THE CONSTITUTIONALISATION OF PRIVATE LAW IN THE UK: IS THERE AN EMPEROR INSIDE THE NEW CLOTHES?

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1  FUNDAMENTAL RIGHTS IN PRIVATE LAW: BACKGROUND

In its Roman law origins, Private law already encompassed the protection of certain aspects of human dignity. Examples are the principles of iniuria and lesio enormis in the jus civile. Several rules of the public jus gentium emerged later, offering minimum humanitarian protection to non-Roman citizens against abuses by the Roman authorities, and becoming the ancient predecessor to modern International Humanitarian Law. Historically and systematically the jus civile (Private law) took precedence over the jus gentium (Public law) and so did the protection of basic human rights by Private law (with the public display in the Forum of the first principles of Private law in the XII Tables). Even slaves had basic rights in Roman law, reminiscent of rights modern animal welfare activists want to see extended to animals in our time. In Continental Europe, as is well known, the jus civile had a lasting influence and its protection of certain freedoms and rights of a human person (even one not yet born or even conceived) became the nucleus of a much greater protection of human dignity embedded in the Law of Persons or Family law of all modern European Civil Codes. Several of these recognize a general right to one’s personality, the content of which defines the Private law’s residual notion of human dignity (i.e. right to one’s freedom, bodily and psychological integrity, reputation,

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image, name and so on).

However, the Roman law’s influence on the protection of human dignity in modern Private law is not the only historical influence; a second very important influence has been the theory of human rights that emerged with the rise of the Law of Reason in Germany, with Immanuel Kant being the first major thinker in modern times to develop a full theory of human dignity, based on the primary principle of individual freedom or self-determination, which is necessarily coupled with personal responsibility (the two must be interchangeable in causal order). Several others followed in the same vein as Kant, firmly founded in the liberal-individualistic Kantian model, right down to our contemporaries Rawls, Habermas and Alexy, the latter proposing a theory of fundamental rights based on basic notions of morality, underpinning not just Private, but also Constitutional law (see also the German Grundgesetz that can be said to exemplify this approach).

But in post-modern times, this one-dimensional view of fundamental rights based on classic western liberal ideologies has given way to theories of fundamental rights that define human freedom and responsibility in the light of the collective entity in which humans exist, i.e. communitarian or even cosmopolitan theories of fundamental rights. And in an interesting aversion to far eastern Confucianism, one can also approach fundamental rights in the context of freedom and responsibility within groups other than states or other public entities, of a more private nature, such as churches or religious associations, sport associations, private clubs and, as shown in the emergence of contemporary principles of Child Law, in the family itself, with rights and duties of parents and children toward each other.

Against this background, what exactly is meant by Constitutionalisation of Private law? Is it the fertilization of traditional private law, styled in Continental Europe by the jus civile, with Constitutional rights born of political-moral ideas of fundamental rights, in the way that this has clearly occurred, for example, with civil law in Germany, after the introduction of the Grundgesetz in the second half of the last century? Or could it be the elevation of Private law principles to constitutional status, as one saw recently in France with the recognition by the Constitutional Council in France of the quasi-

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