



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

Hugh Collins

LSE Law, Society and Economy Working Papers 7/2012
London School of Economics and Political Science
Law Department

This paper can be downloaded without charge from LSE Law, Society and Economy Working Papers at: www.lse.ac.uk/collections/law/wps/wps.htm.

© Hugh Collins. Users may download and/or print one copy to facilitate their private study or for non-commercial research. Users may not engage in further distribution of this material or use it for any profit-making activities or any other form of commercial gain.

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

Hugh Collins*

Abstract: In this survey and critical analysis of European debates and judicial practices regarding the application of fundamental or constitutional rights to private law disputes involving contracts, proprietary rights, and other private interests, it is argued that the discomfort of some private lawyers with the spectre of the (direct or indirect) horizontal effect of fundamental rights, though differing in its emphasis between jurisdictions, can be explained in part by reference to novel theories of the place of fundamental rights in the legal order and in part by exaggerated concerns for the integrity of private law. Nevertheless, the insertion of fundamental rights into private law engenders problems of transplantation and translation, especially with respect to the derogability of rights. In the context of private law, fundamental rights take on new meanings and must be balanced against each other by a double test of proportionality. This transformation in the interpretation and the legal operation of rights is explained by a shift in the moral foundation of fundamental rights as they should be understood in relations between individuals from negative liberty to positive freedom (or autonomy).

Key words: Private law, fundamental rights, horizontal effect, transplant, proportionality, autonomy

I. INTRODUCTION

Are human rights and private law compatible? Can respect for human rights be seamlessly integrated into the doctrines of private law? Or, like oil and water, will the fundamental rights declared in constitutions and international conventions never mix properly with private law? And if integration or coherence of legal doctrine is unattainable, does that incompatibility mean that we should resist the

* Professor of English Law, London School of Economics and Political Science.

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.¹ In Europe, we are currently witnessing in many jurisdictions a transplant of the human rights discourses of constitutional and public law into private law. Surely, it may be asked, the doctrines of private law will reject this transplant of human rights law as an alien species of legal reasoning with incompatible values and legal concepts?

As for the controversy that the insertion of human rights law into private law often provokes, the objections of the critics vary in their emphasis according to the particular of national legal traditions. Many of the concerns voiced in civil law systems are summed up well by Oliver Gerstenberg (before he disagrees with them):

‘The extension of fundamental rights between and among private (non-state) actors would thus: (i) pose a threat to private law’s libertarian core of private autonomy (by placing private actors, by way of *judicial fiat*, under the same duties as public bodies acting in the common interest); and, at the same time, (ii) result (if carried to a logical endpoint) in a sweeping judicial usurpation of legislative prerogatives in determining the boundaries of spheres of private autonomy, thereby displacing or even overriding the policy choices of [the] statutory legislator; and (iii) shift authority to interpret private law’s core concepts such as property, contract, tort from ordinary (and specialised) courts to constitutional (and generalist) courts, and thereby render private law redundant and superfluous [...]’²

¹ *Bürgschaft* BVerfG 19 October 1993, BVerf 89, 214 (business loan); *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 (civil wrong); *Palomo Sanchez v Spain* [2011] ECHR 1319; *Pla and Puncernau v Andorra* (2006) 42 EHRR 25 (interpretation of a Will).

² O. Gerstenberg, ‘Private Law and the New European Constitutional Settlement’ (2004) 10 *European Law Journal* 766, 769.

In these criticisms there is a combination of concerns about the imposition of unwelcome (illiberal) values by forcing individuals to comply with public standards of political correctness, an overreaching by the judiciary into a field properly left to democratic legislatures, and a question about the competence of judges who have expertise in constitutional and human rights law to refashion private law. There may even be an underlying concern that public law and human rights law is swallowing up private law. If so, not only will the distinctive methods and traditions of private law be undermined or even obliterated, but the imperialism of human rights lawyers may lead eventually to the demise of separate departments of private law in some European universities. Though sharing some of those concerns, in the common law tradition critics emphasise the potential disruption to the settled rules and principles of private law that may be provoked by the transplantation of human rights law into the laws of contract, tort, and property.

While both the puzzle and the controversy described above give voice to valid concerns about the compatibility between human rights law and private law, further reflection on the issue reduces the force of the stark oppositions commonly drawn between human rights and private law. Private law is surely not opposed to the values and principles embodied in the terse statements of human or fundamental rights found in constitutions, conventions and charters. On the contrary, many of those values influenced the doctrines of private law. The individual right to liberty may be discovered at the core of such key ideas of private law as freedom of contract and protections in tort against injury to the person. Similarly, private law provides most of the rules that protect the interest in or right to peaceful enjoyment of possessions; and tort law protects vital interests such as the right to privacy and through the law of defamation sets the limits on the misuse of the right to freedom of expression. It is certainly possible to argue that private law should be understood as an earlier embodiment of many of the values that also inspired declarations of human rights.³

That claim about the similarity of values (though not the mode of expression in the discourses of human rights) can be true even when we acknowledge that there is a significant difference in the way in which human rights function in public and private law. In a public law context, the rights are granted to individuals and associations; the law requires the government and agencies of the state to comply with those rights in the absence of compelling reasons to the contrary such as national security. Rights are never accorded to the state. In a private law context, however, both parties to a dispute are private individuals or organised groups, so both parties can appeal to the values underlying human rights such as individual liberty and dignity, respect for private property, and the

³ E.g. A. Barak, 'Constitutional Human Rights and Private Law', in D. Friedmann and D. Barak-Erez (eds), *Human Rights in Private Law*, (Oxford: Hart Publishing, 2001), 13, 21-22; J. Smits, 'Private Law and Fundamental Rights: A Sceptical View', in T. Barkhuysen and S. Lindenbergh (eds), *Constitutionalisation of Private Law*, (Leiden/Boston: Martinus Nijhoff, 2006) 9; R. Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007).

protection of private life from interference. So there is a sharp difference in the function of rights in the two branches of the legal system: in public law rights serve principally as a defensive weapon against infringements by the state; in private law rights (often described as interests) are positive claims that must be balanced between the parties. Nevertheless, with apparently only minor changes in terminology, private law can be viewed plausibly as a branch of the law where, through the learning of centuries, the competing interests and rights of individuals have been reconciled into a settled scheme of codes in civil law systems and judicial precedents in the common law countries.

It may be the case that private law has traditionally shunned any explicit reference to the discourse of human rights because it originated in the one-sided claims of public law and therefore seemed unsuitable to the need for a balancing of the competing interests and rights of two formally equal parties. Yet such discomfort with the language of human rights does not contradict the view that the same values that prioritise individual interests and liberties underpin both public law and private law. The relation between human rights law and private law is closer than is commonly supposed by lawyers, but the connection is not a simple conduit. Human rights influence the content of private law through a network of connections that transmit and diffuse impulses.

Furthermore, to acknowledge that common values concerning the importance of individual interests or rights have informed both public law and private law is not to say that private law can be reduced to an articulation of individual rights. Rights may have influenced private law, but they are not the sole source of principles. Indeed, univocal theories of private law or parts of private law that attempt to explain the entire corpus of legal rules by reference to a single idea, whether it be rights, wealth maximisation, or some other moral principle, inevitably fail to account for the complexity and richness of the law. All of these incommensurable discourses have probably played a part in shaping legal doctrine, including the ideas of liberty, dignity, and equal treatment that form the backbone of claims for human rights. To understand both the compatibility and the incompatibility of human rights with private law, we need to accept the rich tapestry of private law as it stands, not diminish it by reductionist interpretations that conveniently confine its role to the protection of individual rights.

This investigation of the compatibility of human rights with private law commences with a brief survey of how in many jurisdictions private law has fallen under the searching examination of the spotlight of human rights law (II.). We then examine more closely why the introduction of explicit discussions of human rights into private law relations provokes such puzzlement. We call this: ‘the puzzle of horizontality’ (III.). That discussion leads to the need to consider different theories regarding the structural relation within a legal system between public and private law. Part of the puzzle of horizontality derives from uncertainty about the location of fundamental rights in the architecture of a legal system and the consequent relation between those rights and other branches of

the law. Are fundamental rights located in public law, private law, both, or somewhere else entirely (IV.)? The next step by which to discern the structure of the connections is to understand the reasons for the distinction that is commonly drawn between the direct effectiveness of fundamental rights in the sphere of public law and their limitation to indirect effect in the context of private law. Why is it that in private law it is usually asserted that fundamental rights, if they are effective at all, will only have an indirect effect on the law (V.)?

Answers to those questions permit us to return to the puzzle of horizontality with a clearer perspective and analysis. We can reconsider some of the criticisms and puzzles posed about the insertion of fundamental rights into private law. In particular, will the application of fundamental rights to private law disrupt legal doctrines with unforeseeable and probably unwelcome results? How can the competing rights of individuals be reconciled if not through the traditional doctrines of private law (VI.)? We can then address a problem of translation that arises during the transplant of constitutional and human rights into private law: should these fundamental rights mean different things according to whether they arise in a public law or a private law context (VII.)?

Whether or not the core meaning of the rights remains constant in the context of private law, it is evident that some practical differences will necessarily arise. In the first place, when rights are qualified by reference to other legitimate interests, such as other rights or legitimate goals of public policy, how should the test of justification be formulated in private law? Is the normal public law approach of the test of proportionality compatible with the mode of reasoning in private law (VIII.)? A further difference may emerge when we consider the paradoxical challenge mentioned above that the insertion of human rights into private law will force the imposition of illiberal values on private actors rather than according them a wide margin of liberty (IX.)? We can also address the relevance of derogation from or consent to the withdrawal or sacrifice of rights in a private law context, which appears rather different from the traditional rejection of derogations in public law (X.). Finally, we should consider what contribution, if any, the application of fundamental rights to private law will make to ensuring fairness between the parties in a private law context. In public law the aim of rights is to protect the weaker party, the ordinary citizen, against the greater, collectivised power of the state. Does this protection of a weaker party also apply to the application of human rights to private law (XI.)?

In the conclusion, the central claim that will be advanced is that the application of rights in a private law context demands a shift in the emphasis of the underlying philosophical foundations of rights. Using the distinction commonly drawn between negative liberties and positive liberty or autonomy, the argument is that whilst liberal theories of the state tend to employ both sorts of foundations for theories of rights, both negative and positive liberty, in public law the context usually requires a focus on the values of negative liberty, whereas in private law the emphasis tends towards a more positive conception of liberty or autonomy. That contrast ultimately explains, it is suggested, the different ways

that rights function in the different contexts of public law and private law (XII). It also explains how human rights or fundamental rights are simultaneously compatible and incompatible with private law.

II. THE GROWING IMPACT OF HUMAN RIGHTS ON PRIVATE LAW

1. NATIONAL CONSTITUTIONS

Since there are several excellent studies of the increasing frequency and range of the application of human rights law to private law in many European countries,⁴ there is no need here to rehearse in detail the extent of this jurisprudence. Most European countries acknowledge the existence of some potential impact of human rights law on private law, even if the effect is very weak. In many European jurisdictions, such as Denmark, Italy and Greece, the national constitution provides explicitly that rights that may be inserted into private law and have horizontal effect between individuals. More commonly, the impact of human rights law contained in national constitutions and similar documents is derived indirectly, by the courts acknowledging that those values and fundamental rights should have a ‘radiating effect’ (to use the German phrase)⁵ on the entire legal system. That radiating effect may steer courts towards a particular interpretation of the rules, principles, and general clauses of private law, or it may require a court to credit those values and rights with special weight when carrying out a balancing exercise between the competing rights of the parties. We will consider many examples of such insertions of human rights law into private law below.

⁴ E.g. D. Oliver and J. Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study* (London: Routledge, 2007); C. Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, (The Netherlands: Wolters Kluwer, 2008); S. Grundmann (ed.), *Constitutional Values and European Contract Law*, The Netherlands: Kluwer Law International, 2008); G. Bruggermeier and A. Columbi Ciacchi, and G. Comandè (eds), *Fundamental Rights and Private Law in the European Union*, vol I, *A Comparative Overview* (Cambridge: Cambridge University Press, 2010); O. O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party* (Munich: Sellier, European Law Publishers, 2007); David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge: Cambridge University Press, 2011); C. Busch and H. Schulte-Nölke (eds), *Fundamental Rights and Private Law* (Munich: Sellier, 2011); and books in note 3 above.

⁵ This is the phrase used in some German constitutional theory to describe the influence of the Basic Law (and its rights) on all aspects of the legal system: see: M. Kumm, ‘Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law’ (2006) 7(4) *German Law Journal* 341; J. Fedtke, ‘Germany: Drittwirkung in Germany’, in D. Oliver and J. Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study*, (London and New York: Routledge-Cavendish, 2007), 125.

2. EUROPEAN CONVENTION ON HUMAN RIGHTS

In addition to national constitutions, in all jurisdictions in Europe the European Convention on Human Rights (ECHR) of the Council of Europe has an impact on private law.⁶ This impact may occur because of the ‘monist’ view that international instruments form part of the national legal system (as in France), or less directly, as in Germany, because judges will respect decisions of the European Court of Human Rights by means of compatible interpretations of domestic law. The impact of the ECHR is strengthened in some countries such as the United Kingdom by its express incorporation into national law and the imposition of a duty on all public authorities, including courts, to make decisions that are compatible with the ECHR.⁷

Given this influential role of the ECHR in guiding the application of human rights to private law, the approach of the European Court of Human Rights (ECtHR) is pivotal. As an international court with a jurisdiction confined to the application of the ECHR to national governments, at first sight the ECtHR appears unlikely to become involved in domestic private law disputes. But the ECtHR may establish jurisdiction over such disputes by insisting that in accordance with Article 1 of the ECHR, which imposes an obligation on states to secure the protected rights and freedoms, national courts have a duty to protect the observance of convention rights by national law, so that any decision of a national court must be compliant with those rights.⁸ Although a human rights issue is unlikely to arise in the ordinary run of private law cases, when a national court resolves a property dispute or provides an interpretation of a contract, as an agency of the state that must uphold the ECHR, a court must provide a resolution that conforms to the protected rights. The question at the heart of *Pla and Puncernau v Andorra*,⁹ for instance, concerned the interpretation of a Will. Notwithstanding the deference that the ECtHR would normally show to national courts to determine the content of obligations under national private law, it insisted that the interpretation of the Will by the national court, as part of the state, should be compatible with the convention rights. By this technique of reviewing decisions of national courts for fulfilment of the duty to ensure compliance of their judgments with convention rights, the ECtHR can in practice intervene in any private dispute once there has been a judgment by a national court.

The jurisdiction of the ECtHR is extended to governmental administrative actions and omissions, when the applicant argues that a failure of the government to take the measures which may be legitimately expected has resulted in a failure

⁶ As well as applying to all the Member States of the European Union, the Convention applies to a further 20 states including Russia and Turkey.

⁷ Human Rights Act 1998.

⁸ D. Spielmann, ‘The European Convention on Human Rights: The European Court of Human Rights’ in D. Oliver and J. Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study* (London: Routledge, 2007), 427.

⁹ (2006) 42 EHRR 25.

by the state to protect his or her convention rights from other private individuals.¹⁰ In the case of environmental torts, for example, when an individual claims an interference by a private business with the right to privacy because the noise or fumes emitted by the business pose a risk to the health of the applicant, the ECtHR establishes jurisdiction when it is demonstrated that the public authorities have failed to take appropriate protective action,¹¹ or have failed to enforce the applicable environmental laws.¹² In such cases the ECtHR does not appear to require more from public authorities than for them to comply assiduously with domestic laws, so that the Convention is not used to create new private law rights but rather to uphold existing legal standards.¹³

3. CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Article 6 of the Treaty of the European Union (TEU) declares that the Charter of Fundamental Rights of the European Union (CFREU)¹⁴ shall have the same legal effect as a Treaty between the Member States. The CFREU duplicates the civil and political rights of the ECHR, but also contains a list of social and economic rights that is strongly influenced by the European Social Charter of the Council of Europe. Yet Article 6 also insists that the Charter will not extend the competences of the European Union (EU), which suggests that, while respect for human rights is a condition of the lawfulness of EU acts including decisions on EU law by courts, individuals cannot invoke the Charter as an independent basis for a legal claim. Article 6 TEU adds that the EU will accede to the ECHR and that those convention rights, together with the constitutional traditions of member states, constitute general principles of EU law. From these complex and nuanced provisions,¹⁵ it is evident that any court, including the Court of Justice of the EU (CJEU (formerly ECJ)) and national courts, when applying any aspect of EU law, should interpret that EU provision in a manner that is compatible with the CFREU, including appropriate deference to the decisions of the ECtHR on similar rights in the ECHR.¹⁶

Although the EU lacks formal competence in the field of private law, there has been a creeping invasion of the field through legislation ostensibly designed to

¹⁰ *Cyprus v Turkey* [2001] ECHR 331; *Oneryildiz v Turkey* (2005) 41 EHRR 325.

¹¹ *Lopez-Ostra v Spain* (1994) 20 EHRR 277; *Guerra v Italy* (1998) 26 EHRR 357.

¹² *Moreno Gomez v Spain* (2005) 41 EHRR 40; *Fadeyeva v Russia* (2007) 45 EHRR 10; *Giacomelli v Italy* (2007) 45 EHRR 38.

¹³ D. Nolan, 'Nuisance' in D. Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge: Cambridge University Press, 2011) 165, 173.

¹⁴ *Official Journal of the European Union* 14.12.2007, C 303/1.

¹⁵ In more detail: D. Chalmers, G. Davies and G. Monti, *European Union Law* 2nd edn (Cambridge: Cambridge University Press, 2010) Chapter 6.

¹⁶ CFREU article 52(3) specifies this connection. Cf Case C-540/03 *Parliament v Council (family reunification)* [2006] ECR I-5769, for remarkable deference to the ECtHR.

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 often raise questions about the enforceability of contracts. For the purpose of interpreting EU regulation of markets and what national constraints on the fundamental freedoms may be permitted, the CJEU can turn to the CFREU and other human rights documents. The general principle applied is that where a Member State tries to justify rules that are likely to interfere with the exercise of the fundamental freedoms, the justification in accordance with Community law must be interpreted in the light of general principles and fundamental rights.²¹ For instance, in the *Omega* case,²² the ECJ relied upon the protection of human rights and in particular the right to dignity to uphold a German restriction on the marketing of computer games containing simulated acts of violence against persons (even though the marketing of the games was perfectly lawful in their country of origin).

4. SOCIAL AND ECONOMIC RIGHTS

The analysis in this paper concentrates on the civil and political rights protected by the ECHR and duplicated almost verbatim in the CFREU. These rights are likely to have the greatest impact on private law because they are usually given legal force in national constitutions at least in the context of relations between a citizen and the state. Many jurisdictions also recognise to some extent social and economic rights, such as rights to health care, education, and workers' rights.²³

¹⁷ E.g. L. Miller, *The Emergence of EU Contract Law: Exploring Europeanization* (Oxford: Oxford University Press, 2011); Ch. Twigg-Flesner, *The Europeanisation of Contract Law* (Abingdon, Oxon: Routledge-Cavendish, 2008).

¹⁸ E.g. Directive 2011/83 on Consumer Rights OJ L304/64.

¹⁹ E.g. S. Weatherill, *EU Consumer Law and Policy* (Cheltenham: Edward Elgar, 2005);

²⁰ E.g. C. Barnard, *EC Employment Law* 3rd edn (Oxford: Oxford University Press, 2006); Brian Bercusson, *European Labour Law* 2nd edn (Cambridge: Cambridge University Press, 2009); A. C. L. Davies, *EU Labour Law* (Cheltenham: Edward Elgar (European Law Series), 2012).

²¹ Case C-260/89 *Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis* [1991] ECR I-2925.

²² Case C-36/02 *Omega Spielballen –und Automatenaufstellungs v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

²³ 'In fact, twenty-five out of the twenty-nine constitutions of the countries which now form the EU (or aspire to become members) have social rights': C. Fabre, 'Social Rights in European Constitutions' in G. de Burca and B. de Witte (eds), *Social Rights in Europe* (Oxford: Oxford University Press, 2005).

Many of these rights are included in the CFREU, though often in guarded terms that curtail the substance of those rights to the standard, no matter how inadequate, set by national legislation. At EU level there is also the declaration of the European Council of the Community Charter of the Fundamental Social Rights of Workers.²⁴

In some national constitutions and in the CFREU, some social and economic rights are expressed not as rights but as guiding or directive principles, which are expected to influence the interpretation of the law but not provide the basis for any individual claims. In the German *Bürgerschaft* case,²⁵ for instance, which concerned a surety agreement to facilitate a loan to a business, the reference to a ‘social state’ in the Constitution as a directive principle was significant in the determination of the case by favouring the naive surety against the bank. The importance of the inclusion of directive principles in a constitution is that, even in the absence of constitutional protection of social and economic rights, the directive principles create the potential to augment the impact of social and economic concerns in the interpretation of private law by the mechanism of indirect effect.

Although the ECHR does not contain social and economic rights for the most part,²⁶ the ECtHR has used the European Social Charter of the Council of Europe as a point of reference in its interpretation of the rights protected by the ECHR. The ECtHR promotes an integrated approach by which the meaning of the rights protected by the ECHR should be compatible with other international conventions including the European Social Charter.²⁷

These social and economic rights or equivalent guiding principles have considerable potential to influence the development of private law relationships. At the level of the EU, the *Jaeger* case illustrates how the presence of a right steered the ECJ towards a rigid enforcement of protective legislation.²⁸ In that case, a collective agreement that fixed the hours of work and rest periods of hospital doctors was effectively invalidated on the ground that it provided inadequate rest periods. The Court relied on the entitlement to a rest period contained in the working time Directive,²⁹ but also strengthened its interpretation of the entitlement by reference to the Community Charter of the Fundamental Social Rights of Workers, which, though not legally binding in itself, declared the right to a daily period of rest to be fundamental. Similarly, when an issue is considered by the ECtHR, a convention right may receive a broad interpretation

²⁴ 9 December 1989.

²⁵ *Bürgerschaft* BVerfG 19 October 1993, BVerf 89, 214.

²⁶ There are some exceptions: e.g. the right to be a member of a trade union and to have that union represent a worker is protected in Article 11 (freedom of association).

²⁷ V. Mantouvalou, ‘Work and Private Life: *Sidabras and Dziantas v. Lithuania*’ (2005) 30 *European Law Review* 573; J. Nickel, ‘Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights’ (2008) 30 *Human Rights Quarterly* 984; C. Scott, ‘Reaching Beyond (Without Abandoning) the Category of “Economic, Social and Cultural Rights”’ (1999) 21 *Human Rights Quarterly* 633.

²⁸ Case C-151/02 *Landeshauptstadt Kiel v Jaeger* [2003] ECR I-8389.

²⁹ Directive 93/104.

in order to align its meaning with the rights protected in the soft law of the European Social Charter. For instance, Article 11 ECHR has been interpreted to include not only the right to be a member of a trade union, but also a right to effective mechanisms for collective representation of the interests of workers, which may include, in appropriate circumstances, the right to strike for the purposes of protecting the interest in collective representation through collective bargaining.³⁰

III. THE PUZZLE OF HORIZONTALITY

What are the risks of seeking to insert ideas of human rights discourse into private law? At first sight, it seems attractive to suggest that ordinary citizens should respect the ideals of human rights when conducting their ordinary dealings with others. Principles such as respect for liberty and for the dignity of individuals should no doubt infuse the entire legal order and influence all social relations. In a contract of employment, for instance, those values should ideally play an important role in the fabric of the relationship. At a certain level of restrictions on the freedom of the worker, the contract of employment becomes a contract of servitude, through which the worker is bound inextricably to a master in a subservient manner. Similarly, workers need to be protected from harassment and other kinds of demeaning treatment that deny them dignity and respect as autonomous individuals: labour is not a commodity. Through these and similar examples in relationships between citizens, it is possible to detect the importance attached to certain values or principles such as dignity and liberty throughout a liberal legal system, whether one looks in the constitution or in the details of private law governing contracts, property rights, wrongs, and family relations.

Yet there is a difference between saying that common values may infuse every aspect of a society and its legal system and proposing that fundamental rights or human rights should function to shape private relationships through law. The latter proposal suggests that the fundamental rights articulated in the constitution or bill of rights of a state should provide legal arguments that can determine the outcome of private law disputes and shape the development of the law. This proposal would suggest, for instance, that in the case of servitude, the worker should be able to challenge this condition and find a remedy through arguments based upon fundamental or constitutional rights rather than merely on the basis of the contractual relationship and other employment law measures. Similarly, in the case of demeaning treatment such as abusive language, the proposal seems to mean that the worker should be able to make a legal claim based upon a constitutional right to dignity rather than a claim based on breach of contract or a violation of some specific labour right. In short, the proposal for using

³⁰ K.D. Ewing and J. Hendy QC, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 2.

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 some particular values or religion, or the misuse of coercive powers by executive agencies such as the police. These origins of constitutional rights in protecting civil liberties and a liberal democratic system of government have emphasised the importance of protecting civil and political rights. Although analogous problems of abuse of power may occur in a private law context, as in the above examples of employment contracts, similar problems are not, generally speaking, a central concern of private law. Private law is more oriented towards the protection of economic interests of individuals against harms caused by other individuals, whether through the commission of wrongs against those interests or breaches of contractual undertakings and other promises. It is, however, possible to restate private law in the language of individual rights, particularly property rights and individual liberty. But in so doing, one notices both that the list of rights that appear to be significant differs between public law and private law and that the rights mentioned in the discourses of private law, if referred to at all, appear to weigh less heavily than those protected in the context of public law.

To make the same point in a technical way, in public law fundamental rights are conceived as having direct vertical effect. An individual exercises rights by bringing a claim for breach of those rights directly against a state authority. To use those same rights in a private law context would be to accord them horizontal effect against other individuals, a function outside their original scope and purpose. Consider, for instance, the right to a fair trial. The right was conceived in the context of a state exercising coercive powers. The right ensures that the individual receives a fair hearing before an independent court, with legal representation, and an unbiased determination of the issues before any punishment is imposed. How can such a right be transferred to the context of private law relations such as contracts? The shift in context does not deprive the right of any meaning, but to make sense of the right to a fair trial in a private context, it is necessary to engage in a reshaping of the content of the right. One

meaning that can be given to the right in horizontal relations between citizens is to insist that it imposes a positive duty on the state to provide adequate and effective civil courts and access to those courts for the resolution of disputes. This translation requires a shift from a negative right to be protected from arbitrary or biased adjudication to a positive obligation on the state to provide a professional service of civil courts. Another meaning that can be given to the right to a fair trial in a private law context is that it may affect the interpretation of private obligations. In a commercial contract that contains an arbitration clause, for instance, the right might be interpreted to create an implied contractual obligation for the arbitrator to conduct a fair hearing. In a contract of employment, the right to a fair trial might be narrowed to exclude the concern that a manager might be biased against an employee when deciding to make a dismissal and the employee's interest in legal representation, whilst preserving the element of fairness that grants the employee a fair chance to respond to criticisms and allegations of misconduct. Through either the construction of positive duties or the insertion of implied obligations, the right to a fair trial can be accorded meaning in the context of private law, but in crossing the border between public law and private law or moving from vertical effect to horizontal effect, the meaning of the right shifts. Some content of the right is lost in the translation, but new meanings are added.

Furthermore, in public law, generally speaking, fundamental rights are regarded as mandatory and inalienable. A citizen cannot give up constitutional rights to liberty and democracy by agreement: signing a contract that gives the authorities the power to detain a person indefinitely without trial would surely have no legal effect. Whilst these civil and political liberties can be qualified by reference to the protection of other rights or the rights of others and strong public policy considerations such as national security, these limitations arise not from consent given by an individual but by virtue of a closely patrolled test of justification, such as the legal test of proportionality, in which the relevance of consent will be closely monitored and in many cases excluded altogether. In contrast, in private law, the power of individual choice and consent, though not paramount, plays a pivotal role. The right to the peaceful enjoyment of private property, for instance, can be relinquished by a contract in private law, whereas in public law a state would have to find a strong justification to permit the seizing of private property (as well as having to pay compensation). Whilst there are limits to the power of individuals to consent to the abrogation of rights, such as the invalidity of a contract of slavery, these outer boundaries leave a wide range of choices for the exercise of individual discretion to qualify or forfeit individual rights.

To sum up these observations: whilst it seems likely that the values that underlie fundamental rights in public law context will infuse the whole legal order including relations governed by private law such as contracts, the change to a private law context requires a double transformation. First, the rights have to be translated to fit their new context of private law: a simple transplant will be rejected. Second, the rights must become substantially alienable or derogable

rather than mandatory. In public law, rights are clubs to defend oneself against the abuse of power, with clubs having been accorded trumping power by the constitution or bill of rights,³¹ whereas in private law rights are diamonds to be traded with others or discarded by choice.

These differences provide the underlying reason for doubt about the practicability and appropriateness of inserting fundamental rights into private law. They indicate that there is a risk that such a transplant of rights will cause a perturbation in private law doctrines that will result in misunderstanding and distortion. Incompatible public law conceptions of rights will be applied to private law. This interpretation of the risks of inserting fundamental rights relies upon a view of the internal structures of a legal system. This view of the division between public and private law must now be interrogated in order to assess how far it determines the concern about the compatibility of fundamental rights and private law.

IV. THE STRUCTURAL RELATION BETWEEN PUBLIC AND PRIVATE LAW

In order to approach the puzzle of horizontality, it is helpful to draw a distinction between two theories of the structural relation between private law, on the one hand, and constitutional rights and principles, on the other. On one view of this relation, private law and constitutional law resemble semi-detached houses: independent homes, but joined by a common wall. The two houses of public and private law lean on each other for support, but can be inhabited entirely separately. In the development of legal doctrine, each system of law, both public and private, develops its own autonomous integrity and coherence. On another view of this relation, constitutional laws, or at least the basic constitutional principles such as the fundamental rights, provide the common foundations for what is ultimately a single structure. The foundational rights support both the edifice of public law and private law. On this latter view, legal doctrine requires for its coherence and integrity that all the dimensions of law, both public and private, should be ultimately united into a single edifice. The former view may be labelled the mutual support structure and the latter view the single source structure.³² What is the practical difference between these metaphorical structures?

On both views, there is a communication between the fundamental rights and private law: neither structure provides impermeable insulation. In the mutual support structure, the communication may be described as one in which both

³¹ R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) (for the metaphor of rights as trumps).

³² Cf H. Collins, 'The Constitutionalization of European Private Law as a Path to Social Justice?' in H.-W. Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Cheltenham: Edward Elgar, 2011) 133.

sides of the joining wall, like considerate neighbours, have to take into account the interests of the other. In other words, in developing private law, it is important that lawyers ensure that the rules do not violate basic principles and rights of constitutional law, that is, do not greatly disturb the neighbours. Equally, the public lawyers should not disrupt the normal processes of private law. The structure requires harmonization, mutual respect, but there is no relation of dependence. In the single source structure, in contrast, the rules of private law are regarded as being ultimately derived from the same fundamental principles and rights of the constitution. It is possible on this view to regard to view private law as a detailed articulation of constitutional rights. For instance, freedom of contract as a principle in private law will be regarded as being based on or as representing a more practical expression of the constitutional principles of liberty, dignity, autonomy, and freedom of association. The content of Civil Codes and the common law can be analysed as a careful, often incremental, development of legal rules and principles that seek to balance or accommodate the different rights of citizens to property, liberty, dignity, equality, and so forth. In daily practice private lawyers may not refer explicitly to the underlying constitutional principles, but key constitutional ideas such as respect for proprietary interests, respect for the dignity of others, and protection of individual liberty exert a constant influence on private law doctrines.

The main difference between the two structures for a legal system lies in the contrast between the proposition that private law should not be permitted to subvert constitutional rights and the proposition that private law is ultimately derived from constitutional rights.³³ With regard to the systematic coherence of the law, whilst the single source structure requires all law, both public and private, to fit into a coherent body of legal doctrine, the mutual support structure only requires coherence within the autonomous spheres of public and private law, subject only to the constraint of abstention from interference with the principles of the other. It should be noted that this contrast is not a claim about historical origin or antecedence: the idea of private law antedates ideas of constitutional rights in most European countries. It is rather a claim about constitutional theory and the theoretical relation between private law and constitutional law.

The contrast between the mutual support theory and the single source theory is designed to highlight an ambiguity in conceptions of the legal system and the place of fundamental rights within it. It is probably possible to interpret any national legal system in both lights. What the contrast does emphasise is that the advent of the application of human rights law to private law does signal the growing strength of the single source structure as a theory of the arrangement of the internal divisions of a legal system. It is still possible, of course, to argue consistently with the mutual support structure that what is happening is that the

³³ A similar contrast between a subordinate relationship and a complementary relationship between fundamental rights and private law is drawn in: O. O. Cherednychenko, 'Fundamental Rights and Private Law: A Relationship of Subordination or Complementarity?', (2007) 3 *Utrecht Law Review* <http://www.utrechtlawreview.org>

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 unjustifiably interfered with A's rights, as set out in the relevant constitution or convention on fundamental rights. The violation of the fundamental right is itself a sufficient condition for A to have a cause of action against B. In contrast, for indirect horizontal effect, no such claim is available. A must argue instead that B has broken a private law obligation owed to A, but that claim is buttressed by the further argument that the content of that obligation should be determined in a way that is compatible with applicable fundamental rights. In both cases, the fundamental rights are applicable to the dispute between the parties, but only in the former do they create the claim.

The distinction can be restated in formal Hohfeldian terms.³⁵ Under direct horizontal effect, A has a claim-right based on the fundamental constitutional or convention right, and B has a correlative obligation. Under indirect horizontal effect, A has a claim-right based upon private law, and B has a correlative private

³⁴ The distinction is also expressed as one of unmediated and mediated effect (or application) following the German legal distinction between *unmittelbar* and *mittelbar Drittwirkung*.

³⁵ W.N. Hohfeld, 'Fundamental Legal Conceptions: as applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16.

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 She attended the clinic to address her drug problem, the existence of which she had repeatedly denied to the press. If she could rely upon Article 8 ECHR directly, her claim-right would be the newspaper's unjustifiable interference with her right to respect for her private life; if she could only rely on the right indirectly, she would have to bring a suitable tort claim (breach of confidence under English law) and a court, when interpreting the scope of her right in tort, would have to ensure that it protected her Article 8 right adequately. In either case, the result would be that the newspaper would be liable if it had unjustifiably interfered with Campbell's Article 8 right, because the content of the private law right in tort would have to be developed so that it was compatible or consistent with Article 8.

No significant difference in outcome between direct and indirect horizontal effect is likely to arise unless there is no available private law claim on which to found an action in the first place. Given the sophistication and flexibility of private lawyers in developing new kinds of claims, such a situation seems almost inconceivable today. In the past, rules about status, such as one preventing a wife from suing her husband, may have created gaps in the coverage of private law claims, but those gaps have been filled no doubt in part for the reason that these differentiations by status are inconsistent with the commitment to equality before the law found explicitly or implicitly in all human rights documents. The Naomi Campbell case was alleged to fall into a gap in the law with respect to the protection of privacy against press intrusion, but eventually the gap was filled (or

³⁶ For a similar analysis: D. Beyleveld and S. Pattison, 'Horizontal Applicability and Horizontal Effect' (2002) 118 *Law Quarterly Review* 623, 626. But those authors suggest (at p. 628), inconsistently with the Hohfeldian scheme, that in cases of indirect horizontal effect B owes two duties, a private law duty to A and a public law duty to the state to observe human rights. In Hohfeldian terminology, however, a liberty-right (or privilege) does not impose a duty on B but rather (if on anyone) on the state and its courts.

³⁷ *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

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 the rest of the evening because I am trying to write an article, I may have unjustifiably interfered with their right to freedom of expression, but surely no private law claim would arise in this family context. Even in a legal system that accords fundamental rights direct horizontal effect, it seems unlikely that a court would want to intervene in the domestic sphere and defend the children's rights. If there is no practical difference between direct and indirect horizontal effect in the outcome of cases, why does the conceptual difference matter and provoke such controversy?

2. INSTITUTIONAL CONTEXT

The labels of direct and indirect horizontal effect can be misleading owing to the differences in national court structures. Direct and indirect effect can appear virtually identical in a legal system with a constitutional court that is separate from the private law system, as in Germany, because to acquire jurisdiction over the matter the court must assert that a constitutional right of the claimant is engaged and consider whether private law interferes with it. Although the German constitutional court is widely interpreted since its decision in *Lith*³⁸ as confining the role of constitutional rights to an indirect effect on private law, for the constitutional court to exercise its jurisdiction at all it must insist that a fundamental right (or some other constitutional provision) is engaged. A claimant before the court must rely on the fundamental right in much the same way as in a case of direct horizontal effect. In the context of a separate constitutional court with supervisory powers over all other courts, the distinction between, on the one hand, interpreting a private law doctrine in an innovative way in the light of a constitutional right (indirect effect), and on the other, simply enforcing the constitutional right (direct effect), can appear rather technical, a distinction without a substantive difference.³⁹ The fig leaf of preserving the integrity of private law by suggesting that the constitutional court is merely interpreting a general clause in the Civil Code cannot disguise the reality that the court's reasoning relies entirely on an interpretation of constitutional rights and principles.

³⁸ BVerfG 15 January 1958, B VerfGE 7, 198 (LÜTH).

³⁹ M. Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7(4) *German Law Journal* 341, 352: "The practical difference between indirect and direct effect, however, is negligible. It concerns merely the formal construction of the legal issue and has not implications whatsoever for questions relating to substantive outcomes or institutional competence."

In contrast, in legal systems such as France and the United Kingdom, the highest court claims jurisdiction in private law matters and at the same time insists that it must ensure, so far as possible, that its decisions are compatible with the ECHR. Within this latter institutional framework, the court can achieve all that it needs to do to secure compliance with the ECHR through granting indirect horizontal effect. Invoking a fundamental right is unnecessary to secure jurisdiction. Nor is a reference to a fundamental right even necessary to achieve a judgment that complies with those rights, for compliance can be achieved by manipulation of private law doctrines within the traditions of private law. Furthermore, it seems probable that a unified court structure tends to weaken the impact of fundamental rights on private law, because a court will be reluctant to disrupt its own settled principles and rules on private law.⁴⁰

Given these differing institutional frameworks, why then, as in the opening quotation from Oliver Gerstenburg, does the distinction between direct and indirect horizontal effect generate such controversy? In each legal system, the debate is often rooted in the separation of powers and the relation between different parts of the court structure. In the case of Germany for instance, the allegation can be made that the constitutional court should not engage in adjudicating over private law disputes for two reasons. First, it is unlikely that the members of the constitutional court will have developed suitable expertise in private law, because the lawyers who make up the judges are likely to have specialised in public law. Equally, and this applies to France, the problem of competence arises in the opposite way: the Cour de Cassation is familiar with the civil code, but may have little experience of the ECHR. None of these criticisms carry much weight in the United Kingdom, because the higher courts have general jurisdiction in both public and private law. This argument about competence, if it seems relevant to the particular legal system, tends to encourage a cautious approach to the insertion of fundamental rights into private law: if it is to happen at all, it is said, the insertion should be done by the private law experts and then only by giving fundamental rights indirect effect.

Beyond the issue of competence lies the issue of the separation of powers. Whenever judges use fundamental rights to challenge settled interpretations of private law, the question arises whether they are overstepping their powers. Where private law has been developed primarily by the legislature, as in the case of codified systems of law such as France and Germany, judicial revisions of private law doctrines are regarded as *prima facie* invasions of a sphere properly left to democratic decisions through the legislature. It is said that the democratic legislature has devised a civil code that balances the competing interests and rights of private individuals and it is not appropriate for a court to adjust that balance by appealing to fundamental rights. For this reason, granting direct horizontal effect

⁴⁰ For a similar assessment of practice in The Netherlands: O. O. Cherednychenko, 'Subordinating Contract Law to Fundamental Rights: Towards a Major Breakthrough or towards Walking in Circles?' in S. Grundmann (ed.), *Constitutional Values and European Contract Law*, (The Netherlands: Kluwer Law International, 2008) 35, 50.

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 by acknowledging that the law of tort needed to be slightly adjusted in order to make it compatible with Article 8 ECHR,⁴¹ but other members of the court simply revised the scope of the tort and professed it unnecessary to invoke any convention right.⁴²

3. A UNIFYING THEORY?

These institutional considerations regarding the choice between direct and indirect horizontal effect probably mask a more fundamental jurisprudential dispute. Lord Neuberger has observed in this context that the issue will not be resolved without a ‘grand unifying theory’.⁴³ By this phrase he is probably referring to what was described above as a single source theory of the structure of a legal system. On this view, all the law, both private and public, rests ultimately on the core protection of fundamental rights. If the single source theory is correct, it may then be suggested that there can be no objection in principle to granting direct horizontal effect to fundamental rights, because private law, so understood, is ultimately grounded in those fundamental rights. The development of private law can be understood as a process of ‘reflective equilibrium’,⁴⁴ in which detailed legal rules are developed by the legislature and the judiciary to express the fundamental rights, but their concrete application can always be reconsidered in the light of interpretations of the underlying fundamental rights. Such reinterpretations are necessary to achieve consistency and coherence for the legal system, essential ingredients, according to Dworkin,⁴⁵ of its integrity and legitimacy. On this view

⁴¹ E.g. Baroness Hale. “The 1998 Act does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties’ Convention rights.”

⁴² E.g. Lord Nicholls and Lord Hoffmann. For criticism of this approach: Jonathan Morgan, ‘Privacy in the House of Lords, Again’ (2004) 120 *Law Quarterly Review* 563.

⁴³ Lord Neuberger, ‘Forward’, in D. Hoffmann (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge: Cambridge University Press, 2011) xiii.

⁴⁴ J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972) 20.

⁴⁵ R. Dworkin, *Law’s Empire* (Cambridge, Ma.: Harvard University Press, 1986).

of a grand unifying theory, the single source structure provides the necessary justification and mandate for granting direct horizontal effect to human rights.

The logic of this argument is, however, flawed. A grand unifying theory (or single source structure) is a necessary but not a sufficient condition for granting direct horizontal effect to fundamental rights. It is probably necessary in order to establish the proposition that human rights have a profound 'radiating effect' on all branches of the law, whether private or public. But it is not a sufficient condition, because even with a conception of a single source structure for the architecture of a legal system, there may be important additional considerations that dictate that the influence of fundamental rights in private law should be limited to indirect horizontal effect. Those additional considerations include, but are not limited to, the factors mentioned above concerning the institutional structures of legal systems. A single source structure or unifying theory is equally compatible with a practice of indirect horizontal effect. We should therefore consider in more detail these additional considerations in favour of judicial use of indirect horizontal effect as opposed to direct horizontal effect. These additional considerations were briefly described above as aspects of the puzzle of horizontality. Here we concentrate on the most salient issues: doctrinal integrity; the modification of the meanings of rights; the balancing of competing rights; the illiberal constraints of public law standards; consensual derogation from rights; and the protective function of rights.

VI. DOCTRINAL INTEGRITY

The most striking concern is that direct horizontal effect might turn out to be seriously disruptive to private law and therefore generate unpredictability and a consequent problem for businesses and citizens seeking to rely on the law in conducting their affairs. Settled doctrine on which the parties have relied in their dealings with each other might be bypassed by a direct constitutional claim. Not everyone shares that concern about unpredictability: for instance Viviane Reding, the Vice-President of the European Commission, has asserted that the requirement for all courts when applying EU law to conform to the CFREU will ensure a more efficient and coherent interpretation of the existing EU legislation in the field of private law.⁴⁶ Whilst it may be true that in a field like EU private law, where rules and guiding principles are sparse and opaque, extra guidance is always welcome, even if it takes the form of abstract entitlements, this is not the

⁴⁶ 'Foreword', in C. Busch and H. Schulte-Nölke (eds), *Fundamental Rights and Private Law* (Munich: Sellier, 2011) p. vii; cf C. Mak, 'Harmonising Effects of Fundamental Rights in European Contract Law' (2007) 1 *Erasmus Law Review* 59; A. Colombi Ciacchi, 'Non-Legislative Harmonisation of Private Law under the European Constitution: The Case of Unfair Suretyships' (2005) *European Review of Private Law* 285; for a more sceptical assessment of the potential of fundamental rights in the harmonisation project: O. O. Cheredychenko, 'The Harmonisation of Contract Law in Europe by Means of the Horizontal Effect of Fundamental Rights?' (2007) 1 *Erasmus Law Review* 37.

problem in national private law systems, where complex and detailed doctrinal systems exist already.

Even if one takes the single source structure view of the relation between private law and constitutional law, this concern about disruption and unpredictability remains pertinent. On that view, the significance of the introduction of constitutional arguments into private law is not that wholly new types of considerations are being voiced, but rather that the existing balance struck by private law between the rights of individuals needs to be adjusted. In a case concerning a contract, for instance, the argument based on constitutional rights may either be pressing for greater weight to be given to the interest of private autonomy and freedom of contract or for greater protection to be accorded to a weaker party on such grounds as the need to respect principles of dignity and equality. The threat posed by the application of the technique of direct horizontal effect to constitutional rights in a sphere already occupied by private law is that it may pay insufficient attention to the way in which private law has already sought to balance competing rights through its legal doctrines and rules and the way that people have ordered their affairs in reliance on these rules. Indirect horizontal effect seems superior in this respect, for it insists that any claims based on rights should be integrated into the existing, carefully considered, settlement between competing rights in private law, which has effectively been tested for generations through litigation in the courts and parliamentary debates.

This argument for the superiority of indirect horizontal effect makes certain assumptions about private law. It assumes that private law has already fully subsumed the human rights values that are proclaimed in constitutions or conventions into its legal doctrines. A second assumption is that the introduction of direct effect threatens to disrupt the coherence of private law and its elaborate doctrines that reconcile the competing rights of individuals. This second point requires a perception of private law that holds that it comprises a systematic and integrated both of rules. Given these assumptions about the qualities of private law, the introduction of novel claims based on directly effective fundamental rights will reopen, at the very least, the underlying claims of rights and values.

For instance, if a celebrity claims an invasion of the right to respect for privacy by a newspaper, the legal presentation of the argument for a directly effective right requires a court to engage in an explicit balancing exercise between the celebrity's right to privacy and the newspaper's freedom of expression. Not only will the reconfiguration of the arguments at a higher level of abstraction not help to resolve the underlying problem of the tension between privacy and freedom of the press, but there is a danger that, if judicial decisions pay less attention to the existing doctrines of private law, they will weaken the coherence of private law. The technique of indirect horizontal effect appears superior in this respect to direct effect, because it reduces the disruptive potential of the insertion of human rights into private law. As in the theory of the mutual support structure of the relation between public and private law, the method of indirect horizontal

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 'indecent', 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 would have been clear that even if the advertisement was in bad taste, it did not pass the threshold of indecency.

These arguments about the superiority of indirect horizontal effect with regard to the preservation of the normative coherence and predictability of private law can be challenged by testing their assumptions. What if the existing private

⁴⁷ For a critical discussion of this position from the perspective of systems theory, see O. Gerstenberg, 'Private Law and the New European Constitutional Settlement' (2004) 10 *European Law Journal* 766, 774. It should be added that Gerstenberg doubts the coherence of this position, calling it 'inadequate and seriously misleading' (p. 775).

⁴⁸ *Stern v Benetton*, 6 December 2001, I ZR 284/00; this case (and the next) is translated in H.-W. Micklitz, J. Stuyck and E. Terry, *Cases, Materials and Text on Consumer Law* (Oxford: Hart Publishing, 2010) 80-82.

⁴⁹ *Stern v Benetton*, 11 March 2003, [2003] Gewerblcker Rechtsschutz und Urheberrecht 442

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 of cases will be determined by the application of often unacknowledged extra-legal policy considerations. If so, the putative damage to the integrity of legal doctrines caused by the insertion of directly effective human rights should not be a matter of serious concern, because the courts use doctrines, drawn from both public and private law, instrumentally to achieve their preferred policy goals. On this sceptical view, the only difference that the insertion of directly effective fundamental rights into private law will make is that it will add to the available justificatory devices for the judges, though it is unlikely to affect the outcomes of the decisions. One need not go so far as to regard legal rules as ‘pretty playthings’,⁵⁰ in order to acknowledge that direct horizontal effect is unlikely either to obstruct or to facilitate judges in achieving the results that they regard as just and appropriate in the circumstances of a particular case.

Although these sceptical points suggest that concerns about the integrity of private law under the onslaught of directly effective fundamental rights are overstated, the problem remains that the balance of interests contained in private law may be disrupted by directly effective human rights. This problem is bound to arise because of the great weight customarily accorded to fundamental rights in public law. Rights prioritise the interests of individuals, even if they can be subsequently modified by restrictions imposed to achieve legitimate goals and to protect the rights of others. When that strong value attached to rights is transposed to private law, it may unsettle rules that function to put collective interests ahead of individual rights. One example in English law where this system of values may apply concerns the occupier of premises duty to take reasonable care to protect the health and safety of any persons on the premises, whether they are employees, visitors, or even trespassers. This duty seems to be aimed at

⁵⁰ K. Llewellyn, *The Bramble Bush* (New York: Oceana, 1930).

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 agencies of the state have invaded the privacy of individuals, it often makes sense to draw a line between actions taken by citizens in public places and those in their own homes. Whereas the state may be entitled in general to observe and to control what occurs in public places without violating privacy rights (though the state may be violating other liberty rights), attempts to observe and to control what takes place in the home are likely to be regarded as an interference with privacy, which will require strong justification. In contrast, in the relations of civil society, this particular spatial distinction between public and private places seems less significant.⁵⁴ Instead, what seems more important is the protection of the confidentiality of personal information and the preservation of boundaries between public roles and private and personal life.

For instance, in *Pay v UK*,⁵⁵ the employer had dismissed a probation officer when he refused to give up or alter his outside work activities. In the evenings and at weekends, he ran a business selling bondage and sado-masochistic garments and implements. The business was advertised on the Internet, which featured a picture of the claimant wearing a mask that illustrated the products for sale. The products were also marketed at private clubs, where he performed a show. The employer, the probation service that assists convicted criminals to reintegrate into society, was concerned that Mr. Pay's activities would embarrass the service and would be perceived as inappropriate for a person who sometimes supervised convicted sex offenders. The UK tribunal rejected Mr. Pay's claim against his employer that he had been unfairly dismissed from his job. The tribunal accepted that the dismissal would have been unfair if it had involved an unjustifiable interference with his right to privacy. Following an earlier decision of the English Court of Appeal,⁵⁶ the domestic courts concluded, however, that as the activities took place in public, on the Internet and in clubs to which the public had access, those activities were outside the scope of the protection of privacy established by

⁵³ H. Collins, *Justice in Dismissal* (Oxford: Oxford University Press, 1992) 198.

⁵⁴ V. Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 *Modern Law Review* 912 (who rejects the spatial conception of privacy in both public and private spheres); see also M. Freedland, 'Privacy, Employment and the Human Rights Act 1988' in K. S. Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Oxford: Hart Publishing, 2007) 141.

⁵⁵ *Pay v UK*, Application No. 32792/05, Admissibility Decision of 16 September 2008, [2009] IRLR 139.

⁵⁶ *X v Y* [2004] EWCA Civ 662, [2004] ICR 1634.

Article 8 ECHR. When Mr. Pay took his case to the ECtHR in Strasbourg, a different view was taken of the scope of Article 8 in this context. The fact that the activities took place in public or in places that the public could access did not necessarily lead to the conclusion that they were no longer within the scope of Article 8. A person's sexuality and sexual preferences are important dimensions of Article 8, so in this instance Mr. Pay had an arguable case. The Court eventually decided, however, that the claim was 'inadmissible', because on the assumption that Article 8 applied, the employer's decision to dismiss the employee was nevertheless justifiable, because Mr Pay was unwilling to alter his activities at all in order to prevent members of the public from linking his business to the probation service.

This case is interesting both for its different interpretation of the concept of privacy in a horizontal context, where the fact that actions take place in public is not regarded as a crucial factor by the ECtHR (unlike the UK courts), and for its interpretation of what counts as a suitable justification, because the employer was required to satisfy a test of proportionality (rather than the weaker test of reasonableness applied by UK courts).⁵⁷ The UK courts have persistently made the error of applying the public law conception of privacy involving a spatial dimension to private law disputes. This mistake has arisen even though the courts use the method of indirect horizontal effect.

Similarly, the spatial distinction between the public and private spheres may not be appropriate in the context of concerns about the privacy of celebrities when they go about their ordinary everyday lives. The privacy of such a person might be invaded in the street or another public place, as in *Von Hannover v Germany* for instance, where newspaper photographers constantly followed a celebrity around while she went about her ordinary affairs such as shopping.⁵⁸ The right to privacy has also been applied in France to invalidate an employer's contractual right to determine where a worker and his family should make their home.⁵⁹ In the obverse case, a worker using remote access from home to the employer's computer network, the employee is physically in a private space, but the employer is surely correct to regard the misuse of the computer, by for example sending offensive emails to colleagues, to be not a private matter but rather something of legitimate concern to the business. Equally, if the worker is at the workplace, but during a lunch-break is sending emails marked private, there is support in a French case for the view that an employer's attempt to read those messages would be an invasion of the right to privacy.⁶⁰ The spatial distinction between public and private spheres, which in general provides a workable guide to

⁵⁷ V. Mantouvalou and H. Collins, 'Private Life and Dismissal' (2009) 38 *Industrial Law Journal* 133.

⁵⁸ *Von Hannover v Germany* (2005) 40 EHRR 1; (2006) 43 EHRR 7; *Von Hannover v Germany* (No 2) [2012] ECHR 228.

⁵⁹ Cass. Soc. 12 January 1999, *Spielers v SARL Omni Pac*, D.1999, 635.

⁶⁰ Soc. 2 October 2001, *Société Nikon France SA v M Onof*, D.2001, p. 3148. note P.-Y. Gautier. In France, the horizontal effect of fundamental rights in employment is greatly assisted, however, by Article L120-2 of the Labour Code, which states that any limits placed by an employer on the rights and freedoms of an employee must be justified by the nature of the tasks to be accomplished and proportionate to the goal pursued.

the scope of article 8 ECHR in the context of vertical relations between state and citizen, is evidently inappropriate for horizontal relations between citizens. Although article 8 is certainly relevant to private law, its application depends not on physical location but on the kinds of information about a person at stake.

There is also a transformation of the right to freedom of expression, but this adjustment of meaning is more layered and nuanced. When Article 10 ECHR is applied in a public context, the right to freedom of expression has few permitted limitations, because in a democratic society the voicing of almost any kind of political view, even one that is offensive to the majority, is likely to be vigorously protected by the law. In a private context, however, the right to freedom of expression is likely to be regarded as much weaker, easily restricted by consensual derogations, and likely to be outweighed by competing interests of other individuals. The degree of protection for freedom of speech in a private law context is also likely to be strongly influenced by the content of the speech. In appropriate circumstances, the law is likely to be much less tolerant of speech that others find offensive or critical. It is this weakening of the right in the private context that is the key ingredient in the translation.

In the context of employment, for instance, an employer is usually entitled to a contractual duty of loyalty from employees. This duty may be broken in many different ways including the case where an employee denigrates the employer's product or service to others. For instance, the shop assistant who worked in an Apple store who texted his friends to say that his iPhone was rubbish was justifiably dismissed and was accorded no protection on the ground of freedom of speech.⁶¹ Although criticism of a government of a similar nature (e.g. the minister is incompetent) would normally be protected by the right to freedom of expression, a similar criticism of a manager would probably be unacceptable to an employer and result in a justifiable dismissal, without any protection from Article 10 or equivalent constitutional provisions.

As well as being weaker in a private law context, unlike a public law context, protection for freedom of expression is likely to be variable according to the content of the speech. In the case of whistleblowers, for instance, employees are protected by Article 10 if they can demonstrate that the speech was in the public interest, as for example where the speech exposes corruption or criminal behaviour. Courts must determine what kinds of speech are in the public interest in order to determine the scope of the protection for whistleblowers.⁶² The content of the speech is also important in the employment relation where it concerns trade union activities. Almost certainly there would be a violation of a combination of Articles 10 and 11 ECHR if an employer disciplined a worker for advocating membership of a trade union and support for collective bargaining. But that special protection for freedom of expression will not apply, according to

⁶¹ *Crisp v Apple Retail (UK) Ltd*, ET/1500258/11 (22 November 2011).

⁶² *Guja v Moldova* [2008] ECHR 144.

a controversial decision of the ECtHR, when the style of expression is deeply offensive.⁶³ In a public context, however, not involving the relation between an employer and an employee or a trade union official, the same style of expression would almost certainly be protected in liberal European states without careful scrutiny of its content.

In view of this need to translate fundamental rights when they are applied in a private law context, there is evidently a danger presented by the technique of direct horizontal effect that it may enable claims based upon public law meanings of rights to be advanced to regulate the different social context of civil society, where slightly different interpretations of those basic values such as privacy have evolved. Equally, notions of those rights developed in a private law context may be transplanted into a public law context with inappropriate results. That risk is not avoided entirely by the technique of indirect effect, as we noted in the context of the application of the right to privacy by UK courts. On the contrary, the danger is always present whenever constitutional discourse formed in vertical relations between state and citizen is transplanted into horizontal relations between citizens and businesses. The technique of indirect effect merely places some constraint on the misuse of transplants by compelling legal reasoning to measure its outcomes against the existing doctrinal interpretation of rights and fundamental principles developed in private law and social regulation.

VIII. DOUBLE PROPORTIONALITY: ‘THE ULTIMATE BALANCING TEST’

In public law, many fundamental rights can be qualified or modified on grounds of public policy according to some version of a test of proportionality. The test of proportionality can be formulated in slightly different ways, but its focus is on the issue of whether the policy reason for an interference with a protected fundamental right is of sufficient strength to justify the interference. In order to make that assessment, the first step is to establish whether the policy being pursued is a legitimate aim for government action. An aim that on careful analysis was merely designed to fill the pockets of the ruling elite or to cover up corruption in government would not satisfy that requirement. The second stage is an assessment of whether the means chosen are appropriate for the achievement of the goal in the sense that the goal is likely to be achieved. If there is evidence that that means chosen will not in fact promote the goal to any significant extent, the measure is likely to fall at this second hurdle. The third stage asks whether the measure is necessary in the sense that it questions whether other measures that interfere with fundamental rights to a lesser extent could be employed instead and nevertheless achieve the legitimate goal. The final step in the analysis tries to

⁶³ *Palomo Sanchez v Spain* [2011] ECHR 1319.

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 necessary balancing process between the private parties' rights and the policies underlying the legal rules. The point is not that some kind of process of accommodation like a test of proportionality is not needed, but rather that the normal test of proportionality in public law provides the wrong formula in this context owing to its assumption that only one party to the dispute has rights.

If the test of proportionality developed in public law is inappropriate in those cases where both parties to a private law dispute are protesting about an interference with their rights, what is the correct formulation of the test? The simple answer is that the rights need to be balanced against each other. But this

⁶⁴ C. Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, (The Netherlands: Wolters Kluwer, 2008) 48.

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 proportionality. The legitimate aim that may justify such an interference with a fundamental right is likely in a private law context to include the protection of the fundamental right of the other party.

This application of a double proportionality test emerges most clearly in the context of the competition between the right to freedom of expression (Article 10 ECHR) and the right to respect for privacy (Article 8 ECHR). Here the right of the press to publish information and pictures about an individual is clearly in tension with the right of that individual to keep personal information about himself or herself secret and away from the public gaze. Since the tension between the competing rights is self-evident in such cases, courts have to formulate their method for resolving the issue. In a case concerning restrictions on media publication of court proceedings, and therefore a clash between Articles 8 and 10 ECHR, Lord Steyn in the UK House of Lords suggested that the following approach would be appropriate:

First, neither Article has *as such* precedence over the other. Secondly, where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience, I will call this the ultimate balancing test.⁶⁵

The features of this 'ultimate balancing test' have been helpfully explained by Sir Mark Potter:

[E]ach Article propounds a fundamental right which there is a pressing social need to protect. Equally, each Article qualifies the right it propounds so far as it may be lawful, necessary and proportionate to do so in order to accommodate the other. The exercise to be performed is one of parallel analysis in which the starting point is presumptive parity, in that neither Article has precedence over or "trumps" the other. The exercise of parallel analysis requires the court to examine the justification for interfering with each right and the issue of proportionality is to be considered in respect of each. It is not a mechanical exercise to be decided upon the basis of rival generalities. An intense focus on the comparative importance of the specific

⁶⁵ *Re: S (Identity: Restrictions on Publication)* [2004] UKHL 47, para.17.

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 the rights of each party are qualified according to the weight of the rights in a particular context. The double test of proportionality should also apply to a court’s choice of remedy, as for example in the choice between an interim and a permanent injunction.⁶⁷

The sharp difference between a single test of proportionality and a double one provides a further consideration for resisting the direct horizontal effect of fundamental rights. There is a risk that a court using the mechanism of direct horizontal effect might fail to appreciate the need to apply the ‘ultimate balancing test’.

IX. PUBLIC VIRTUE AND PRIVATE PREFERENCE

Private law has traditionally respected a wide discretion for private choices. The law generally permits individuals to live their lives in ways that depart from the requirements of neutrality and equal concern and respect that in a liberal democracy should govern all the actions of the state.⁶⁸ An individual can choose without significant restriction (other than money) what goods and services he wishes to purchase, who to treat as friends and associates, and what cultural events to experience. Respect for the liberty and the privacy of the individual, as demanded in constitutional provisions, necessitates that private individuals acting in a sphere of private activity should not be held to the same high standards of probity or correctness in conduct as will be required from state agencies. The principle of freedom of contract in the sense of freedom to choose a contractual partner represents recognition in private law that liberty of the individual is of utmost importance.

It follows that direct application of constitutional rights to private actors might be inappropriate, because it would impose a degree of ‘political correctness’ that would be oppressive for private individuals. A person may decide, for instance, that he finds everyone exhibiting strong religious faith to be profoundly irritating and confused, so he decides not to befriend or purchase goods from anyone with those religious qualities. If government officials took a similar view about how they should conduct public administration, however, they would be quickly condemned for a material interference with the individual right to freedom

⁶⁶ *A Local Authority v W* [2005] EWHC 1564 (Fam).

⁶⁷ *Plon (Société) v France* [2004] ECHR 200.

⁶⁸ G. Taylor, ‘The Horizontal Effect of Human Rights Provisions, the German Model and its Applicability to Common-Law Jurisdictions’ (2002) *King’s College Law Journal* 187, 218.

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

Anti-discrimination legislation in Europe has moved the boundary in such a way that businesses dealing with the public have to refrain from discrimination on grounds of sex⁶⁹ and race.⁷⁰ Furthermore, in the case of employment and occupation, employers are prohibited from discriminating between applicants and employees on the same grounds and other protected characteristics such as age, religion or belief, sexual preference, and disability.⁷¹ The force of these anti-discrimination principles has been strengthened by Article 14 ECHR, which contains a general anti-discrimination principle:

The enjoyment of 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 a national minority, property, birth or other status.

It is important to note that the provision is not restricted to a finite list of protected characteristics. On the other hand, to invoke Article 14, it is necessary to point to an interference with some other convention right. Usually the ECtHR will hold that a discriminatory interference with a convention right cannot be justified and will therefore violate the ECHR.

It is evident that anti-discrimination law places a significant limit on the freedom of individuals to select their contractual partner. In *Bull and Bull v. Hall and Preddy*,⁷² the proprietors of a small hotel decided to exclude homosexual couples from rooms with a double bed on the ground that the proprietors regarded such behaviour (as with all sexual intercourse outside marriage)⁷³ as immoral and contrary to the tenets of their religious beliefs. Should this decision be regarded as falling within the scope of the proprietors' liberty to choose a contractual partner, or does the public interest require that any exclusion of homosexual couples from the hotel should be unlawful? On the one hand, in addition to their demand for the freedom to choose a contractual partner, the proprietors can claim the support of other important rights such as freedom of religion and the right to exclude unwelcome people from their private property. On the other hand, the proprietors' action certainly denies equal respect to

⁶⁹ Directive 2004/113/EC, implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.

⁷⁰ Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L180, 19.7.2000, 22.

⁷¹ Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L303, 2.12.2000, p.16; Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L204, 26.7.2006, 23.

⁷² [2012] EWCA Civ 83.

⁷³ Under United Kingdom law (at present) it is not possible for homosexual couples to marry, though they can form a 'civil partnership', which has the same legal incidents as marriage: Civil Partnership Act 2004 (c.33).

homosexual couples (and all unmarried partners), and in so doing strikes at the core ideas of individual dignity and liberty that underpin liberal democracies and human rights. English courts had no doubt that the anti-discrimination legislation restricted the freedom of the proprietors of the small hotel. In this context, the normal liberty respected in private law, the freedom to choose a contractual partner, was curtailed in order to uphold the importance of the rights of the customers of the hotel to equal treatment and respect.

But anti-discrimination laws do not always protect equality rights. Suppose that a potential customer of the hotel discovers that the proprietor manifests his or her religion in various ways in the decoration of the premises, by for instance placing a large crucifix and a bible prominently in every room. As an ardent atheist, the customer objects to all religious symbols and prefers a strictly secular environment, so he or she decides to find alternative accommodation. Can the customer's decision be challenged on the ground that it involves disrespect to the proprietor's religious beliefs and autonomy, or is the customer's preference within the proper scope of the freedom to choose one's contractual partner? This conduct falls outside the scope of the European laws against discrimination. In general, a worker or a consumer can lawfully discriminate against a business on grounds such as race, sex, religion, and disability. The requirement of equal treatment usually only applies to employers and businesses. Nevertheless, the anti-discrimination legislation does apply to anyone who offers goods or services to the public, so it is possible for an individual acting in a private capacity to fall within the scope of the legislation. For instance, if an individual puts used goods for sale on an Internet auction site, that offer to the public probably falls within the scope of the EU Directive.⁷⁴ Modern anti-discrimination legislation therefore preserves some scope for unfettered private conduct. The difficult question becomes how to define the appropriate scope of this unrestricted sphere of private autonomy. The application of fundamental rights to this issue could easily eviscerate the scope of private autonomy, because any controversial choice might be criticised for a failure to respect the dignity of others, or for a discriminatory interference with some other right.

The ECtHR considered the proper scope of the application of anti-discrimination laws and private autonomy in private transactions in the context of a Will. In *Pla Puncernau v Andorra*,⁷⁵ a case considered above, the precise question was whether a testator could discriminate in her Will against adopted children. If so, then distant cousins would inherit the property. When the adopted son took his case to Strasbourg, the ECtHR was divided. The majority held that both

⁷⁴ Article 3.1. Directive 2004/113/EC, 'Within the limits of the powers conferred upon the community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.'

⁷⁵ *Pla and Puncernau v Andorra* (2006) 42 EHRR 25.

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, however, Garlicki J maintained, by leaving property only to children born to the marriage and excluding illegitimate and adopted children, the testator had acted within her rights and liberties and the Will should be enforced.

Although this case concerns a Will rather than a contract, similar principles should surely apply. In private tenancies, for instance, legislation often grants succession rights to partners of the tenants, and the ECHR has been used to prevent discrimination by landlords against same sex partners.⁷⁶ The majority of the ECtHR in *Pla and Puncerno* reduced the exclusion of private and family life from the scope of anti-discrimination laws almost to vanishing point. The testator was not acting in the course of business or making offers to the public. On the contrary, she was making a private decision about the distribution of her property among her relatives and descendants after her death. Nevertheless, the majority of ECtHR does not accept that the anti-discrimination principle is so limited in the context of private transactions and the family. Indeed, the court is pushing the anti-discrimination principle into the heart of the family by requiring equal treatment for adopted children, and presumably, between the sexes.

Although the example discussed here is drawn from anti-discrimination law, it is evident that the application of fundamental rights to private law is likely to require a reconsideration of the boundaries of the private sphere where individuals enjoy liberty of choice without the constraints of constitutional standards. It illustrates the concern identified at the beginning by Oliver Gerstenberg that the constitutionalisation of private law 'poses a threat to private law's libertarian core of private autonomy'. The use of the method of indirect horizontal effect will not prevent the risk of illiberal decisions, but it may assist the court in recognising that whilst it is in general important for everyone to respect the dignity of others, there is also a value, emphasised strongly in private law, of permitting individuals a wide scope for unsupervised private autonomy.

⁷⁶ *Karner v Austria* (2004) 38 EHRR; *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

X. DEROGATION IN PRIVATE LAW

In a public law context, it is usually no defence for a state to allege that an interference with a right was justifiable on the ground that the individual concerned had consented to the interference. This rejection of the defence of consent may be due in part to scepticism that any individual would freely part with his or her rights, so that there must be a suspicion that any forfeiture of rights was secured by force or fraud. But even if the state were to overcome the heavy burden of proof to demonstrate free consent to derogation from a right, the defence of consent would surely not be acceptable as a matter of principle, whether the alleged consent be given to slavery, torture, or denial of freedom of expression. The state must defend its interferences with rights according to a strict test of proportionality, under which it must demonstrate that it has a legitimate aim and has acted appropriately and only where necessary.

In contrast, in the private sphere it is normal for fundamental rights to be sacrificed by agreement. For example, alienation of property and therefore the loss of property rights is usually achieved through a consensual transaction. Similarly, the right to keep information private under the right to respect for private life can be lost by agreement, as where an author agrees to publish memoirs about his or her scurrilous life. We noted earlier that in the clash between privacy and freedom of the press, outside matters of pressing public concern that are vital for a democracy, the right to freedom of expression is nuanced and may be qualified by a variety of considerations including the content of the speech and any consent to publication.

This potential to derogate from rights in the private sphere has even been applied where the presence of consent is far from clear. In a line of cases before the ECtHR, employees have tried to assert their right to manifest a religion under Article 9 ECHR when it appears incompatible with the hours of work demanded by an employer. The claims of employees have been denied not only when they decide that their hours of work are no longer compatible with their need to manifest their religion, as in *Ahmad v United Kingdom*,⁷⁷ but also when the employer imposes a change of hours on the employee for production or business reasons.⁷⁸ In these cases it is said that the restriction on the right to manifest a religion is purely consensual, either because the employee initially accepted the terms of employment or because the employee can always find another job that is compatible with his or her religious beliefs. Similar arguments have been applied to cases involving dress codes that interfere with apparel that is worn in order to symbolise religious faith. In *R (Begum) v Headteacher and Governors of Denbigh High School*,⁷⁹ a majority of the House of Lords held that there was no interference with Article 9 when a school insisted on a pupil wearing its uniform on the ground that

⁷⁷ (1982) 4 EHRR126.

⁷⁸ *Stedman v United Kingdom* (1997) 23 EHRR CD 168; *Copsey v WWB Devon Clays Ltd* [2005] ICR 1789.

⁷⁹ [2006] UKHL 15, [2007] 1 AC 100.

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 *Abmad 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 the standards of fairness or social justice applied in disputes arising between

⁸⁰ C.E. Ass. 27 October 1995, *Lebon*, 372.

⁸¹ *Sidabras v Lithuania* (2006) 42 EHRR 6.

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. As Ohla Cherednyencko points out, in the *Bürgerschaft* case, the bank seeking to enforce the contract was able to reply equally on the protection for freedom of contract based on the right to the free development of one's personality.⁸² Indeed, given the advantage of the disparity of resources in most litigation,⁸³ the stronger party may well be able to manipulate fundamental rights to its advantage. It seems unlikely, therefore, that the insertion of fundamental rights into private law will necessarily nudge the law in either direction decisively. We should expect a variegated pattern, with some additional protection for weaker parties, but also a robust defence of vested interests.

Legal history reveals many examples of constitutional courts declaring that social legislation designed to protect weaker parties is invalid under the constitution on the ground that it deprives the holders of rights, such as rights to property, of their entitlements. In particular, in the United States, both at federal and state level, in the past courts have manipulated the constitution to assist challenges to legislation designed to help weaker parties such as workers on the ground that legislation is a restriction on individual freedom or an interference with the right to private property.⁸⁴ Hirschl argues on the basis of some comparative studies outside Europe (Israel, Canada, New Zealand, South Africa), that new constitutions are typically constructed and relied upon by hegemonic elites that fear erosion of their position from new populist groups. He suggests

⁸² O. O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions* (Munich: Sellier, 2007) 551.

⁸³ M. Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974-5) 9 *Law and Society Review* 95.

⁸⁴ *Lochner v New York*, 198 US 45 (1905) (law limiting working hours); *Adair v United States*, 208 US 161 (1908) (law forbidding dismissal of workers for union membership); *Adkins v Children's Hospital*, 261 US 525 (1923) (minimum wage for women). This line of cases in the US Supreme Court was overruled in *West Coast Hotel Co v Parrish*, 300 U.S. 379 (1937) (minimum wage law).

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 of social regulation is evident and unavoidable. The important questions are rather where should the balance be drawn and, perhaps more crucially, who should draw it – the courts or the legislature. In this context, the aim of fairness or social justice is likely to be secured by the courts showing deference to a democratic legislature rather than insisting upon constitutional rights.

In other types of cases, where social protective legislation is not directly involved, the introduction of fundamental rights into private law often invites a court to reconsider the basic ground rules of private law. A court will be asked to strengthen or enlarge the existing protection for fundamental rights, or strike a new balance between competing rights and interests. For instance, the constitutionalisation of the private law of contract interrogates and adjusts the idea of freedom of contract itself in order to ask, for instance, whether or not the conditions necessary to exercise freedom of contract or to have full personal autonomy were present in the circumstances under which the contract was made. There is some evidence that the opportunity afforded by a review of basic principles of private law in the light of fundamental rights has been taken to adjust liberal principles of private law towards a more protective approach.

Reviewing case-law from Germany and The Netherlands, Chantal Mak finds two themes in the cases: first, that the legal reasoning emphasises the importance of party autonomy or freedom of contract, but this concept is understood in a broad sense to require genuine autonomy, which ensures that weaker parties have proper possibilities for self-determination, unconstrained by pressure or deficits in information; secondly, that the effect of this reasoning tends to assist the position

⁸⁵ R. Hirschl, *Towards Juristocracy: The origins and consequences of the new constitutionalism*, (Cambridge Ma: Harvard U.P. 2004).

⁸⁶ *RJR-MacDonald v Attorney General of Canada* [1995] SCR 199; cf T. G. Ison, 'A Constitutional Bill of Rights – The Canadian Experience' (1997) 60 *Modern Law Review* 499, 502.

of a weaker party or to redress a situation of structural inequality.⁸⁷ The leading example that supports this interpretation is the previously mentioned *Bürgschaft* case, where a potentially ruinous surety contract entered into by a family member had been upheld in the private law courts, but the German Constitutional Court insisted that relief should be given to the surety on the basis of her constitutional right to the free development of one's personality in conjunction with the principle of the 'social state'. Another example that supports the idea that fundamental rights tend to protect a weaker party concerns the case of a commercial agent who was able to avoid a term in his contract that restricted the agent from working for a competitor for two years following the agency agreement.⁸⁸ Reviewing the case-law from France, in examples largely drawn from both employment⁸⁹ and landlord and tenant,⁹⁰ Myriam Hunter-Henin also identifies what can be seen as a pattern of protection of the weaker party.⁹¹ In contrast, a search for similar protection for workers as a weaker party in the United Kingdom would prove unrewarding because, aside from cases in the ECtHR protecting the rights of members of trade unions,⁹² no employee has so far successfully invoked the ECHR to improve his or her legal position against an employer.⁹³

The absence of a clear pattern in favour of the protection of weaker parties in a private law context should not come as a surprise. In a public law context, the rationale for rights is the protection of the isolated individual against abuses of power by governments, so protection of the weaker party is part of the genetic make-up of rights. In the different context of relations between individuals, the principle of equality before the law should obstruct any systematic support for one kind of party against another. This verdict will disappoint those who foresee the potential in the application of rights to the private sphere of subjecting private power, based on wealth, to similar constraints to those that are applied to the state. Though not using physical force, corporate power can seem as manipulative and overbearing sometimes as any governmental action. Global capital markets that facilitate the transfer of investments quickly from country to country often put governments, even strong powers, at the beck and call of multinational

⁸⁷ C. Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, (The Netherlands: Wolters Kluwer, 2008), p. 323; cf A. Colombi Ciacchi, 'Party Autonomy as a Fundamental Rights in the European Union' (2010) 6 *European Review of Contract Law* 303.

⁸⁸ BVerfGE 81, 242 (*Handelsvertreter*).

⁸⁹ Soc. 2 October 2001, *Société Nikon France SA v M Onof*, D.2001, p. 3148, note P.-Y. Gautier; C.E. Ass. 27 October 1995, *Lebon*, p.372.

⁹⁰ Civ. 3eme 6 March 1996 *OPAC de la ville de Paris v. Mme Me Yedei*, D.1997, p. 167, note B. de Lamy; Civ. 3eme 18 December 2002, Bull. Civ. III, no 262.

⁹¹ M. Hunter-Henin, 'France: Horizontal Application and the Triumph of the European Convention on Human Rights', in D. Oliver and J. Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study*, London and New York: Routledge-Cavendish, 2007) 98.

⁹² *Wilson and National Union of Journalists v United Kingdom* [2002] EHRR 20.

⁹³ H. Collins, K.D. Ewing, A. McColgan, *Labour Law* (Cambridge: Cambridge University Press, 2012) Chapter 11.

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 to protect their proprietary interests and freedom of contract, the insertion of human rights into private law, whether directly or indirectly, is unlikely to produce much in the way of the desired subjection of business interests to principles that normally protect weaker contractual partners.

XII. AUTONOMY AND POSITIVE FREEDOM

This assessment of the potential problems arising from the application of fundamental rights to private law has suggested a number of tentative conclusions. In the first place, it has become apparent that concerns about the ability of the judiciary to cope with this innovation are probably overstated, either because in many jurisdictions the unified court structure has familiarised judges with the need to treat the division between public law and private law as permeable, or because the values expressed by fundamental constitutional rights are not dissimilar to those underlying private law. The heated controversy about direct horizontal effect exaggerates the difficulties. Nevertheless, there is a strong case for any court to map the principles of private law applicable to a situation before asking whether those principles need to be adjusted in the light of fundamental rights. This method of indirect horizontal effect should avoid unexpected and ill-considered shocks to the system of private law whilst at the same time leaving the door open to shifts in legal rules in the light of modern values contained in declarations of fundamental rights. Given that in a private law dispute both parties are likely to be able to clothe their legal arguments in terms of rights, it is a mistake for any court to think that an appeal to a single right is likely to be determinative of a dispute. Instead, what is necessary in most cases is the application of the 'ultimate balancing test', which is in effect a double application of the test of proportionality to both of the rights at stake.

The most serious concern raised here about the practice of inserting fundamental rights into private law has been the issue of the need to translate the traditional civil and political liberties when inserting them into private law. It would be a mistake for a court simply to take the meanings of a concept such as freedom of speech or privacy that have been established in disputes between the

⁹⁴ M. Tushnet, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' (2003) 1 *International Journal of Constitutional Law* 79.

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 the government believed to be worthwhile activities, no doubt on the valid ground that this concept of positive liberty had been used by totalitarian governments to destroy individuality and autonomy altogether. But if we shift the focus from public law to private law, a positive approach to liberty appears more appropriate and a more accurate description of the evolution of the law. The law of contract, for instance, enables individuals to pursue their goals by making binding transactions. But the law does not enforce every promise that is made. It selects between promises and agreements on various grounds. Was there a good reason for entering the transaction (consideration in the common law, *causa* in Romanistic civil law systems)? Was the consent given to the contract vitiated by force, fraud or undue influence so that it does not really constitute a valid and considered exercise of private autonomy? Does the contract involve illegality or an unjustifiable restraint on the freedom to enter other market transactions, in which case it is unlikely to amount to a worthwhile choice? All these questions and many more constitute an assessment of whether a contract is likely to augment the positive freedom of an

⁹⁵ J. Raz, *The Morality of Freedom*, (Oxford: Clarendon Press, 1986).

⁹⁶ I. Berlin, 'Two Concepts of Liberty' in his *Four Essays on Liberty* (Oxford: Oxford University Press, 1968) 124.

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 private law may be challenged on the ground that it involves a misuse of the concept of human rights, which was invented primarily to protect the negative liberty of individuals. It is questionable whether this view is historically accurate. After all, the great statement of human rights in the Declaration of Human Rights at the foundation of the United Nations in 1946 was not confined to the protection of civil and political liberties, but included social, economic and cultural rights. These rights such as the right to education, to health care, and to work, though containing a negative element that forbids restrictions by the state, clearly contribute to a positive conception of autonomy, in which individuals should enjoy fair opportunities in life. Theories of human rights can certainly be constructed on the foundation of a more elaborate idea of private autonomy, which goes beyond negative freedom from interference, to place a duty on the state to promote conditions that enable individuals to realise their own conceptions of a worthwhile life. Human rights function within a perfectionist theory to guide the extremely difficult decisions about when freedom is not being exercised for a worthwhile purpose. The protection of rights within such a theory perhaps need not be linked to this perfectionist approach,⁹⁸ though the question of what conditions are essential, what interests need to be protected, or what constitutional rights citizens should have surely needs and deserves a more determinate and objective answer than statements like ‘any rights that they feel they need for their well-being’.

If this interpretation of the need for translation when fundamental rights are inserted into private law is correct, it explains the source of the concern that it may involve the imposition of illiberal values by forcing individuals to comply with public standards of political correctness. But to describe these values as illiberal is to use the criterion of negative liberty and to assert that private law has hitherto developed its foundations in negative liberty. If private law is better interpreted as always having expressed a positive conception of liberty, including a perfectionist strand, the insertion of fundamental rights with this kind of ‘radiating effect’ will not cause a seismic shift in legal doctrine. What it will require, however, is a reconsideration of the requirements of positive freedom in the light of modern values. We observed how this transition has occurred dramatically in the context of anti-discrimination laws. It can also be detected in the *Bürgschaft* case, where the bank that demands a surety from a family member, regardless of that person’s comprehension of the transaction or ability to repay the loan, is regarded by the

⁹⁷ H. Collins, ‘Utility and Rights in Common Law Reasoning: Rebalancing Private Law Through Constitutionalization’, (2007) 30 *Dalhousie Law Journal* 1.

⁹⁸ J. Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008); J. Tasioulas, ‘The Moral Reality of Human Rights’, in T. Pogge (ed.), *Freedom From Poverty as a Human Right* (Oxford: Oxford University Press, 2007) 75; K. Moller, ‘Two conceptions of positive liberty: towards an autonomy-based theory of constitutional rights’ (2009) *Oxford Journal of Legal Studies* 757.

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.