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HUMAN RIGHTS AND THE PRIVATE SPHERE

A COMPARATIVE STUDY

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A Comparative Study

Edited by Dawn Oliver and Jörg Fedtke

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Human Rights and the Private Sphere

A Comparative Study

Human Rights and the Private Sphere: A Comparative Study analyses the interplay between constitutional rights and freedoms on the one hand and private law on the other, and the extent to which human rights are protected in the private sphere in fifteen jurisdictions. Focusing on civil and political rights, the book is composed of contributions by constitutional and private law experts covering Canada, Denmark, France, Germany, Greece, India, Ireland, Israel, Italy, New Zealand, South Africa, Spain, England and Wales, the United States, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The book concludes with a comparative essay, which sets out the common features and differences in the jurisdictions under review and attempts to identify common trends in this important area of the law, and a chart which summarises the position in each jurisdiction in the study, designed to guide readers to particular points of comparison.

References to the most important cases in the various jurisdictions and a detailed index make *Human Rights and the Private Sphere* a valuable resource both for academics and practitioners.

Dawn Oliver is Professor of Constitutional Law at University College London. She is particularly interested in constitutional reform, the UK Human Rights Act 1998, and the public law/private law divide. She is the author of *Constitutional Reform in the United Kingdom* (OUP, 2003) and co-editor of *The Changing Constitution* (OUP, 6th edn, 2007). In 2005 she was elected a Fellow of the British Academy.

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Preface

The interplay between private law and human rights guarantees is becoming increasingly topical and often problematic in a number of democracies around the world. Whereas at one time it was assumed that human rights protection could bind only states in their relationships with citizens, nowadays it is widely accepted that citizens may also require legal protection against the abuse of power by private bodies. Much of this protection is provided by ordinary legislation; most countries make provision for the protection of constitutional interests such as privacy or the security of tenure for tenants (to take just two examples from the many areas of the law discussed in this collection). But in some jurisdictions the protection has a more 'fundamental' or 'entrenched' legal status than ordinary legislation. It is this kind of special protection that is the subject matter of our study.

Our focus is on what are generally considered to be 'first generation' rights, namely the range of civil and political rights that find expression in national constitutions such as those of the United States or Germany, and international instruments such as the European Convention on Human Rights or the International Covenant on Civil and Political Rights. This focus on civil and political rights is not to suggest that second generation social and economic rights or third generation environmental and cultural rights are any less important; the fact of the matter is, however, that civil and political rights find expression in constitutional documents more commonly than second or third generation rights, and their protection in the private sphere is more developed in most systems. It may very well be that the next project should be a study of the protection offered to second and third generation rights in the private sphere.

The list of colleagues who have contributed to this collection of essays spans the globe. It was a fruitful collaboration, for which we are most grateful.

13 December 2006
Bentham House
University College London

Dawn Oliver
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Part I: Introduction

Human Rights and the Private Sphere – the Scope of the Project

Dawn Oliver and Jörg Fedtke

This book is about some of the ways in which private individuals and bodies are required by law to respect the civil and political rights of others. It is a question of considerable practical importance and, in many systems, political relevance. Some of the countries considered in this collection have moved fairly recently towards new forms of human rights protection and are now considering how – if at all – these changes impact on the private sphere. South Africa (with its new constitutional settlements of 1993 and 1996) and the United Kingdom (with the introduction of the Human Rights Act 1998) fall into this category. Others have been grappling with the issue of private sphere protection for decades: in these jurisdictions outbursts of debate and discussion still take place when new legislation is passed or when court decisions are made on the subject. Germany is a good example. We shall be considering how human rights have affected private relationships in these and a range of other jurisdictions, and seeking to draw lessons from comparisons between them. The application of human rights protections such as are found in constitutional documents, case law or international instruments in the private sphere is, as we shall see, conceptualised in different ways in different jurisdictions. In Germany the fairly well-know term *Drittwirkung* (or 'third party effect') is used but, as we shall see, there are a number of other ways in which the effect or function of private sphere protection is expressed. We have chosen the phrase 'human rights and the private sphere' as the title for this collection in order to be able to generalise about these issues and avoid assuming any particular model or conceptualisation of the phenomenon.

In this introductory chapter we consider a number of general issues before moving on to the jurisdiction-based chapters in Part II.

With what senses of human *rights* is this project concerned? Why have we focused on civil and political rights rather than social, economic, cultural or environmental rights? What rationales or reasons might be offered for civil and political rights to apply in the private sphere? What are the sources of private sphere rights? What are the positive and negative implications of extending rights protection to the private sphere, and how does private sphere protection affect public-private divides? We now turn to these.

A. Human 'rights'

A question that is bound to arise in what follows is: what is implied by the fact that our inquiry is into whether and how human *rights* are protected in the private sphere? All democratic legal systems provide substantial private sphere protections, though of varying degrees, for life, liberty, privacy, freedom of association, property, speech, conscience and so on against intrusion by individuals or private bodies, even in the absence of a bill of rights or equivalent domestic law instrument. Criminal law punishes murder, manslaughter, assault, false imprisonment, damage to property and, commonly, speech that causes disturbances or breaches of the peace. Civil law or the law of tort also protects these interests, plus reputation, and, in various ways, privacy. In every country rights to marry and divorce and the upbringing of children are regulated. But the concept of 'human *rights*' with which we are concerned here entails that the rights or freedoms in question enjoy *enhanced* or *special* legal status and protection, over and above that provided by the ordinary domestic criminal or civil law. That said, it is also important to note that the content of particular rights such as freedom, property, or privacy may differ within a single legal system. Even 'life' is sometimes defined differently depending on whether the notion is used in the constitutional, criminal or private law context. This in turn begs the question whether these various sub-systems exist side by side or, alternatively, whether a right or freedom with enhanced or special (typically constitutional) status should override or in some other way affect the way particular interests are protected in other parts of a legal system.

In the absence of special legal protection, it is generally considered to be lawful for the legislature to authorise interference with these rights or freedoms by the passage of legislation according to

normal procedures – commonly simple majorities in the chambers of an elected parliament – just as it can normally change the law relating to, for example, traffic regulation. It does not follow from the fact, if it is the case, that human 'rights' do not receive *special* legal protection in the private sphere, that they receive *no* protection at all. The extent to which the protection of the ordinary law in practice secures that these rights are not infringed depends in large part on what private law actually lays down, on whether and to what extent private sphere relationships are regulated by statutory provisions (e.g. in relation to employment), on the political culture (i.e. whether the legislature and the executive do in fact take steps to secure that these 'rights' are legally protected, even without any 'special' legal status), and the civic culture (the extent to which in practice private bodies such as the press, employers, landlords etc. feel it to be legitimate for them to interfere with the 'rights' of those with whom they have dealings). This calls for two additional observations. Private interests can, first, be at risk not only through legislative or judicial *inactivity* – where the outcome of disputes is left to the free competition of social or market forces – but also through legislative or judicial *activity* which favours one particular private interest over another. When it comes to the protection of individual rights, state intervention in private relationships can thus be as relevant as regulatory restraint. It is, second, sometimes difficult or even impossible to determine who actually 'interferes' with a right in a particular situation. To take two examples which have reached the courts in Germany: is the tenant who uses the façade of his rented apartment to display political placards or attach a television antenna 'interfering' with the property rights of the landlord, or is the landlord, in turn, 'interfering' with the rights of the tenant to free speech or unrestricted access to generally available information if he prohibits such use of his property? As will be discussed in more detail below, conflicts in the private sphere are characterised by the fact that both sides to the dispute can invoke rights, whereas only one – the citizen – will be able to do so in 'vertical' relationships with public authorities.

Special and institutionalised legal or political protection for human rights, where it exists, is generally designed primarily to give protection to rights vertically – against state bodies – rather than in the private sphere. But there are significant exceptions to this rule of the thumb, at least on the surface of things. In Europe, Greece is such an exception with its constitutional provision that

constitutional rights 'apply to the relations between individuals to which they are appropriate'. In Southern Africa, Namibia and, since 1996, South Africa have expressly made their bills of rights binding on natural or juristic persons, though the effect of these rules remains ambiguous in constitutional practice. In India it has long been recognised that rights are commonly threatened by powerful private bodies rather than the state and thus human rights protection extends naturally to the private sphere. Finally, even systems which, *in principle*, take the view that constitutional rights should regulate only disputes between the state and its citizens often contain expressly codified exceptions. Germany's Basic Law of 1949 thus determines in Article 9(3) BL that private activities are directly subject to the right to form associations aimed at safeguarding and improving working conditions and, more generally, the economic environment of the country. The image of a general rule (vertical application) which is confirmed by single exceptions (horizontal application) is, however, dangerously deceptive. As we shall see, in a number of jurisdictions the courts have built on and developed existing constitutional rights so as to provide varying degrees of private sphere protection. But in other jurisdictions the declaration of a binding effect of human rights in the private sphere in the text of a constitution may have to be taken with a pinch of salt: in practical terms the relevant provision of the South African Constitution of 1996 on this is currently dead letter law.

Special protection can take a number of forms, as the chapters that follow will demonstrate. Weak protections include prelegislative scrutiny of measures that would interfere with rights, with a view to deterring but not preventing the legislature from passing legislation that breaches rights. The United Kingdom is an example, as is New Zealand. The strongest protection exists where a Supreme Court or equivalent has the power to 'strike down' legislation or official action that interferes with rights, as in Germany and the United States. Between those two extremes of 'weak' and 'strong' protection are requirements that laws that may interfere with rights be 'read down' or interpreted compatibly with those rights, as in many of the jurisdictions in this study, or the practice of the courts in developing the law so as to give effect to human rights, as in Canada, Denmark, England and Wales, France, Greece, India, Ireland, Israel and New Zealand. Other techniques include: the recognition either in a constitutional text or by the

judiciary of the importance of particular *values* (on which see below) that underlie rights (as in the United Kingdom, Greece and Israel); special powers for the executive to introduce amending legislation removing incompatibilities with human rights (as in the United Kingdom); special legislative majorities (as in the United States); and delaying powers (as, again, in the United Kingdom). These various mechanisms can exist side by side in single systems, which will often seek to combine their effects not only with a view to enhancing human rights protection but also to uphold other constitutional principles. In Germany, the exceptional power wielded by the Federal Constitutional Court is thus tempered by the use of interpretative techniques which seek, as far as possible, to uphold statutes (*verfassungskonforme Auslegung*) in order to maintain the division of powers between the legislature and the judiciary.

In common parlance the word 'right' in a human rights context refers to specific rights to, for instance, life, freedom of expression and association, privacy and so on. These rights are in practice concrete expressions of deeper and often overlapping values such as autonomy, dignity, respect, or equality. In some jurisdictions these deeper values are expressed as rights; an Israeli Basic Law, for example, refers to a right to human dignity. But in many jurisdictions these values underlie rights, and recognition of their existence and importance influences the courts when deciding particular cases which have to do with rights.

B. Civil and political rights

Our concerns in this book are with private sphere protection of civil and political rights. These commonly find expression in domestic instruments – written constitutions – either self-executing or not self-executing, basic laws, bills or charters of rights, and laws incorporating international human rights provisions into domestic law. This is true for all of the jurisdictions covered by our study. They are also included in many international instruments such as the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), and the Harare Declaration of Human Rights. Many of the jurisdictions in our study are parties to the ECHR, whose protections are broadly typical of the rights set out in many constitutions or