, as I envisage it, is to protect the fundamental values of private law, not to impose other values on it, no matter how much we may respect those values. But those fundamental values of private law, especially with regard to their concern for the realisation of positive freedom, also provide part of the motivation for the human rights standards of public law. It is likely, therefore, that we will find considerable overlaps in the rights or norms that we should consider.

The German terminology of the 'constitutionalization of private law' is therefore unsatisfactory, as it implies that somehow private law is being subsumed within constitutional law. This notion, which is accurately described by Mattias Kumm as a 'total constitution' in which private law is 'a branch of applied constitutional law',[21] is not what is being proposed here. It is important in my view to preserve the separation of private and public law, since both aspects of law have co-evolved with their respective spheres of social life – civil society with private law, and relations between citizen and the state with public law. The separation of the subsystems of public and private law evolved in response to the correct perception that they were handling different kinds of conflicts and co-ordination problems. It will not work to force the subsystems back together again, with one having priority over the law. Nevertheless, for the reasons I have given, it is necessary to re-establish a conversation between the rights discourse of public law and private law in order to provide a safeguard against potential unsatisfactory developments in contemp

With regard to freedom of expression in private law relations, however, the meaning of the concept must alter because in t.48 322.26752 0law relatio


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about the degree of material interference with such a basic right, the next step is to assess whether or not the interference is disproportionate. It is at this stage of justification that social and economic rights are likely to play an important role.

References to social and economic rights will tend to reinforce the justification for the policy dimension of the hybrid reasoning. A social and economic right will provide a legitimate goal and emphasise its importance in the assessment of the justification. In Mr Pay's case, for instance, if the issue had reached the justification stage on the matter of his right to privacy, the court might then have balanced the interest of the employer in iemplTm(in i)Tj11.52 0 sp