On the (In)compatibility of Human Rights Discourse and Private Law

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temptation to harness the human rights bandwagon to the august steeds of private law? All these questions about the application of human rights law to private law provoke puzzlement and controversy in equal measure.

The puzzle is how human rights law can have any application to the fields of private law, such as contract, tort, and property. The rights protected in leading conventions on human rights and national constitutions focus on civil liberties and political freedoms. In most instances their original purpose was to protect individuals and groups against the abuse of power by governments. The rights secure individual liberty against oppressive measures such as detention without trial and slavery; and they protect the right to form political associations, freedom of speech, and other essential conditions of a democratic system of government. The puzzle is how these civil and political rights might have any connection to such mundane matters as the enforcement of a guarantee of a loan to a business, the commission of a wrong causing injury to another, the dismissal of a worker for misconduct, or the divestment of property rights by a Will. Yet human rights discourse and legal reasoning has played a decisive role in judicial decisions in such cases.

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In these criticisms there is a combination of concerns about the imposition of unwelcome (illiberal) values by forcing individuals to comply with public standards

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help to remove barriers to trade within the internal market.[17] Most noticeably, minimum standards of consumer protection law have been established with a view to encouraging consumers to purchase goods across borders.[18] The European Commission is now edging towards uniform consumer law or full harmonisation, as in the proposed Regulation for an optional consumer sales law.[19] Similarly, patchy regulation has been applied to employment, initially with a view to avoiding unfair competition in capital markets, but more recently to provide workers with basic legal rights to protect them against the risks of social dumping. [20]

Even if European private law is not directly involved, more general market regulation may have consequences in private relations. Any national regulation of markets may be subject to challenge on the ground that it interferes with the fundamental market freedoms of the EU and competition law. Such challenges

fundamental rights to determine the rules governing private relationships breaks down the traditional legal demarcation between the rules of public law, which govern the relation between the citizen and the state, and the rules of private law, which regulate private relations between citizens and business associations.

The categories of public law and private law are perhaps legal constructions that may not matter very much in themselves. A blurring of those boundaries may not create serious risks for a legal system. But the boundaries are not pointless. They have evolved as a functional response to practical problems of government and adjudication. In the case of fundamental rights, this aspect of public law was developed in response to actual and potential abuses of power by public authorities. Constitutional rights protect individuals against the misuse of power by both the executive and the legislature. The content and character of those rights has evolved to combat the different kinds of abuse of power encountered in that context, whether it be the imposition of restrictions on liberty by a majority in the legislature in the name of so2[zjjz?(wI?2*A?z*(I7z=2z(I7*Nz2*zN(pI712jz[?*N(uI712==N1z?2**1N?

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dividing wall between public law and private law has proved far more permeable than previously expected. But as interventions based on human rights proliferate in national private law jurisdictions, the single source structure becomes increasingly plausible as an account of the architecture of a legal system. In turn, this adoption of the single source structure encourages the view that fundamental rights should have direct effect in private law between non-state actors. If the single source structure does justify or at least promote the direct effect of fundamental rights in private law, it heightens concerns about the risks of incompatibility between human rights and private law.

V. THE CONTROVERSY OVER DIRECT EFFECT

Beyond any terminological issues, there are two initial difficulties in assessing the controversy over direct and indirect horizontal effect.[34] One difficulty concerns the distinction at a conceptual level: what exactly is the difference in theory and in practice? The second requires an examination of the constitutional context in which the distinction is employed, because the significance of the distinction varies according to the institutional framework of the particular legal system.

1. CONCEPTUAL DISTINCTION

On its face, the distinction between direct and indirect horizontal effect appears simple. If there is direct horizontal effect, an individual (A) can bring a private law claim against another private individual (B) on the ground that that B has

law obligation, but simultaneously A has a liberty-right (or privilege) that A's fundamental rights should not be unjustifiably interfered with. The role of the court in both cases is to enforce A's rights by imposing appropriate duties on B. For direct effect, the court vindicates A's fundamental right by enforcing the correlative duty imposed on B. For indirect effect, the court vindicates A's private law right by enforcing a correlative private law duty on B, but the interpretation of the respective private law rights and duties must simultaneously avoid unjustifiable interference with A's liberty-right protected by the constitution or convention. In the case of indirect horizontal effect, the sole duty imposed on B arises from private law and is correlative with A's claim-right; a court, however, is obliged to respect liberty-rights in its decisions, so that its interpretation of private law must be adjusted appropriately.[36]

Although the conceptual difference between direct and indirect horizontal effect is reasonably clear, the practical difference is paper thin. Consider the case of Naomi Campbell, the supermodel, who complained of an invasion of her privacy when a newspaper published a photograph of her leaving a rehabilitation clinic.[37]

said not to exist) by the tort claim for breach of confidence being interpreted in a suitable way to comply with the requirements of Article 8. There will remain some areas, such as family life, where private law causes of action may not be recognised owing to the absence of an intention to create legal relations or to adjust proprietary interests. If I tell my children to stop making racket and be silent for

to constitutional and convention rights can be presented as an arrogation of power by the judiciary that undermines democratic government. The position is slightly different in common law countries, where private law is largely the creation of judges. Those judges are expected to develop the common law in an evolutionary manner as society changes, so adjustments and revisions at the margins are a normal part of the judicial function. So the objection based on the separation of powers and the democratic legitimacy of the legislature has much less relevance in common law systems. Even so, limiting the role of fundamental rights to indirect horizontal effect has the attraction in common law systems that it is likely to appear far more gradual and evolutionary than the sudden insertion into the private law system of directly effective human rights. In the *Campbell* case mentioned above, for instance, some of the judges protected her right to privacy

effect enables private lawyers to hear the voices of proponents of human rights next door, but permits them to choose their own way to respond and accommodate those concerns. In the terminology of systems theory,[47] indirect horizontal effect protects the autopoietic character of a private law system of law, whilst acknowledging that the system must respond to its changing environment, in this instance the growing importance attached to human rights in public discourses and values.

Although this argument for avoiding a revisiting of conflicts of basic values is intended to support the use of indirect horizontal effect against direct effect, its implication seems stronger. It suggests that courts would be well advised to steer clear of any discussion of fundamental rights when applying private law rules. Indeed, the introduction of basic rights discourses into commercial matters does not always seem to help to reach a convincing resolution of a dispute. This feature is highlighted, for instance, by German court decisions in connection with an advertising campaign used by Benetton, in which shocking pictures were used to heighten perception of the brand name. A picture in the campaign, which displayed a human's buttocks, stamped in bold letters with the letters 'HIV – Positive', was challenged by representatives of competitors under the German law of unfair competition. The Federal Supreme Court took the view that the advert violated unfair competition law because it was 'indecent', and that it was not protected by the constitutional right to freedom of expression because it violated the constitutional right to dignity of sufferers from Aids.[48] In contrast, the Federal Constitutional Court permitted a constitutional challenge to that decision on the ground of press freedom and rejected the view that the advertisement was an affront to human dignity, because the image of the sufferer had been used sympathetically, albeit for a commercial purpose.[49] Whatever one's view of the outcome, the point is that it is unclear how useful it was for the courts to invoke the abstract rights to dignity and freedom of expression, which both effectively ignored the legislative standard of 'indecency', thereby causing unpredictability, and which at the same time proved unsuitable and unhelpful in the resolution of the issue. The commercialisation of other people's suffering for gain is unsavoury, but that is in effect what news media also do in some of their coverage of events such as wars and famines. If the courts had stuck to the legislative test of indecency, it iiffeesse viN*jAx1?(fIjAvee ivivjzzj2xNA*('5c7[jj2A?(vI712NzA[1[1jz(gI712j2Axx(II712*xxj

law system has not fully subsumed the values of human rights documents, but instead remains locked into a scheme of nineteenth century values that are hard to shift and revise? For instance, where does one find in the civil codes and the common law of contract a prohibition on discrimination on the basis of race, sex, and other protected characteristics? Similarly, has private law adequately adapted its protection of privacy in view of modern technologies, starting with the camera in the nineteenth century and now with the threats to privacy posed by the vast technologies of covert surveillance? Even though the point that the introduction of directly effective rights may prove disruptive to existing private law rules may be valid, the disruption may appear, at least sometimes, to be beneficial in the sense of updating the law to modern values and its social context.

The second assumption regarding the coherence (and autopoietic character) of private law doctrines is, of course, also open to challenge from an American Legal Realist perspective and other sceptical positions. From those perspectives, the legal doctrines and concepts play a part in the ostensible justification for judicial decisions, but in reality the outcomes ti ne 12[?zo-lN[(thl7 ju1n2j=z1jAl(7l72?j1 N[?2j(=172[2j1=1jv((sl7

encouraging occupiers to make their land and buildings safe for everyone, even a burglar. The rights of an occupier to peaceful possession of property and privacy do not seem to figure in the creation of this tort duty.[51] Another example of the risk to private law of according strong priority to rights arose in an English case concerning a consumer credit transaction: *Wilson v First County Trust Ltd (No 2).*[52] The consumer took out a short-term, high-interest loan, pledging her car as security. On default, the lender claimed the outstanding sum and asserted entitlement to the car in part satisfaction of the debt. But the courts decided that the paperwork for the transaction failed to comply with regulatory requirements of transparency by not correctly stating the amount and price of the loan. The statutory sanction for this defect in the documentation was the invalidity of the entire transaction, which apparently deprived the creditor of any remedy whatsoever. The creditor claimed that the statutory regulation interfered with its right to peaceful enjoyment of possessions. The House of Lords held that although there had been an interference with that right, the consumer protection measure was for a legitimate purpose and, granting deference to the decision of parliament, was appropriate. If this justification of the aim and methods of the legislation had not succeeded, the priority accorded to the right to property could have seriously undermined the protections afforded to consumers when dealing with loan sharks.

These examples illustrate the point made earlier that, even though respect for fundamental rights or interests may have informed the creation of many principles of private law, these principles cannot be reduced to a scheme of rights, because other values have shaped private law. The values that represent collective interests or public goods can only be restated in terms of aggregations of individual rights with considerable artificiality. It follows, therefore, that even if private law may be compatible with many claims framed as fundamental rights that are directly effective, that will not always prove to be the case. Where collective interests are concerned, as for example in making premises safe for all users or in cleansing the market of duplicitous loan sharks, assertions of claims based on fundamental rights, such as the right to peaceful enjoyment of property, are liable to defeat or subvert social or collective goals that have been embraced by private law. To that extent, direct horizontal effect of fundamental rights is likely to prove incompatible with private law.

VII. THE TRANSLATION OF TRANSPLANTED RIGHTS

As noted earlier, civil and political rights were formulated in the context of relations between the citizen and the state with a view to protecting the citizen

[51] R. Bagshaw, 'Tort Design and Human Rights Thinking', in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge: Cambridge University Press, 2011) 110, 113.
[52] *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816.

against abuse of power by the legislature or the executive. In the context of relations between citizens, however, the detailed conception of these rights often needs to be adjusted to accommodate the issues presented in horizontal relations.[53] Even if private law is ultimately founded on the same set of rights, the meaning and emphasis of those rights is likely to differ in response to the context of competing rights between citizens. This consideration that points to a risk arising from giving direct horizontal effect to fundamental rights was introduced above with the illustration of the right to a fair trial, but it applies more broadly to civil and political rights.

Consider the right to privacy: for the purpose of considering whether tr ig ne7z(rI=12[(e7zN2AzN(W(,I7121jx1xz(wI7=21**=(hI712jzzjA[(121[1x(I[z1] '5c7[N=2[*(oI712jzzjA

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weigh the benefits of the achievement of the legitimate aim against the harm caused to the individual in having to sacrifice a fundamental right. This last stage often takes on the appearance of a cost/benefit analysis, though of course the values at stake are not usually commensurable. For instance, in the case of a ban on a public protest, the legitimate aim of protecting law and order on the streets has to be measured against the individual's right to freedom of assembly and freedom of expression. To balance these interests against each other is far from straightforward. In truth, the test of proportionality provides a useful structure for a legal analysis of the justifiability of interferences with fundamental rights, but ultimately it requires a court to engage in a difficult balancing exercise between incommensurable values.

The balancing exercise in private law often assumes a rather different character. This change results from the problem that in many cases both parties can claim that their fundamental rights are at stake. It is not a matter of assessing whether the government's case for the need to override a right in the pursuit of a compelling public interest is established, but rather how to measure competing rights against each other. There are likely to be both rights and policy considerations on both sides of the argument. This structure prevents the application of the familiar test of proportionality, because this transplant will not function to provide a procedure by which all the different relevant considerations are measured against each other. As Chantal Mak observes, 'the application of "limitation clauses", which constitutionally regulate the manner and situations in which certain fundamental rights may be restricted, seem difficult to transplant as such from the constitutional level to contract law disputes.'[64]

Again, direct horizontal effect presents a risk in this respect. This technique may induce courts to conceive of the necessary reasoning process as one of determining whether policy considerations justify the limitation on the claimant's constitutional right, whereas the correct question to ask must involve the balancing of interests on both sides, taking into account both rights and policies. Admittedly, private law reasoning must also resort to indeterminate open-textured tests such as good faith and reasonableness to provide the mechanism for this necessar[?z=N[(iI712[?z==1[*x(tI79esA7121jzA1[x(I7N*2=1=?N2rhthhhtttht[?z=N[(iI712[?A[(tI7et toN1
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answer is not as informative as one might hope. Given that there are competing interests, rights, and policies on both sides of the argument in a private law dispute, the correct approach appears to be a double proportionality test. In other words, the case for interference with the separate rights of each party needs to be assessed separately according to a test of proportional

> rights being claimed in the individual case is necessary before the ultimate balancing test in terms of proportionality is carried out.[66]

As these remarks indicate, the 'ultimate balancing test' involves in fact a double application of the test of proportionality, in which

of religion. This boundary between private autonomy and public responsibility is not fixed and has been challenged in particular contexts.

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article 8 (the right to respect for private and family life) and article 14 were engaged. The Court held that the Andorra's High Court's interpretation of Will had a discriminatory effect against adopted children, contrary to Article 14, so that a Will containing such a discriminatory provision would be invalid. The majority of the Court therefore treated the enforcement of a Will as a kind of public act, so that a state is required to ensure that any interference with the rights of others, such as the right to respect for private and family life of the adopted son in this case, should not be conducted on a discriminatory basis. For the minority, Garlicki J insisted that a testator's right to dispose of her property as she wished was an aspect of the right to property and her right to privacy under Article 8. As a protected convention right, her freedom to make this personal decision could only be restricted in exceptional circumstances. Such exceptional circumstances would only arise where the disposition in the Will was repugnant to the fundamental ideals of the Convention or aimed at the destruction of the protected rights and freedoms. In this case, howe pf1t1t1t1t1t1t1t1t1t1t1t1t1t(tI712*[A[z[(hI71Nx2?ANA(aI=12

X. DEROGATION IN PRIVATE LAW

In a public law context, it is usually no defence f

she could have attended three other schools in the area that would have permitted her to wear the jilbab.

The distinction between public law and private law with regard to consensual derogations from fundamental rights is not always clear cut. In some of the cases concerning manifestation of religion mentioned above, the employee concerned worked for a state managed school and the governors of the school were permitted to rely in part on the employee's consent to the terms of employment to justify their stance. As in *Ahmad v United Kingdom*, the defence of the governors was invariably strengthened in such cases by a demonstration that the contractual requirement was appropriate for the job in the pursuit of a legitimate aim and that the needs of the employee could not be accommodated without great difficulty.

The appropriate scope for consensual derogation of rights in the private sphere was the key issue in the French case concerning the public entertainment of dwarf-throwing. In this entertainment, these physically tiny people were thrown about like a ball. No doubt their treatment was undignified and the element of the commercialisation of their treatment was regarded by French authorities as unlawful.[80] Yet the actors themselves wanted to continue with their jobs, because this was their principal source of income, which is an important part of their private life in the sense that work provides an income and helps social inclusion.[81] If the case is simply regarded as a contest between two rights – the right to be treated with dignity and respect and the right to respect for private life – a court will have to determine whether the interference with the former is justifiable by reference to the latter. But if we permit the issue of consensual derogation to enter into the discussion, the consent of the actors to this treatment in full knowledge of the circumstances may well undermine the concern about dignity altogether.

Private law has always attached considerable importance to consent in determining the lawfulness of conduct. Human rights law usually takes the opposite starting-point. The potential problem with permitting directly effective human rights to determine the outcome of private law disputes is that this traditional and liberal respect paid to informed consent will be ignored or sidelined. Again, the method of indirect horizontal effect will not avoid this risk, but it may force a court to explain more carefully why it proposes to ignore the consensual nature of the activity just because it regards it as undignified, distasteful, or perverse.

XI. PROTECTIVE EFFECT

What impact will the introduction of fundamental rights into private law have on

private parties? Will the rights serve to protect weaker parties such as employees, tenants, and consumers against harsh contracts and robust property rights? Or, on the contrary, will those rights be used strategically by strong businesses and property owners to defend their interests against challenges from protective legislation and equitable legal doctrines? Attitudes towards the insertion of fundamental rights into private law are coloured by perceptions of the likely effects on weaker parties. In turn, those predictions influence the enthusiasm with which directly effective fundamental rights are greeted.

It is certainly the case that in the context of public law the role of human rights has been to protect the weaker party, the individual citizen, against the power of the state. But will this protective effect also apply in the context of horizontal relations? Given that both parties to a dispute can claim rights, there is no apparent reason why the insertion of rights into private law should help weaker parties against stronger ones. The large corporation or bank can claim its rights to property, liberty, or to freedom of speech just as easily as the ordinary individual.

that the new constitutional courts of these countries, staffed by fellow professional elites, typically safeguard a neo-liberal economic order against redistributive political movements.[85] Such cross-country comparisons may be extremely misleading, of course, not least because the constitutions and legal processes to invoke them differ substantially. Even so, such studies provide worrying examples for those who believe that constitutionalisation of private law may assist social justice. The conflict in those examples, it should be noted, is between entrenched constitutional rights and social regulation. The social regulation concerned is likely to interfere with freedom of contract and private property rights, because part of its justification is that the free market does not produce acceptable outcomes as in the example of hours of work that are unhealthily long. Similarly, where social legislation seeks to promote a public good such as the health of the nation, it may interfere with the market and freedom of speech, as in the Canadian case on tobacco advertising, where the business interests were successful in having the legislation struck down as a violation of the Charter.[86] The tension between constitutional protections of the market order and the market-correcting purposes

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enterprises for fear of disinvestment and economic decline. The idea of subjecting private business organisations to the same duties as governments have under human rights law has the appeal, at least symbolically, of taming those private powers. By abolishing the restriction of 'state action' that has for so long tended to exclude considerations of fundamental rights from the sphere of the market and personal relations,[94] the introduction of horizontal effect has some potential to protect dignity, liberty, and equality in all fields of social and economic life. Yet as long as business organisations can employ the same rights as individuals in order

state and the citizen and then apply them to the different context of a private law dispute. The need for a translation of concepts occurs because the idea of liberty or freedom differs between the contexts of public law and private law.

In public law, the protection afforded by human rights is aimed primarily at negative liberty. It is concerned with placing limits on state power in order to protect the freedom of the individual from abuse of power and to enable individuals and groups to participate in a democratic political process. In private law, in contrast, the notion of liberty is primarily concerned with a positive freedom to achieve one's goals. In this context, the idea of private autonomy expresses the ideal that individuals should have the ability to be the authors of their own lives. There is a perfectionist strand also in this idea of private autonomy, as explained by Joseph Raz.[95] The law assists people to make worthwhile choices, but deters or frustrates efforts to make unwise bargains that are not in their long-term interests. When freedom is not used for such worthwhile purposes, the individual steps outside the constitutional protection for private autonomy. If this freedom is used, for instance, to harm the dignity of another, to invade another's privacy, or to exploit the weakness of another, or (more controversially) to harm oneself, it is arguably not serving a worthwhile purpose.

This contrast mirrors the famous distinction drawn by Isaiah Berlin between negative and positive liberty.[96] Berlin favoured negative liberty and distrusted the idea that individuals should be free only to do what

individual. In answering such questions, private law needs to develop a positive and perfectionist view of freedom and private autonomy.[97]

This use of human rights to support a positive conception of freedom in

constitutional court as a misuse of the bank's freedom of contract because it necessarily involves inducing the surety to make a choice that cannot possibly be in her own best interests.