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The Constitutionalization of Contract Law in the Irish, the German and the Italian systems: is horizontal indirect effect like direct effect?

A comment on Professor Kumm's view

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Abstract

Historically fundamental rights were confined to governing the relationship between the State and the individual, and they did not affect in any way relationships between private actors. Over time, the growing influence of constitutional right on contract law makes it clear that the sphere of constitutional rights and the sphere of contract law cannot be considered as two separate worlds. As a consequence, today a horizontal effect of constitutional rights has been accepted by many European countries, but it is still controversial how this effect should operate: directly or indirectly. This paper analyses the direct approach followed by the Irish legal system and the indirect approach followed by the Italian and the German legal systems. It is argued in this paper that even if the German and the Italian doctrines insist upon a clear distinction between horizontal direct and indirect constitutional effect, in practice this distinction seems more formalistic that substantive. In fact, this paper, by supporting Professor Kumm's view, shows that the doctrine of indirect effect, as applied by courts, seems to have substantively the same consequences of the doctrine of direct effect.

Keywords: Contract Law; Fundamental Rights; Direct Effect; Indirect Effect

Summary

1. Introduction

Historically fundamental rights were confined to governing the relationship between the State and the individual, and they did not affect in any way relationships between private actors. Fundamental rights were weapons to protect individual citizens against the abuse of the State power. This means that a citizen cannot invoke constitutional rights against another citizen, but only against a state actor. Over time, the growing influence of constitutional right on contract law makes it clear that the sphere of constitutional rights and the sphere of contract law cannot be considered as two separate worlds. In fact, today a horizontal effect of constitutional rights has been accepted by many European countries, but it is still controversial how this effect should operate: directly or indirectly[1].

The proponents of direct approach would provide the most effective protection of fundamental rights, by defending the private parties from abuse of power by both public or private entities. And this in turn has been taken to require the courts to permit an individual to invoke the Constitution directly as a source of a claim not only against the State, but also against another individual.

The proponents of indirect approach instead consider the private law as an autonomous branch of the law which has its own considerations of fairness. As a result, constitutional rights cannot affect directly private law, but they can influence private law, by guiding the judicial interpretation of its existing civil norms.

In the following paragraphs this paper analyses the two different approaches: the direct approach followed by the Irish legal system and the indirect approach followed by the Italian and the German legal systems. This paper shows that the difference between the two approaches is negligible, by supporting in that way Professor KUMM's view.

2. The direct approach of the Irish legal system

The Irish system follows the doctrine of direct horizontal effect of constitutional rights. It means that every citizen can invoke a constitutional right directly against another citizen, and not only against the State. According to this doctrine, if a fundamental right has been violated, it should not make difference if it has been violated by the State or by a private party. The Irish Supreme Court established this principle in two famous cases. As was pointed by Justice Budd in Educational Company of Ireland Ltd v. Fitzpatrick[2], "if one citizen has a right under the Constitution there exists a correlative duty on the party of other citizens to respect that right and not to interfere with it". As a result, the Court would act so as not to permit a person to be deprived of his/her constitutional rights and would seek to it that those rights were protected.

[1] M. W. HESSELINK (2003, p. 5).

[2] Educational Co. Ltd., v Fitzpatrick (No 2) [1961] IR 345.

In the following case Meskell v. Coras Iompair Eireann[3], Justice Walsh said that "if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right". And Justice Costello held also that "the Irish Constitution confers a right of action for breach of constitutionally protected rights against persons other than the State and its officials". In other words the Irish Supreme Court has interpreted the Irish Constitution in a manner to impose a positive obligation on all State actors, including courts, to defend and enforce the constitutional rights of individuals. And this in turn has been taken to require the courts to permit an individual to invoke the Constitution directly as a source of a claim against another individual[4]. Examples of constitutional rights that have been given full horizontal effect include the freedom of association[5], the freedom from sex discrimination[6], the right to earn a livelihood[7], and the right to due process[8].

3. The indirect approach of the German legal system

In Germany the question of direct or indirect horizontal effect of human rights has been debated for a long time, and this debate still continues.

Some scholars argue in favour of a horizontal direct effect of constitutional rights, the so-called *unmittelbare Drittwirkung*. NIPPERDEY was the first to argue in favour of direct approach in a 1950 law review article. According to him, some fundamental rights provisions should have a direct effect as between individuals[9]. As consequence, the parties may invoke fundamental rights in relations with each other. When both parties have a claim or defence directly based on fundamental rights the judge has to strike a balance between the two clashing fundamental rights in order to resolve the private dispute. As a result of this balance a contract term in violation of a fundamental right would be invalid. Fundamental rights were considered by NIPPERDEY as absolute rights, which had the function to protect the individual not just against the State but against all individuals.

[3] Meskell v. CIE [1973] IR 121.

[4] Stephen GARDBAUM (2003, p. 396).

[5] Meskell v. CIE [1973] IR 121.

[6] Murtagh Props., Ltd. V. Cleary [1972] IR 330.

[7] Lovell v. Gogan, [1995] 1 I.L.R.M. 12; Parsons v. Kavanagh [1990] 10 I.L.R.M. 560.

[8] Glover v. B.N.L., Ltd., [1973] 1 I.R. 388.

[9] H.C. NIPPERDEY (1950, pp. 121, 124-26); H.C. NIPPERDEY,(1954, pp. 1, 18-21, 35-6).

Other scholars instead, argue in favour of indirect horizontal effect of the *Grundrechte*, the so-called *mittelbare Drittwirkung*. According to them the private law cannot be affected directly by constitutional rights. Constitutional rights provisions can just influence the private law, by guiding the judicial interpretation of open-textured private law provisions. By this means, especially the general clauses, such as good faith (*Treu und Glauben* § 242 *BGB*) or good morals (*gute Sitten* § 138 *BGB*, 826 *BGB*), would become the inroads for fundamental rights into private law[10].

The indirect approach was confirmed by the *Bundesverfassungsgericht* in the *Lüth*[11] case, and it became the official accepted theory. In this judgement the *Bundesverfassungsgericht* established that the Constitution's section on fundamental rights incorporates an objective order of values which informs the interpretation of private norms[12]. But the dispute remains substantively and procedurally a civil law dispute, and the claim or defence continues to be grounded on civil norms, such as the clauses of good faith and good morals. As a result, the distinction between private law and public law is preserved.

Even if the German courts officially continue to follow the indirect approach, in practice it is unclear if they continue to do it. As a consequence of the decisions of the *Bundesverfassungsgericht* in the *Bürgschaft*[13] case the debate regarding the direct or indirect horizontal effect of constitutional rights was reopened[14].

In this case the Court, essentially, invalidated a contract under which a daughter has accepted to act as a guarantor for the whole of her father's debt. In this judgement the Federal Constitutional Court established that the civil courts have an obligation to protect the constitutional right to party autonomy in connection with the principle of social state. As a result, when a structural imbalance of bargaining power has led to a contract which is exceptionally onerous for the weaker party, the civil courts are obliged to protect the constitutional right to private autonomy of this party, by using the general clauses (§ 138 and § 232 *BGB* concerning respectively good faith and good morals). In that case, the mentioned imbalance existed because the bank failed to sufficiently inform the daughter, who, at the time of concluding the contract, was 21 years old, uneducated, without any property, and worked as a unskilled employee for a very modest salary, about the contractual risk. As a result the Court held that the contract was contrary to the good morals and therefore it was void.

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[10] G. DÜRIG (1956, pp. 157, 160 n. 5, 171 n. 28, 176-84).

[11] BverfG 15-1-1958, *BVerfG* 7, 198 (Lüth).

[12] S. VOGENAUER (2006, p. 643).

[13] BVerfG 19-10-1993, *BVerfG* 89, p 214 (Bürgschaft).

[14] This case led a discussion upon the question whether the *BVerfG* had overstepped the boundaries towards a paternalistic State intervention and had abolished the concept of private autonomy see K. PREDDY (2000, p. 128, supra note 10); J. ESCHENBACH & F. NIEBAUM (1994, p. 1079).

As argued by a scholar, the *Bundesverfassungsgericht* by imposing on the civil courts an obligation to protect constitutional rights in practice, reached the same result that it would have reached by employing the theory of direct effect[15]. In fact, this means that the parties may have a claim or defence on the basis of constitutional rights and freedoms, and that a balance has to be struck between these competing constitutional rights and freedoms[16] by the judge. But this is the same kind of determination that the judge would have been required to make under the doctrine of direct horizontal effect.

As a result, the doctrine of indirect effect, as applied by courts, seems to have substantively the same consequences of the doctrine of direct effect.

Probably for this reason Professor KUMM considers this distinction "highly negligible", in fact, he has argued that, "if the German legislator were to amend the Constitution and determines that constitutional rights are directly applicable to the relationship between individuals, it would not change anything", it is because "the German law is already fully constitutionalized[17]".

4. The indirect approach followed by the Italian legal system

Even the Italian legal system follows the indirect approach by way of the so-called general clauses, which are empty boxes to be filled in by courts with more concrete norms determined in connection with the Constitution and its values[18]. But today, as a consequence of the *Fiuggi*[19] case, the debate regarding the direct or indirect horizontal effect of constitutional rights was reopened. In this case seems that the outcome of the dispute was determined on the basis of constitutional values, whereas the role of the clause of good faith seemed to be limited to vehicle this outcome in the field of contract law.

In fact, as established by the Italian Corte di Cassazione, the contracting parties infringe the duty of good faith when they infringe the duty of solidarity provided by art. 2 of the Constitution, which, when applied in the field of contract law, requires that every contracting party, if possible and not contrary to his/her own interest, has to preserve the interest of counterparty[20]. In this

[15] O. CHEREDNYCHENKO (2004, p. 7).

[16] O. CHEREDNYCHENKO (2004, p. 7).

[17] M. KUMM (2006, p. 352).

[18] G. ALPA (2000, p. 604); M. L. CHIARELLA (2004, p. 69).

[19] Cass. 20-4-1994, n. 3775, in *Corriere giuridico,* (1994, p 566).

[20] Cass. 20-4-1994, n. 3775, in *Corriere giuridico.,* 1994, 566; Cass. sez. Un. 17-5-1996, n. 4570, in *Gazzetta giuridica,* n. 24/96, 50.

case, the duty of solidarity was used by way of the general clause of good faith to limit the contractual freedom to unilaterally determine the price of mineral water exercised by the stronger party on the ground of a contractual term. This party used his stronger position to perform the contract to the detriment of the interest of the weaker party, by infringing in that way the obligation of solidarity which implies a duty to preserve the interest of the counterparty and which determines the content, effect, interpretation and performance of contracts. As a result in this case, as well as in the German case illustrated above, the constitutional values played a leading role, in fact the court determined the outcome of the dispute by balancing the clashing fundamental principles and values, which were the contractual autonomy and the solidarity[21], whereas the role of the clause of good faith seemed to be limited to transpose the outcome of this balance into the realm of contract law[22]. It means that under the guise of interpreting the general clauses, the judge is required to make the same kind of determination that he would have been required to make under the doctrine of direct effect. Probably the outcome of the case would not change if the Italian legislator were to amend the Constitution and determines that constitutional rights are directly applicable to the relationship between individuals. Imagine for a moment, that constitutional rights are directly horizontally effective in the Italian legal system. In this hypothesis both the *Fiuggi s.p.a.* and the small *Fiuggi Comune* could invoke directly constitutional rights to support their claims. On the one hand, the *Fiuggi s.p.a.* could sue the small *Comune* claiming that it, by refusing to recognize the validity of contract, infringed its constitutional right to contractual autonomy[23]; on the other hand, the small *Comune* could invoke the constitutional right to contractual autonomy in conjunction with the value of solidarity[24] (art. 2 Cost) as a defence against the *Fiuggi s.p.a.* In order to resolve this conflict the courts should make a balance

[21] In a certain number of the cases the principle of good faith was used in conjunction with the duty to preserve the interest of counterparty in order to control the content of imbalanced contracts and to invalidate onerous contractual terms, see for example Cass., 2-11-1998, n. 10926, in *Foro italiano,* 1998, I, p 3081, in this case the clause of good faith was used by the court as an instrument to control the content of contract and to make void a term of leasing contract, which was considered exceptionally onerous. In fact, since this contract transferred the risk for contractual non performance (including defective performance) of supplier from the lessor to the lessee, it was considered against the duty to perform a contract in good faith, which implies the duty to take into account the interest of the counterparty. For a comment upon this case and upon the relationship between the duty of good faith and the constitutional obligation of solidarity see A. RICCIO (1999, pp. 21-29); G. SICHIERO (2006, pp. 929-930).

[22] In another case the Corte di Cassazione established that in order to control the private autonomy, a balance has to be struck between the value of solidarity and the freedom of private economic initiative which protects the freedom of contract, see Cass. 24-09-1999, n. 10511 in *Giustizia civile*, 1999, I, 2929.

[23] Some authors consider the right to contractual autonomy as a fudamental right on the basis of the art. 2 of the Italian Constitution, .see for example A. Pace (1993, pp. 3 ss.); another author considers the contractual autonomy as a right of personality on the basis of the art. 2 of the Italian Constitution, see G. GIAMPICCOLO (1958, p. 469); other authors consider the contractual freedom as a principle or freedom protected indirectly by the art 41 of the Italian Constitution which regards the freedom of private economic initiative, see for example L. MENGONI (1997, p. 1 ss). In all cases the private autonomy is guaranteed by the Italian Constitution, see M. GAGLIARDI (2004, pp. 186-190).

[24] The solidarity is a fundamental value protected directly by the art 2 of the Italian Constitution.

between the competing constitutional interests[25] and values[26]. But this is the same kind of determination that has been done by the Court in the *Fiuggi* case while it was interpreting the general clause of good faith under the doctrine of indirect effect. As a result, the theory of indirect effect in practice seems to have much the same consequence as the embrace of the doctrine of direct horizontal effect.

In fact the distinction between the two approaches seems only procedural. It seems to regard the formal construction of the legal issue and in particular, as argued by KUMM, the way complaints can be framed[27]. In fact, under the doctrine of indirect effect, the complainant instead to invoke constitutional rights against the other party, can invoke these rights against the court, which has a duty to interpret the private law so as to ensure his/her constitutional rights. But as argued by KUMM it has no implications for question relating the substantive outcome of the case[28]. Even if KUMM, in holding it, refers to the German legal system, we have seen that his view can be applied to the Italian legal system.

5. Horizontal direct and indirect effect: is it an useful distinction?

The German doctrine and the Italian doctrine insist upon a clear distinction between horizontal direct and indirect constitutional effect. But we have seen that the theory of indirect effect, as applied by the most recent jurisprudence, seems to have much the same consequences as the embrace of the doctrine of direct horizontal effect. Probably for these reasons some scholars consider this distinction more formalistic than substantive[29].

Even the European Court of Justice does not seem to pay attention to this distinction between direct and indirect effect. In fact, the ECJ sometimes employed an indirect horizontal approach, but other times it employed a direct horizontal approach[30], by showing in that way that the distinction is of little importance.

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[25] A constitutional interest could be even a principle or a constitutional right.

[26] About the constitutional balance among interests and values see G. SCACCIA (1998, pp. 3956-3961); A. Baldassarre (2007, pp. 10 ss.)

[27] According to KUMM under the direct approach, "*instead of naming the public authorities, which are currently the addresses of the complaints, the complainant could name the other party as the defendant in that case*". See M. KUMM, (2006, p. 352);

[28] See M. KUMM, (2006, p. 359); see also p. 359 of the same article where KUMM asserted that "*the indirect horizontal effect and direct horizontal effect are merely alternative, but in all relevant respects equivalent constructions of a legal problem*".

[29] B. LURGER (2002, p. 228).

[30] K. PREDDY (2000, pp. 128-30) notes that in the case of free movement of goods (art. 28 EC Treaty), the Court refused to confer a horizontal direct effect but resorted to an indirect effect where necessary. In the free movement of persons cases, however, it admitted their horizontal direct effect.

In spite of all that, the classical doctrine insists upon a clear distinction between the two approaches on the basis of two main reasons. The reluctance to recognize a direct horizontal effect of constitutional rights and the consequent preference for the indirect approach is primarily grounded on the distinction between private law and public law. The indirect approach preserves the distinction between private law and public law, and avoids to equate private acts and state acts. Private law addresses the relationship between individuals, whereas public law addresses the relationship between the individual and the state. Not recognizing this distinction could undermine the private autonomy[31].

It is important to note that originally constitutional rights were construed as a defence against the state power, and not against other individuals. The original intention of this distinction was to guarantee a sphere within private actors were protected from state intervention, free to make their own choices in pursuance of their interest. Instead, an eventual extension of fundamental rights between private actors would thus threaten private autonomy, by placing private actors under the same duties as public bodies acting in the common interest[32].

This argument seems unpersuasive. According to Professor KUMM, if it is true that private autonomy implies that individuals may often do things that public authority may not, it does not mean that constitutional rights cannot be applied to the relationship between private individuals, but that when applying constitutional rights to the private context the autonomy interest of the other party need to be taken into account by courts[33]. Some examples make clear this point. An individual does not need to have good reason to not invite a person to his/her dinner party. A private actor can choose to invite anyone to his/her party. At the same time he/she can exclude anyone for good reason, bad reason or no reason. For example he/she is free to not invite a person because he/she is Jew or negro. In the field of employment, the balance between competing rights leads to a different result. In fact an employer cannot choose to not employ a person for a racial reason. The rights of the employer are limited by the competing rights of the applicant not to be discriminated on the basis of his/her race or ethnic origin [34]. At the same way, an employer cannot fire an employee because she is woman and he/she does not approve of the women in the labour market.

But the second argument raised by the classical doctrine is proper: that the theory of direct effect cannot strike an appropriate balance between competing fundamental rights and freedoms[35].

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[31] For an analysis of the argument raised against the direct effect of fundamental rights, see M. W. HESSELINK, (2003, p. 6); K. PREDDY (2000, p. 131-32).

[32] O. GERSTENBERG (2004, p. 769).

[33] M. KUMM (2006, p. 363).

[34] See also examples quoted by M. KUMM (2006, p. 363).

[35] See supra note 21.

This balance is necessary to determine the respective spheres of autonomy of the rights holders. In fact, the application of constitutional rights to private acts involves the restriction of one party's freedom in order to protect the other party's rights. But the choice to restrict one or both competing rights seems a matter for the legislator, and not for a judge. As a result, in absence of objective and specific legal criteria, courts, by usurping a legislative prerogative in determining the spheres of private autonomy, might reach arbitrary choices guided primarily by their own views. In fact the major danger is that when courts are engaged in the balancing process, they might interpret the vague and indeterminate constitutional norms on the basis of their personal and political convictions[36], by following in this way unpredictable criteria which might override or displace the legislative choices and infringe the certainty of law[37].

According to the classical doctrine, these problems may be avoided, to some extent, by adopting the indirect approach, which requires the application of constitutional rights in the framework of private law. In fact private law is already a system of balanced rights and freedoms of private actors, that can be modified by courts only in a way that respect legislative choices, which are inherent in such system[38].

Let me note that, on the one hand, even under the doctrine of direct effect the judge would no displace the legislative choices but on the contrary the judge would give some degree of deference to the ordinary legislation.

On the other hand, we have seen in the *Fiuggi* case that, under the guise of interpreting the general clause, the judge is required to make the same kind of determination that he would have been required under the doctrine of direct effect. In fact, the judge determined the disputes on the basis of a complex balance between competing constitutional interests and values.

Even in the *Bürgschaft* case it seems that the constitutional rights played a leading role. In fact, the outcome of the dispute was determined on constitutional level, by balancing the competing constitutional rights and freedoms involved, which were: the bank's constitutional right to party autonomy (art. 2, Sec.1 *GG*) and the daughter's constitutional right to party autonomy in conjunction with the principle of social State (art. 20 Sec. 1, and art. 28, Sec. 1 *GG*) [39]. Instead, the general clause was used only as an instrument to bring the outcome of this balance into the realm of contract law[40]. In my view the *Bürgschaft* case shows that the theory of indirect effect in

[36] O. CHEREDNYCHENKO (2004, p. 10).

[37] O. GERSTENBERG (2004, p. 769); O. CHEREDNYCHENKO (2004, p. 10).

[38] K. PREDDY (2000, p. 133).

[39] O. CHEREDNYCHENKO (2006, p. 494).

[40] O. CHEREDNYCHENKO (2004, p. 7): "if both private parties have a claim or defence on the basis of constitutional right, a balance has to be struck between the two constitutional rights, and the role of general clauses of private law seems to be limited to providing a shelter for this balancing process".

practice seems to have much the same consequence as the embrace of a doctrine of direct horizontal effect.

6. Conclusion

A horizontal effect of constitutional rights has been accepted by many European legal systems. But it is still controversial how this effect should operate: directly or indirectly. The Irish legal system follows a direct approach; whereas the Italian and the German legal systems follow an indirect approach. But the analysis led above, shows that the difference between the direct approach and indirect approach seems more formalistic than substantive. In fact, we have seen that even in the *Fiuggi* case, under the doctrine of indirect effect, seems that the leading role was played by constitutional provisions, whereas the role of the general clauses seems to be limited to vehicle the outcome reached on constitutional level in the realm of contract law.

In the *Bürgschaft,* under the doctrine of indirect effect, seems that the parties in practice may have a claim and a defence on the basis of constitutional rights, and that a balance has to be struck between the clashing constitutional rights by the courts in order to resolve the private dispute. In these cases the difference between direct approach and indirect approach seems, to some extent, to disappear and probably for this reason some scholars consider questionable if the courts continue to follow an indirect approach. In my opinion these cases do not show that the courts overstepped the boundary of an indirect effect, but only that the theory of indirect effect in practice seems to have much the same consequence as the embrace of the doctrine of direct horizontal effect.

This conclusion, which supports Professor KUMM's view, seems to comply with the features of contemporary society where the borderline between public and private may be disintegrating, and where fundamental rights became an useful instrument to promote democratic liberties and also a model of social justice, by protecting the weaker party[41].

[41] A. COLOMBI CIACCHI (2006, p. 180).

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