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Andrew Hutchison *Editors*

# The Constitutional Dimension of Contract Law

## A Comparative Perspective

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*Editors*
Luca Siliquini-Cinelli
Department of Law
Liverpool Hope University
Liverpool, UK

Andrew Hutchison
Faculty of Law
University of Cape Town
Cape Town, South Africa

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# Introduction

## Theme(s) and Context(s)

One of the hallmarks of the present era is the discourse surrounding Fundamental rights and the necessity that the law takes cognisance of these. Various national and supranational Human rights instruments have been developed and implemented in order to transition society away from atrocity and callousness toward a more just and inclusive future. In some countries, this is done through the mechanism of a supreme Constitution, while in others international conventions or ordinary legislation holds sway. Contract law has increasingly been playing a pivotal role in this phenomenon. According to many, this has been done especially through the much-debated 'civilising mission' of contract,[1] a notion that itself constitutes the canon of the Western liberal principle of 'civilised economy'. The movement away from the belief in the absolute freedom of contract, which reached its zenith in the nineteenth century, to the principles of fairness and justice that underpin contract law today, is often deemed to be a testament to this civilising influence.

This first volume of a two-book collection offers contributions from leading Contract law scholars, as well as emerging researchers from various jurisdictions who were asked to discuss the role that Constitutional/Human rights law played in Contract law in their home jurisdiction. The constitutionalisation of Private law and the impact of Fundamental rights on its development are well-known topics.[2] Hence, it comes as no surprise that a great deal of compelling scholarship has analysed them both over the past decade.[3] However, the value of these studies notwithstanding, what sets the present work apart from comparable literature on the subject is that we, the editors, did not simply want another collection of essays dealing with the impact of a given (typically: European) Human rights regime on

[1] Critically, see Supiot (2007) and Kahn (2008). See also Siliquini-Cinelli's chapter in this book.

[2] Markesinis (1990).

[3] Among others, see Barkhuysen and Lindenbergh (2006), Mak (2008) and Grundmann (2008).

Private law. We wanted to see the law in action. Our motive in this regard was a concern to highlight legal culture and legal context.[4] Hence, this collection broadens the field of inquiry, both methodologically and contextually.

Gathered together, this volume of collected essays offers contrasting and innovative perspectives from around the world on specific topics related to contracting that include a constitutional dimension. Contributors were asked not merely to describe how Fundamental rights and constitutional values have been incorporated into their national law but also to pick a particular topic and to analyse how the treatment of this particular area of contracting has changed in the jurisdiction represented. Hence, what characterises this book is that it does not merely collect essays on a given abstract topic (e.g., formation of contracts, performance, termination, remedies, *etc*.) but that it provides readers with different tangible and relevant examples on the everydayness of the interplay between Human rights policies, Constitutional law and Contract law. The variety of the themes chosen by the authors is in line with that of the approaches they have opted for. Both reflect the unconventional essence and aims of the overall project. Throughout the book, the reader will indeed find a broad range of methodologies of inquiry, ranging from the empirical to the philosophical. At times, the authors have also decided to provide a comparative constitutional angle on their own topic as a way to add a broader perspective on the issue in focus.

The result is a collection of essays with different focal points but a common idea that Human rights and constitutional values are an important dimension of modern Contract law. Exactly how important, we shall argue below when presenting each chapter, is a question of legal culture and context. What clearly emerges from this comparative study is, indeed, that the role given to Fundamental rights and values in a contractual context will vary from jurisdiction to jurisdiction. While in some countries the entire legal system is subject to a supreme Constitution or Bill of Rights, in other countries this is not the case. While for some there is no separate Contract and Constitutional law, but rather just one form of law, namely law under the Constitution, for others Human Rights are protected in other ways in the law and practice of contracting, and the actual Bill of Rights text is more peripheral, if such a text even exists. As examples of different contextual perspectives on this question, compare the following legal arguments:

> I cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.[5] [South Africa]

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[4]Berger and Luckmann (1967), Bhasker (1989), Stammers (1993), Stammers (1999) and Searle (1995).

[5]*Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 44.

> As everyone knows, the purpose of the Human Rights Act 1998 was to make the Human Rights and fundamental freedoms set out in the European Convention on Human Rights directly enforceable in this country as part of its domestic law. . . .The Act prescribes two principal means whereby it 'brings Human Rights home' from Strasbourg: first, by making provision for the interpretation and amendment of legislation and, secondly, by making it unlawful for a public authority to act in a way incompatible with a Convention right.[6]
> [United Kingdom]

Our argument is that the manner in which Human rights and constitutional values are protected in a given jurisdiction is an important question of national or supranational consciousness. This means that while there is a large degree of commonality between the various Human rights texts worldwide, the implementation thereof is a uniquely jurisdiction-specific question. In jurisdictions with a history of Human rights abuses, such as Germany, Italy or South Africa, the necessity for a Constitution to entrench Human rights and transform society is of great importance, and will have a deep impact on the implementation of the Constitution in question. In other countries, such as Australia, where a Bill of Rights is lacking and the Constitution, in Gaudron J's words, 'until 1967 . . . was blatantly discriminatory',[7] the spread of fundamental values and policies within the private law dimension takes place differently in such a way as to fill the void of weak equal treatment provisions at the federal level.

In the context of Contract law in particular, there is a potential for a Human-rights- and constitutional-values-based revision of the law to have an impact on core concepts such as freedom of contract, possibly through a greater emphasis on policies and mechanisms protecting weaker parties. There may also be a distinction here between strictly Commercial law, in which business-to-business contracting operates subject to only minimal regulation and judicial interference, and specific statutory regimes designed to address an inequality of bargaining power, such as those dealing with consumers, tenants and employees. This also explains why our contributors were not instructed to focus on consumer or commercial transactions specifically: it is informative to see whether the constitutionalisation of Contract law meant to our contributors protection of the weaker party, particularly in contracts involving natural persons, or a broader vision for Contract law as an entire construct. This question may involve an investigation of the manner in which public Human rights law has affected private Contract law in a given jurisdiction. This will be seen from the discussions of this type of topic by most of our contributors.

Unsurprisingly, this leads us back to the vexed issue as to whether Private, and in particular Contract law, should be understood as a closed system, or rather as something that should transcend the mere regulation of private interests and forms of interaction. This debate has shaped the very essence and development of contractual reasoning in modern times. To contextualise its trajectory here would

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[6] *Wilson v Secretary of State for Trade and Industry* [2003] UKHL 40 at paras 10–12.

[7] *Kruger v Commonwealth (Stole Generation Case)* (1997) 190 CLR 1 at 112, while describing the former s 127 of the Constitution.

fall beyond the scope of this Introduction. It will suffice to say that while Hugo Grotius promoted a methodological approach that would sever (contractual) legal doctrine from practical reality, Rudolph von Jhering stressed the importance of law's purposive nature, and thus of an understanding of contracts as legal arrangements that should not contrast with common interests. Both positions are echoed today, particularly in the works of Ernst Weinrib,[8] who argues that Private law should not be concerned with distributive justice, and of Duncan Kennedy, who instead believes that the 'technicalities' of Contract law are ultimately political.[9]

Both arguments have to be appreciated against the broader theoretical questions as to whether there is a public/private divide at all and what its potential impact may be. Writing in 2001, Raymond Geuss contended that

> [t]here is no such thing as the public/private distinction, or, at any rate, it is a deep mistake to think that there is a single substantive distinction here that can be made to do any real philosophical or political work. When one begins to look at it carefully, the purported distinction between public and private begins to dissolve into a number of issues that have relatively little to do with one another. It is thus unlikely one could come up with an interesting, general, substantive theory of the public and the private.[10]

We agree. As is well known, the legitimacy and effectiveness of distinguishing between public and private spheres have been much discussed in modern and contemporary times from different perspectives and through a variety of approaches. By way of example, Max Weber was of the idea that the working logic of capitalism is underpinned by a fundamental separation between these two dimensions. For his own part, the later scholar Carl Schmitt criticised the Hobbesian conception of sovereignty for not being truly absolutist and instead drawing the distinction between 'outer' and 'inner', or public and private. To Schmitt, the fact that Hobbes left something outside sovereignty's reach (namely, religious freedom) renders the state not an omnipotent 'total man' that unifies the people in a political community but rather a mere technical device whose functioning is in line with the apolitical essence of liberalism and positivism. Hannah Arendt too long stressed the importance that the separation of the private from the public had in antiquity and up until the emergence of the category of the 'social', the latter to be understood as the apolitical confusion between bourgeois ideology, civil society's sphere of influence and the sovereign's political prerogatives.

In this sense, it is commonly accepted that the 'Public/Private law' dichotomy is the result of a modern conceptualisation ultimately aimed at endorsing liberal theories of democracy, legitimation and accountability. More precisely, liberalism has used this antithesis to promote what might be defined as the 'depoliticisation' of societal affairs, that is, the principle of political neutrality according to which '[t]he state should abstain from intervening in the affairs proper to civil society'.[11] Yet,

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[8] Weinrib (1995).

[9] Kennedy (2001).

[10] Geuss (2001), p. 106.

[11] Cristi (1984), p. 532.

since the fall of classical Greece, the development of the Western tradition has always been characterised by the inclusion of public life into its private counterpart and vice versa—the only discontinuity being represented by the reasons why this phenomenon has occurred, as well as its extent, manifestations and repercussions through time. Although in diverse forms and through different patterns, the same applies to other traditions addressed by this book as well. Of course, the evolutionary trajectory of juridical practices and normative settings is not extraneous to this phenomenon either.

This raises a socio-political and socio-legal question of the first order, namely, how the 'public/private' interaction takes place in its concrete manifestations in various jurisdictions. answer to this type of interrogative will of course vary from system to system. In a collection of essays written from different comparative perspectives, it will not be possible to fully investigate the position in each country covered herein beyond certain broad trends. For us, this is again a question of context and culture, which will be covered briefly in discussing broad trends in the chapters below.

Yet before moving on to introducing the chapters that comprise this collection, a preliminary interrogative ought to be addressed: that is, whether—and, if so, why—there is even the need to address the constitutional dimension of Contract law in an age, such as ours, undoubtedly post-Westphalian, globalised and decentralised. Or, put bluntly, in a post-national dimension in which the authority of the modern state, and thus of constitutional charters, is constantly at stake? The list of factors to document the demise of the modern form of polity and its legal structure as we have come to know it could be drafted endlessly. For present purposes, one could point at the emergence of hybrid functional equivalents to law at the local level, as well as to the transformations of public law and its accountability schemes, and to how state functions are increasingly delegated to the private sector and spread among multiple orderings of society without legitimate authorisation and efficient supervision—not to mention how state foreign strategies and internal agendas are undemocratically determined by market forces and corporate interests. It would therefore be a mistake to try to codify this trend through socio-political and juridical lenses only without realising the role that the economic structure has in moulding the state's prerogatives and capacity for regulation.[12]

Legal scholars are, of course, familiar with this phenomenon. The founding of dedicated law journals and book series, as well as the launch of new undergraduate and postgraduate courses in transnational and global law worldwide, is testament to this subject's increasing relevance within legal discourse.[13] Yet, if anything, the

[12]Hardt and Negri (2009), pp. 1–21; Brown (2012). See also Siliquini-Cinelli's contribution to this book.

[13]For present purposes, and in addition to Gunther Teubner's scholarship on societal constitutionalism, see Jansen and Michaels (2008), Twining (2009), Kuo (2010), Handl et al. (2012), Dobner and Loughlin (2010), Walker (2012), Krisch (2010), Amhlaigh et al. (2013), Zumbansen (2013) and Helfand (2015). See also the (2008) 6(3)-(4) Special Issues of the International Journal of Constitutional Law on the Symposium: Constitutionalism in an Era of Globalization and

same reasons that, at first glance, appear to suggest that the analysis that this book proposes would be unnecessary on closer inspection instead reveal that there is an urgent need to inquire into the Constitutional/Contract law (and thus, public/private justice) dialectic as way to ascertain whether or not constitutions still matter in the current regulative landscape, and if so, why, how and to what extent. More particularly, the complexities of current pluralist regulative phenomena and settings on the macro, meso and micro levels require us, as lawyers, to revisit and reconsider the axiomatic findings and statements that characterise this subject, as well as the perspectives from and methodologies through which we have come to form our insights into it. This is further demonstrated by the fact that, in opposition to those who argue for the impoverishment of the state's role, guidance, legitimacy and authority, some commentators are instead of the idea that what the state is currently witnessing ought to be inscribed within modernity's inner pluralist structure and, as such, cannot be considered as a wholly new phenomenon in the strict sense of the term.[14] Of course, the existence of supranational legal regimes, as well as the extent to which there is legal pluralism in a given jurisdiction, is a question that is highly dependent on the geographical location and regional integration of a given jurisdiction. The position in the European Union may differ from the position in (for example) Canada, Australia or parts of Asia. Legal pluralism may also refer to parallel systems of aboriginal or indigenous forms of law, as is the case in South Africa. Again, this socio-political dimension of both Constitutional and Contract laws highlights the role of legal context and culture in this regard.

This, however, does not tell us much on whether the constitutionalisation of Contract law and the influence of Fundamental rights and values over its development should be welcomed or criticised. A specific reference (by way of example) to Jan Smits' scepticism on this matter would in this sense be profitable.[15] Indeed, while Smits recognises that the constitutionalisation of Private law is becoming more and more noticeable, he raises a series of important 'normative questions' on the 'adverse effect of this development' and, thus, its 'desirability'.[16] More specifically, Smits points at the limited impact that an inclusion of Fundamental rights reasoning within the private dimension might have. This is so, Smits maintains, because of the indirect, subsidiary role that these rights inevitably play in legal

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Privatization, and the interview released by Canada's Prime Minister, Justin Trudeau, with the New York Times, in which Canada is defined as the 'first post-national state', http://www.nytimes.come/2015/12/13/magazine/trudeaus-canada-again.html?_r=0 (last visited: February 15, 2016). For a philosophical, comparative-oriented account, see Marramao (2009), pp. 109–130.

[14]Among others, see Roughan (2011), Roughan (2013), Fontanelli (2011) and Thornill (2012). See also Riles (2008), pp. 206–207, according to whom the model of global private law and governance does not pose a substantial threat to state law as it is wholly in line with the 'knowledge practises[,] bureaucratization and proceduralism' that inform the working logic of the modern state. Hence, in the post-national dimension, 'the state is not so much challenged as mirrored, reflected, and deflected in new technical forms' (ibid.).

[15]Smits (2006).

[16]Ibid., p. 2.

decision-making. In his words, '[p]rivate law can be interpreted in the light of Fundamental Rights, but can in the end not be absorbed by these rights: the private law rules remain decisive for deciding the case'.[17]

Secondly, Smits reflects on Fundamental rights' incapacity to offer enough guidance. This is due, according to Smits, to the inevitably broad purview of the term 'Fundamental Rights', which itself does not allow for an efficient application.[18] Finally, Smits makes the provocative, yet well-grounded, argument that private parties are not bound by Fundamental rights. In particular, Smits notes, drawing on Montesquieu and Locke, 'Fundamental Rights have the function of guarding against the public from meddling with private affairs: the State cannot always intervene when public interest requires so'.[19] This point serves, in turn, to endorse Weinrib's well-known account of what distinguishes distributive justice (properly of the political, and thus public, sphere), from its corrective counterpart (properly of the private sphere).

Smits' claims are, in fact, less radical than what it might appear at first glance as they build upon the above-mentioned liberal view that aims to keep what is of public concern apart from all those sets of relationships that allegedly remain confined within private settings (as the reference to Montesquieu and Locke makes clear). In this sense, while certainly sound, Smits' arguments fall short of offering a comprehensive view on the benefits and perils implied by the constitutionalisation of Private law and, thus, are (in our view) open to criticism. It could be doubted, indeed, that Smits' view may be successfully applied to gain insights on the working logic of either socialist forms of polities or legislation where the socialist thread plays a considerable role.[20] Hence, Smits, particularly when he elaborates on the subsidiary essence of Fundamental rights and constitutional values, in our view, underestimates the function that ideology plays in shaping the development of Contract law and the impact that these two elements have in it. More importantly, while Smits aptly uses Weinrib's distinction between distributive and corrective justice to support his claims, it is Weinrib himself who more recently highlighted the relevance of the 'institutional guarantees of public rights [in] transforming private law into a community of rights'.[21] Finally, Smits' account remains silent on why Weinrib's above-mentioned argument that Private law is concerned with corrective justice, while distributive justice remains the preserve of Public law is ultimately difficult to reconcile with more radically transformative notions of the constitutionalisation of Contract law as found in certain modern jurisdictions, such as South Africa.

From this it follows that a critique of the constitutionalisation of Private law would need to be promoted through different paths to those pursued by Smits. By

[17] Ibid., p. 15.

[18] Ibid., pp. 16–18.

[19] Ibid., p. 19.

[20] See Monateri's contribution to this book.

[21] Weinrib (2011), p. 211.

way of an example, and narrowing the field of analysis to the Contract law dimension, it could be noted that to assign an incisive and direct role to fundamental values (such as that of contractual fairness) might prejudice the parties' ability to understand what their obligations would be under the contract. In turn, this might cause an economic uncertainty in markets. Conversely, one might favour the inclusion of constitutional values and Fundamental rights in contractual reasoning because of their capacity to lead to the formation of a society based upon a specific moral conception of justice. The reader will find in the following chapters valuable insights on these and other matters that will cast new light on the development of Contract law in comparative perspective.

## Arguments: Outline of Book Chapters

Francois du Bois sets out in his chapter to defend a view that the English Human Rights Act 1998 (HRA) has had very little impact thus far on the law of contract in that country. He demonstrates that this is true through an appraisal of the leading case law, as well as by pointing to the existing English scholarship in point. In his excursus, du Bois adapts the analytical framework of Leigh in order to discuss the horizontal impact of the HRA on contract under the headings of (1) Direct Statutory Horizontality, (2) Public Liability Horizontality, (3) Remedial and Procedural Horizontality and (4) Substantive Horizontality.

Under the first heading, du Bois examines key cases dealing with employment, residential lease and consumer credit statutes to identify the major factors shaping horizontality in this context. His key findings are that courts prefer to avoid a finding of statutory incompatibility with the HRA, and indeed in specialist areas like discrimination are often crowded out by more detailed legislation directly in point. Under the second heading, du Bois attempts a definition of the concept of a 'public authority' under the HRA. He notes that the courts typically link this concept to a body exercising a governmental function, either in contracting as an equal with private parties or when ensuring adherence to the HRA by private parties as an intermediary. He does, however, note the important role of 'hybrid' public authorities, namely private parties performing public acts. Despite the existence of hybrid public authorities, du Bois notes a strong public/private distinction in the implementation of the HRA under this heading. Under the third category, du Bois deals in particular with the discretionary remedies of specific performance and injunction. He notes that these could conflict with certain Fundamental rights such as the prohibition of forced labour, the right to privacy and the right to freedom of religion. In the view of the author, this potential conflict is managed by the long-established preference of the common law for the remedy of damages, which entrenches individual liberty and obviates reference to the HRA. Finally, under the fourth heading, du Bois deals with leading cases on the development of the substantive common law, taking illegal contracts, insurance contracts, litigation and arbitration agreements and private leases as his examples. Although noting

important case law in these areas, he concludes that the existing common law already meets the demands of the HRA and the ECHR.

In sum then, du Bois's conclusion is that the HRA has had little impact on the English law of contract outside of the limitation of public authorities' actions by Article 8 ECHR (protection of privacy and family life). He notes that unlike Germany's normative constitutional right to dignity, for example, the HRA omits such value-laden tendencies. Hence, the existing common law device of public policy is able to do most of the work of regulating Contract law. Indeed, du Bois's primary conclusion is that the constitutionalisation of contract law is a technique of legal development rather than a normative phenomenon.

In a contribution that evaluates present and future European Union responses to the regulation of privacy among consumers, Joasia Luzak tackles the difficult issue of how to 'nudge' consumers towards healthy and sustainable lifestyles without infringing on their autonomy or their right to privacy. The protected Fundamental right in question is Article 8 of the European Convention on Human Rights, as given effect to at present by two directives: the Data Protection Directive and the ePrivacy Directive. Luzak discusses by way of example the food and clothing industries. She describes the ideals of healthy consumer eating, as well as sustainable choices in clothing purchases, which ensure corporate social responsibility in the production supply chain. With regard to food, Luzak suggests two options: more detailed and accurate labelling of products, possibly using smart labels or RFID (radio-frequency identification) tags, or regulating the food industry. On the consumer nudging side, better information may provide the necessary push towards healthy eating. Perhaps in a futuristic world, a smart fridge could link with an RFID tag reader. With clothing, Luzak notes that RFID tagging is already useful to retailers in order to track garments through the production supply chain and could also provide a far larger canvas for presenting detailed information on a clothing product to a purchaser. The downside of increased technological interfacing in both industries, however, is the potential for RFID tags and other electronic devices to be used to profile consumers and for surveillance, even after goods have left the store. Luzak notes that existing regulation of technology used in the consumer sphere does not adequately protect consumer privacy, which can lead to data collection and a resultant manipulation of consumer choice.

Luzak ends her contribution with a brief discussion of the so-called Internet of Things: a state of being where advanced technology allows computers to communicate with each other and with smart machines. This can assist in consumer lifestyle choices, such as the smart fridge example above; however, the resultant potential for consumer data collection poses a massive threat to privacy. Luzak discusses the work of the European Commission in 2015 with the creation of an 'Alliance for the Internet of Things', which co-operates with stakeholders to control the development and standardisation of technology. She concludes by asking whether consumer privacy and autonomy will be the victims of the war on unhealthy lifestyles, noting that the right to privacy has not been the first priority of the European Commission thus far.

Jean-Baptiste Seube's chapter starts with the intriguing contention that, in France, the concrete influence of Constitutional law over contracts' essence and development cannot be measured with any degree of certainty. This is due, according to Seube, to the strict divide between Public and Private laws in the French legal system, which in turn affects the competences and prerogatives of the *Conseil constitutionnel* (or Constitutional Council) on the rules and techniques proper of the Contract law dimension. However, Seube also shows that the Council's rulings have an important, indirect role in inviting the judge to resort to a control of proportionality. More specifically, the Council exerts a direct influence on the substance of the rule of law, as well as an indirect influence on the judiciary's contractual legal reasoning. With respect to the former, Seube analyses two areas of contracting on which the Council's efforts have been more focused. These are the formation and the execution of contracts. Seube's aim in this part of his discussion is to show that the Council moved from holding that no constitutional provisions guarantee the principle of the freedom of contract (cf. Article 1102 *Code civil*) to admitting that this principle can in fact be invoked as long as the violation of another substantive principle (such as proprietary right or entrepreneurial freedom) is also invoked in further enshrining its respect by hooking its legitimacy to Article 4 of Universal Declaration of Human Rights. In regard to contractual execution, the Council has instead taken a clear stance on making sure that the entering into force of a new law does not alter the parameters of parties' contractual relationship and, thus, their rights and obligations. However, it is the Council's indirect influence over contractual reasoning that provides more terrain for discussion. Indeed, through the so-called control of proportionality, the Council regularly checks whether a given rule is justified by a legitimate interest, as well as whether its use may be considered to be proportionate in light of such an interest. Importantly, Seube also notes that while the control of proportionality has been implemented by the European and administrative jurisdictions, it has long been unrecognised by the ordinary judge. In addition, Seube explains why, notwithstanding the criticism on the subject, this proportionality mechanism is on the rise and is likely to become the key to litigation as regards the violation of Fundamental rights by contractual provisions. This, however, raises the question as to *how* the judiciary will concretely implement the control of proportionality in contractual relationships. The comparison between the rulings that have implemented the control of proportionality and those that have vertically and horizontally applied the European Convention on Human Rights (ECHR) serves Seube to show the practical implications of proportionality controls. The analysis then concludes with the discussion of an important case study on freedom of religion on the grounds of Article 9 ECHR and Article 9 of the Civil code.

Annekatrien Lenaerts sets out a detailed analysis of the role that the Private law doctrine of the prohibition of abuse of rights plays in the enforcement of Human rights in contractual relationships in Belgium. Lenaerts explains that this doctrine (in a contractual context) provides a means for policing the exercise of a subjective right by a contracting party on grounds of good faith, fairness and justice, where the true spirit in which that right was conferred has not been adhered to. Lenaerts's

central claim is that there is a large degree of equivalence between the policing of conduct for non-compliance with fundamental Human rights in public law and the policing of conduct by private parties in a contractual setting using the abuse of rights doctrine. She argues that the doctrine of abuse of rights, essentially the limitative/negative aspect of the good faith doctrine, has been used as an appropriate existing Private law mechanism through which to channel a supervening public law concern for the protection of Human rights. In this way, Lenaerts shows that Human Rights are horizontally applicable in Belgian Contract law but that these operate indirectly through the prohibition of the abuse of rights. Specifically, she demonstrates that the public law criteria of legality, legitimacy and proportionality, used to review exercises of power by the State, are equally at home when evaluating private (contractual) conduct. She points out in this regard that the protection of weaker parties is as much the concern of Private law as it is of public law. However, this concern for inequality of power has to be balanced in a contractual context, she argues, against the important competing value of freedom of contract, such as (for example) the freedom not to enter into a contract. This theory is then concretised by Lenaerts in the latter half of her chapter through the use of examples from the Belgian case law. She demonstrates how abuses of contractual rights have been policed in order to protect Human rights such as non-discrimination, privacy, property, freedom of expression and freedom of religion. She demonstrates in this way how contractual power can be limited through the abuse of rights doctrine to protect weaker parties, such as students, employees and tenants. She concludes by arguing that there is a role for the doctrine of prohibition of abuse of rights in Private law to achieve a proportional balancing of conflicting constitutional rights, which thereby achieves a working synthesis between Public and Private laws.

In his chapter, Pier Giuseppe Monateri embarks upon an unconventional journey within the Italian Contract law dimension to unfold the liberal and socialist ideologies of contract and pose the basis for a social ontology of contract. More specifically, Monateri shows how the modern and contemporary development of Italian Contract law is characterised by the presence of inherent, ontological ambiguities that cannot be dismissed. Italy is, then, an exemplary case study to analyse the inconsistencies of Contract law discourse and values as emerged both before and after the entering into force of the Italian Constitution in 1948. This particularly emerges through a comparison with the French and German scenarios. To support his claim, Monateri uses ontology against itself and speaks of ‘crystal’ and ‘mud’ contracts. While the first label refers to the liberal conception according to which contract are a mere private ordering associated with a more or less strong judicial protection of the weaker party, the latter applies to the socialist approach to contracting. According to this model, contracts are ‘social acts’ instrumentally used to achieve a spontaneous order, with more or less limited but not absolute power of construction by the courts. Monateri is prompt in recognising that both models entail social risks and costs and different moral conception of justice. Against this framework, Monateri shows how both ideologies are but socio-political constructs that never work according to the logic they officially promote. The conception and use of the cause requirement in the French and Italian liberal traditions, for instance,

shows that contracts are, in fact, neither 'crystal' nor free acts. Rather, they are always subject to a high degree of political control through judicial interventionism. The Nazi and fascist experiences, Monateri tells us, have to be analysed within this perspective of inquiry as well: while the values changed, these were promoted through the same technical (i.e., ontological) elements used by the liberal doctrine of contract. Finally, Monateri argues that the entering into force, in 1948, of the first Italian Constitution has pushed this phenomenon even further. Not only the limitations on property and freedom of contract introduced by the Civil code of 1942 have been preserved and further expanded in the 1948 Constitution, but also the whole legislation had (and still has) to be interpreted and applied through constitutional lenses. Hence, as it happened with the transition from the liberal to the fascist-socialist epoch, rather than being substituted, old norms have started being interpreted and used in light of new conceptual framework. The ontological constitutionalisation of Private, and in particular, Contract law, is therefore made evident by the Italian legal system's tendency to form a social conception of private interests. This is due, Monateri further maintains, to the Constitution's strong focus on the value of the 'Person'. The contextualisation of what is the nature of values in the legal, and in particular, contractual field serves Monateri to support his call for a social ontology of contract.

Rather than a conventional account of the constitutional dimension of Contract law in South Africa, Andrew Hutchison tackles this issue indirectly, by examining one of the key underlying themes here, namely the transformation of South African law and society. Under the politically relevant catchword of 'decolonisation', Hutchison examines the question as to how to incorporate a greater element of Afropolitanism in the South African law of contract to better reflect the culture and context of the majority of that country's population. This links to the constitutionalisation of Contract law through statements capturing the transformation ideal by the Constitutional Court in a contractual context and by its use of the African philosophical concept of 'ubuntu' (essentially a concept entailing communitarian values and solidarity). Hutchison examines the role of historiography of South African Contract law, noting the exclusion of the African in many older accounts. This is then applied through an examination of the concept of good faith, which the author argues is the equivalent concept to ubuntu in the South African common law. Historically, good faith in South Africa has been traced to Roman and Roman-Dutch laws, with no element of African values. Hutchison argues that a synthesis is possible here between good faith and the African concept of ubuntu, to allow for an Africanised concept of underlying contractual values and possibly even contract policing along these lines.

This begs the question, however, as to what exactly this new concept of good faith/ubuntu would entail. Hutchison answers this by examining the traditional African customary law of contracts, much of which reflects a pre-commercial sense of community through mutual interdependence and trust. Hutchison argues that a narrower concept of ubuntu is needed if this is going to be employed in a broader commercial context. He suggests that 'contractual ubuntu' should be the new governing value in the common law of contracts but that courts should clearly

articulate what this concept entails to avoid uncertainty. A model for this could be foreign definitions of a duty of good faith in contracts, as is starting to emerge in the Common law world and has long been found in Civil law systems, such as Germany. In sum, the future of South Africa's system of uncodified Roman-Dutch law is facing a new struggle for political legitimacy and must now seduce a new cohort of black South African legal practitioners and judges if this system is to survive. A synthesis with African values and concepts is likely and also appropriate.

The purpose of Philip Clarke's chapter is to draw a comparison between the Australian and UK abuse of dominant position and unfair contract terms regimes as disciplined by the Australian Consumer law (set out in Schedule 2 of the Competition and Consumer Act 2010) and the Australian Securities and Investments Commission Act 2001, on the one hand, and the (UK) Consumer Rights Act 2015 and the Unfair Contract Terms Act 1977, on the other. To this, Clarke compellingly adds a comparison with the inspiring source of both regimes, namely the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. Such an analysis is all the more important for our theme on the constitutionalisation of Contract law as in neither country is there a constitutional restriction on the power of the legislature to intervene in this sense. Consequently, as Clarke himself notes at the very beginning of his contribution, 'although the doctrines of freedom and sanctity of contract have exerted a restraining influence in this respect, in both countries Parliament has been able to intrude into contractual relationships in the pursuit of securing just and fair outcomes'.

As it may be easily imagined, to address such a topic requires an engagement with the above-mentioned movement from the belief in the absolute freedom of contract, which characterised legal thought in the eighteen century, to the principles of fairness and justice, which underpin the law of contract today. And indeed, Clarke's account starts from the delicate relationship between the doctrine of contractual freedom and the limitation of the abuse of dominant position. The discussion reveals to be particularly productive as according to Anglo-Australian law, it is lawful to occupy a dominant position, as well as to seek to acquire such a position via competitive means. This conception notwithstanding, the recognition of collateral interests, as well as of anti-discriminatory values and principles of procedural fairness, has led to the introduction of important legislative and judicial limitations to the doctrine of contractual freedom. However, as Clarke shows, while these new measures turned out to be effective to a certain extent, dominant parties have retained considerable opportunity to abuse their dominant positions by dictating terms that are unfair to the weaker parties with whom they contract. Both the UK and Australian unfair contract term regimes are aimed to address this situation directly. Clarke's analysis therefore proceeds by outlining in detail the rationale for the new legislation in both legal systems, its scope and test of unfairness. Before discussing the consequences arising out of a term being found to be unfair, Clarke's investigation takes into account what he deems to be the most controversial aspects of the new regimes, namely, the subject matter and price exclusions—two delicate themes on which both the UK and Australia have followed the European Directive.

Finally, in his conclusive remarks, Clarke suggests that businesses will respond positively to the new regimes. However, he also identifies a number of areas in which one jurisdiction may benefit by following the lead of the other.

In her contribution, Béatrice Schütte elaborates on the constitutional dimension of Contract law in Germany, through a discussion of three pivotal topics, namely, good faith, control of contract terms, and limited party autonomy in labour law. Schütte's chapter makes it clear that, in Germany, constitutional values, and in particular Fundamental rights, exert an important theoretical and practical influence on Contract law. Schütte also notes that while in the past there has been a dogmatic discussion as to whether the influence was a direct or an indirect one, there is now a strong consensus that the effect is, in fact, an indirect one (*Drittwirkung der Grundrechte*). Yet a few exceptions apply, particularly regarding Article 9 III *Grundgesetz*, the German Basic Law, where the direct horizontal effect is implied. To understand the essence, aims, benefits and flaws of the German indirect approach to the constitutionalisation of Contract law, Schütte notes, attention ought to be paid to Günther Dürig's intention to safeguard private autonomy and the independence of Private law. This aim also explains why Fundamental rights exert their influence over Private law through the so-called comprehensive clauses, that is to say, through the performativity of legal provisions that are formulated with a wide scope so that they have to be substantiated in court practice. The best-known examples, Schütte argues, are good faith as codified in § 242 and *bonos mores* according to § 138 of the *Bürgerliches Gesetzbuch* (the German Civil code, usually known as BGB), both of which are discussed at length later in the chapter. Most importantly, this indirect, comprehensive approach has been welcomed by the German Constitutional Court starting with the well-known 1958 *Lüth* case. In a few words, according the Constitutional Court, Fundamental rights exert their influence mainly through those provisions that are to be considered as part of the *ordre public*, i.e. those principles that bind the parties to a contract by reason of public interest. As noted by Smits in his sceptical account of the constitutionalisation of Private law, discussed in the previous section of this Introduction, this socio-legal and socio-political approach does not prejudice, per se, the decisive role of Private law provisions in the resolution of contractual conflicts. Rather, Schütte contends, it merely requires that constitutional values are endorsed and promoted through contracts. The so-called *Schutzpflichtentheorie*, or theory of the state's duty of protection, is also analysed by Schütte when setting out the German landscape. In addition to this, Schütte thoroughly elaborates on the 'constitutional' function of such provisions as § 134 BGB concerning statutory prohibition, § 133 BGB concerning the interpretation of a declaration of intent, § 157 BGB concerning the interpretation of contracts, § 307 BGB on the control of standard contract terms. Particular attention is also paid to the above-mentioned Article 9 III *Grundgesetz* in regard to the right to form coalitions (*Koalitionsfreiheit*) and associations to safeguard and improve working and economic conditions.

In her contribution, Elsa Dias Oliveira discusses the question of the impact of constitutional rights and values on the existing Portuguese law dealing with

agreements controlling personality rights. Oliveira defines personality rights as protecting aspects of the person, such as life, physical and psychological integrity, good name, privacy and the use of one's image or voice. The chapter begins with a brief account of the impact of the Portuguese Constitution on the Private law realm of contract. She also delves into the overlapping legal regimes governing personality rights in Portugal, including the Constitution, the Civil code and specific statutes. She underlines the fact that the interplay between these various instruments is far from clear and that there are conflicting viewpoints on this issue. In this process, she tackles the important constitutional question as to whether this instrument applies directly or indirectly to personality agreements and whether it may be horizontally invoked or is only applicable in disputes involving the state. She also argues for a role for the general clauses of the Portuguese Civil code in policing agreements regulating personality rights, such as the clauses dealing with public policy and good morals. A key feature of Oliveira's discussion of agreements controlling personality rights is whether these rights may be revoked once conferred, particularly in a commercial context. She explains that the standard position is that such rights are freely revocable, subject to two points: firstly, there may be a duty to compensate for losses caused to the grantee by such revocation under the Civil code, and, secondly, there may be a complicating factor from a constitutional point of view, where the right of the grantor to revoke may conflict with the legitimate right to economic enterprise of the opposing party. An example would be where the grantee is a professional photographer or artist who has depicted the grantor's image or used a recording of her voice.

Oliveira illustrates her arguments with depictions of the industry, which has grown up around popular culture figures, such as celebrities, models, actors and professional sportspersons, particularly footballers. She describes the industry norms in these contexts, including footballer's collective agreements and specific statute law governing this lucrative Portuguese showpiece. Particularly important for Oliveira is the view that personality interests last a lifetime and the personal viewpoints of models, celebrities and sportspersons may change as they mature, so that images or other depictions from an era of youth may later come back to haunt them with the experience of old age. For Oliveira, this implicates fundamental constitutional rights, such as human dignity, or even (potentially) religion. Finally, on the question of privacy, Oliveira draws once again on celebrity culture, noting that this Fundamental right may be limited where this is in the public interest, or perhaps where it has been waived, such as by partaking in a reality television show. Oliveira's central message is that constitutional rights have a role to play in personality agreements, but may be subject to limitation, and that sometimes protection of personality interests may be better achieved indirectly, through the use of existing Private law means.

Engaging with the pluralism that characterises the Canadian legal system, Nicholas Lambert's chapter delves into the constitutional aspect of Canadian Contract law through the lenses of the Constitution Act, 1867, and the Canadian Charter or Rights and Freedoms, which forms part of the Constitution Act, 1982. According to Lambert, the need to pursue such a roadmap is due to the fact that

these two documents were drafted in vastly differing times and could represent different approaches to social and economic regulation. However, at the time of writing, it is not so clear as to what extent contract rights have received an updated constitutional consideration. Before embarking upon this comparative analysis, however, Lambert's efforts focus on whether there is such thing as *ius commune* of contracts in Canada. To answer this interrogative is all the more relevant for the correct understanding of the impact that constitutional values and HR policies have on Contract law in Canada. Indeed, at first glance, Lambert argues, the answer would be a clear-cut 'no'. Section 92(13) of the Constitution Act, 1867, confers indeed jurisdiction over 'property and civil rights' to provincial legislatures. However, Lambert further notes that the degree of fragmentism that one may see in the United States does not figure in Canadian law, the reason being that Canada, Quebec included, does not have an independent and final system of 'provincial courts' wielding jurisdiction over Private law: the rulings of the Supreme Court, the highest court in the judicial hierarchy, apply throughout the country. Having clarified this, Lambert embarks upon the above-mentioned comparative analysis between the Constitution Act, 1867, and the Canadian Charter of Rights and Freedoms. In so doing, Lambert pays particular attention not only to the forms of legislative control over contracts but also to the peculiarities of the judicial (including administrative) jurisdiction over contractual disputes, as well as to the Fundamental right of contractual freedom. The discussion of the last topic turns out to be particularly relevant for the purposes of this study as in the late 1980s the Supreme Court ruled that the parties to a contract are free to exclude all liabilities arising from a breach of their obligations. As Lambert tellingly notes, this approach to contractual freedom not only raises the question as to how individuals can exclude judicial jurisdiction when the legislature itself cannot do so but also requires a thorough engagement with the Canadian conception of what a contract is. Ultimately, what emerges from Lambert's investigation is that in Canada, contrarily to what may initially be thought, it is not the Constitution that informs the development of the law of contract. Rather, and bearing in mind that the Common law acts as a filter for the interpretation of constitutional provisions, it is the form of contractualism depicted by Canadian courts that has played a pivotal role at the public level.

Taking a lateral step from the positivistic focus of previous chapters, Luca Siliquini-Cinelli opts for a theoretical-philosophical method of investigation that compares the condition of the *pactum* at the public and private spheres. In particular, Siliquini-Cinelli compares the behaviouralisation of human existence and relations that informs the Hobbesian project to the recent emphasis on contractual good faith within the Common law tradition as epitomised by the Canadian and Irish cases of *Bhasin v. Hrynew* and *Flynn v. Breccia*, as well as by other important judgments in England, New Zealand, Australia and Scotland (a mixed legal jurisdiction). Siliquini-Cinelli's aim is to show that the movement toward the conceptualisation of good faith as an organising principle and implied term in the Common law dimension is due to the need to counterbalance our inhuman condition as made manifest by the illusory character of the modern constitutional project.

To understand this phenomenon fully, Siliquini-Cinelli contends, we ought to delve into the nature of the *pactum* as both substantial and functional bond, as well as mythical canon of any contractual-constituting initiative on the public and private spheres. This requires not only the unfolding of the notion of contractualism as depicted by such scholars as Alain Supiot and Roger Cotterrell, but also an unconventional engagement with a series of important philosophical, political and juridical accounts of modern secularism. A comparison between Martin Loughlin's, Hannah Arendt's and Giorgio Agamben's scholarship on Hobbes and sovereignty may represent an important starting point for such a discussion.

However, Siliquini-Cinelli also argues that this is not sufficient. What is also needed is a thorough contextualisation of the 'experience-knowledge' and 'action-behaviour' dichotomies in Constitutional and Contract law discourse. Importantly, Siliquini-Cinelli notes that some commentators would deem the aim of his contribution to be pretentious, or at least inappropriate, from a purely Comparative law perspective. This would be a conservative reaction to the fact that, over the last two decades, Comparative law has branched out in new directions, galvanising legal theorists and practitioners; sparking novel socio-political, legal and business models; and attracting worldwide attention. Such criticism, Siliquini-Cinelli contends, would fall short in recognising the increasing relevance of Comparative law's methodological pluralism. Yet Siliquini-Cinelli also notes that the variety of accounts on Comparative's law essence and method(s) has inevitably displaced the anthropological and philosophical, rather than legal, difference between self-dissolving 'behaviour' and 'knowledge' and self-defining 'action' and 'experience'. The re-discovery of this antithesis may shed new light on the paradoxical condition of the *pactum* in the Public and Private law dimensions.

Luca Siliquini-Cinelli
Andrew Hutchison

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# List of Contributors

**François du Bois** Professor, Leicester Law School, Leicester, UK

**Philip H. Clarke** Emeritus Professor of Law, Deakin University, Geelong, VIC, Australia

Adjunct Professor, Australian Catholic University, Banyo, QLD, Australia

Professor of Law, Swinburne University of Technology, Hawthorn, VIC, Australia

**Andrew Hutchison** Associate Professor, Department of Commercial Law, University of Cape Town, Capetown, South Africa

**Nicolas Lambert** Professor of Administrative Law, Comparative Law, and Contract Law, Université de Moncton, Moncton, NB, Canada

**Annekatrien Lenaerts** Référendaire at the Belgian Court of Cassation, Leuven, Belgium

Affiliated Senior Researcher, Institute for Law of Obligations, KU Leuven, Leuven, Belgium

**Joasia Luzak** Associate Professor, University of Exeter Law School, Exeter, UK

**Pier Giuseppe Monateri** Professor of Comparative Law and Law and Literature, University of Turin, Turin, Italy

Professor of Advanced Comparative Law, Sciences-Po, Paris, France

**Elsa Dias Oliveira** Assistant Professor, Faculty of Law, University of Lisbon, Lisbon, Spain

**Béatrice Schütte** PhD, Department of Law, Business and Social Sciences, Aarhus University, Aarhus, Denmark

**Jean-Baptiste Seube** Honorary Dean of the Faculty of Law of the Reunion Island, Saint-Denis, France

**Luca Siliquini-Cinelli** Department of Law, Liverpool Hope University, Liverpool, UK

# The Impact of Human Rights on English Contract Law

**François du Bois**

**Abstract** This chapter examines the influence of fundamental rights on English Contract law since the enactment of the Human Rights Act 1998. Its aims are twofold—to provide a first comprehensive analysis of this phenomenon in English law and to tease out the factors that have shaped its contours. The chapter accordingly explores each of the various routes by which fundamental rights may touch on English Contract law: direct statutory horizontality, public liability horizontality, remedial horizontality and substantive horizontality. It is shown that although all permutations of horizontality have featured in contract litigation before English courts, the actual influence of fundamental rights on Contract law has been slight. Indeed, the gap between Contract law and fundamental rights is so wide that the contractual origin of a right frequently features as a reason for not finding a rights violation. The causes uncovered are complex and impossible to reduce to a single factor. The analysis nevertheless opens up a fresh perspective on the constitutionalisation of Contract law: it is not so much a normative phenomenon universally furthering specific values as a particular legal technique the impact and value of which are decisively moulded by the local environment in which it operates.

## 1 Introduction

Ever since the Human Rights Act 1998 (HRA) 'brought rights home' to the legal systems of the United Kingdom, English Contract law has been exposed to the influence of fundamental rights.[1] Section 6 of the HRA renders it unlawful for courts and tribunals to act in a way that is incompatible with the European

[1]For background on the Human Rights Act, see Klug (2000). There is scope for debate about when rights are 'fundamental'. I take this to be whenever they are meant to have an impact (whatever that might be) throughout a legal system and on all forms of law. This includes the Human Rights Act 1988 but excludes the Employment Rights Act 1996.

F. du Bois (✉)
Leicester Law School, University of Leicester, Leicester, UK
e-mail: francois.dubois@le.ac.uk

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Convention on Human Rights (ECHR),[2] and there is broad agreement that this includes the adjudication of disputes among private persons.[3] Yet little trace of such influence is to be found in the law reports.[4] Why? Several of the chapters in this book recount the influence of fundamental rights on Contract law in jurisdictions where the law does not appear to compel this any more forcefully than the HRA. What lies behind the English divergence from this trend? What does this tell us about the role of fundamental rights in relation to contracts and about English contract?

The burgeoning literature in England on the horizontal application of fundamental rights has surprisingly little to say about these questions. Authors typically concern themselves with how horizontal application should be treated as a matter of legal doctrine or legal theory, or with demonstrating its impact (or otherwise) in a particular jurisdiction or area of law, often arguing either for or against this phenomenon.[5] Scant effort has been expended on trying to identify the factors determining whether horizontal application flounders or rises to prominence.[6] In the field of English Contract law, the rarity of cases exhibiting fundamental rights influence is matched by the scarcity of writing on the topic. Although it is covered in the leading practitioners' manual, *Chitty on Contracts*,[7] books aimed primarily at an academic and student readership ignore the topic altogether,[8] restrict themselves to scattered references[9] or contain rather limited discussion.[10] There is not much more than a handful of book chapters or journal articles, and these mostly cover Contract law briefly as part of wider concerns.[11]

Against this background, the present chapter commences with a systematic mapping of the terrain, employing a framework adapted from Ian Leigh's helpful typology of horizontal effect.[12] The chapter accordingly explores each of the various routes by which fundamental rights may touch on English Contract law:

[2]More precisely, with Convention rights, which are those set out in Articles 2–12 and 14 of the Convention, Articles 1–3 of the First Protocol to the Convention, and Article 1 of the Thirteenth Protocol, as read with Articles 16–18 of the Convention, and subject to any designated derogation or reservation by the United Kingdom—see s 1 HRA.

[3]Young (2011), p. 16.

[4]References to the small number of reported cases are provided in the following sections of this chapter.

[5]See the contributions in Friedmann and Barak-Erez (2001); Ziegler (2007); Oliver and Fedtke (2007); Hoffman (2011). There is also a large volume of journal articles.

[6]A notable exception is Giliker (2015).

[7]Beale (2015), Ch 1.

[8]Andrews (2015).

[9]Beatson et al. (2016); Peel (2015).

[10]McKendrick (2013), pp. 11–13; Collins (2008), pp. 44–45, 100, 104.

[11]Beale and Pittam (2001), p. 131; Brownsword (2001), p. 181; Duffy (1997), Ch. 23; Cherednychenko (2007), Ch. 3; Mak (2008), Ch. 2; Rose (2011), p. 300; Davey and Richards (2015); Collins (2011); Collins (2013); Collins (2014).

[12]Leigh (1999), pp. 74–85.

direct statutory horizontality, public liability horizontality, remedial horizontality and substantive horizontality.[13] The purpose of doing so is twofold—to provide a first comprehensive analysis of this phenomenon in English law and to tease out the factors that have shaped its contours. This investigation concentrates on the impact of Convention rights via the HRA, leaving to one side a more recent addition to the fundamental rights landscape, the European Union Charter of Fundamental Rights.[14] The Charter is not only too recent to have produced much relevant effect but is also affected by the 'Brexit' referendum result. The chapter concludes with a closer focus on the factors so identified, tracing their impact to the intersection of an ambivalent reception of the Convention rights with a strong tradition of a comparatively dynamic and open Contract law already engaged in an overt balancing of interests. This conclusion opens up a fresh perspective on the 'constitutionalisation of Contract law': it is not so much a normative phenomenon universally furthering values such as 'protection of the weaker party',[15] social justice,[16] autonomy[17] or a reconceptualisation of contractual freedom,[18] as a particular legal technique the impact and value of which are decisively moulded by the local environment in which it operates.

## 2 Direct Statutory Horizontality

Direct statutory horizontality occurs where a legislative provision regulating rights and duties among private persons is affected by Convention rights. This can be due to s 3(1) of the HRA, which requires that primary and secondary legislation should, 'so far as it is possible to do so', 'be read and given effect in a way which is compatible with Convention rights'. This duty has been held to apply 'to the same degree in legislation applying between private parties as it does in legislation which applies between public authorities and individuals'.[19] Its effect is thus to impose indirectly an obligation to comply with Convention rights on private parties.[20] Statutory horizontality can also involve s 4 HRA, which empowers a court to issue a 'declaration of incompatibility' when a legislative provision is found to be

[13]The final category combines what Leigh refers to as indirect horizontality and full or direct horizontality.

[14]For discussion, see Leczykiewicz (2013a, b), p. 171.

[15]See Mak (2008), p. 323; Colombi Ciacchi (2014), p. 126.

[16]Meli (2006).

[17]Collins (2014), pp. 57–60.

[18]Brownsword (2001).

[19]*X v Y*, [2004] EWCA Civ 662, [2004] IRLR 625 (Court of Appeal (Civil Division)), para 66; See also *Pirabakaran v Patel & Anor*, [2006] EWCA Civ 685, [2006] 1 WLR 3112 (Court of Appeal (Civil Division)), para 45.

[20]Amos (2014), p. 55.