

Introduction: Rights Talk in the Domain of Supply and Demand

The purpose of this study is to examine the way in which different economic actors employ argument relating to basic legal rights to protect their interests. The ideology of human rights protection has gained considerable momentum during the second half of the twentieth century at both national and international levels. As both a legal and a political strategy, framing argument as a matter of basic human rights protection increasingly appears as an effective lever for effecting legal change. This is especially evident in a context such as that of penal reform – for instance, in relation to the removal or stricter control of capital punishment through the use of such argument. But it is also a strategy which may be employed in other contexts, such as those involving environmental or commercial policy. Thus economic or commercial actors may invoke basic rights argument as a means of ‘trumping’ opposing interests and claims. In this way, the language and logic of fundamental human rights has infiltrated the economic and commercial sphere, so making this a study of how the ‘public law’ discourse of basic rights protection has been transported and used in the ‘commercial law’ context of economic policy, business activity and corporate behaviour.

Inevitably, the discussion of this subject tends to centre upon two significant different and largely opposing interests: those of the suppliers and consumers of economic commodities. The present intention is to compare the deployment of argument in these two main interests, not only in order to identify the range of basic legal rights which are exploited by these principal economic actors, but also to investigate their respective success in using such legal argument, at different levels of the legal system and across jurisdictions. In this way, the discussion may be seen as an analysis of the ‘rights talk’ which is now emerging in the economic domain of supply and demand.

This subject-matter is naturally informed by some main underlying themes. One such theme arises from the market context, and concerns the way in which economic policy and market developments may drive and condition legal development and the deployment of legal argument. At the beginning of the twenty-first century, a major issue of this kind is the global movement towards market liberalisation and the impact of the goal of market freedom within the legal domain. Especially with the emergence of the EU and WTO regimes, it is pertinent to consider the extent to which dominating single and global market objectives are the motor of legal programmes such as free movement and consumer or environmental protection. Another crucial, though different, theme is the increasing global commitment to protecting rights,

enunciated through the growing international human rights protection systems, which are in turn linked to the broadening commitment to democratic governance. How does this relate to economic themes and to what extent do the two tendencies have an impact upon each other?

The resort to rights-argument by economic actors, whether large corporate producers or individual consumers, is a fertile site for exploring these themes. The coincidence of economic motive and the political force of rights-based argument has resulted in an instructive dynamic of legal development. This has manifested itself in both the appearance of complex and sophisticated regulatory systems¹ and the development of new channels of litigation and legal representation. At the same time, economic actors – corporate, collective and individual – have thereby acquired new or fuller legal identities as right-holders, in turn influencing the character of legal systems and legal process.

At this stage a number of preliminary points should be made about the scope and organisation of this discussion.

First of all, the approach taken is *comparative* in terms of the *jurisdictions* which are covered in the study, although inevitably some jurisdictions invite more comment than others, given the subject-matter. Much of the legal development referred to here has taken place in international and transnational contexts, particularly those of the EC/EU regime over the last forty years and that of the WTO more recently, as sites within which different and competing economic interests have been balanced through the formation of policy and law. None the less, some national legal orders remain significant, in so far as they contribute through their own example and heritage to the process of law development at the international level, or play a role in the subsequent implementation and enforcement of international norms. Moreover, new issues and novel dimensions of the subject may well make their first appearance at the national level, so that national courts and legislatures may be the initial venue for new conflicts. Although therefore a comparison between EU and WTO approaches provides a useful focus for much of the discussion, it is still necessary and useful to refer to developments at the national level: the subject is by its nature multi-layered.

Secondly, much of the following is a discussion of the exploitation of basic rights – of how such argument may feed into the law-making process, or be employed in dispute resolution and litigation. For that purpose, it is necessary to explore the *framework* of rights discourse and the legal strategies employed by the main actors, and this requires some consideration of the theoretical underpinning of economic rights. Inevitably, some thought must be given to how the relevant rights are defined and classified in order to understand how rights are then used in political and legal process. It will be evident, for instance, that the discussion will cover both substantive ‘economic’ rights (such as the right to carry out a trading activity, or to exercise choice as a consumer) and ‘civil’ and ‘political’ rights (such as rights of defence in the context of regulatory enforcement procedures). It is customary in much writing

¹ Producers of goods and services have increasingly been subject to legal regulation, through the development of such regimes as those comprising ‘competition law’ and ‘consumer law’. For a useful overview of the development of this area of law, see Colin Scott and Julia Black (2000), *Cranston’s Consumer and the Law* (London: Butterworths, 3rd edn), Ch. 1.

on basic rights to categorise such entitlement as programmatic economic rights, requiring some public authority intervention, on the one hand, and reactive political rights, triggered spontaneously as a matter of legal process, on the other hand. But some reflection of the interplay of interests as between economic suppliers and economic consumers suggests rather that the process of rights deployment is circular and continuous in nature. Rights discourse is generated within a cycle of market problems, generating legal argument through processes such as lobbying or litigation, which then contributes to policy and law making, the new law then entering into the market place and supplying the content of new issue and problems (see Figure I.1 below). It is useful therefore to explore the resort to rights-argument and its dynamic within this *circular* framework of political and legal processes, rather than to view the matter within a more abstract scheme of rights classification.

Third, and following on from that point, it may be helpful to identify the *main arenas* within which economic actors deploy argument relating to basic rights. There would appear to be two main sites for this legal activity. First, attempts may be made to influence the formation of the increasing amount of policy and law concerning the regulation of industry and commerce. Thus a range of actors may present their arguments, often competitively, to policy makers and law makers at different levels and in different jurisdictions, through lobbying, taking advantage of consultation processes and by exploiting a variety of media. Secondly, and in a more characteristically legal form, the conflict of economic interest is likely to give rise to more specific disputes and argument which may then be taken forward to litigation of some kind for its resolution. This provides the opportunity in particular for courts to translate the conflict of interests into a conflict of rights which may then be amenable to legal resolution. Courts of law provide the classic venue for rights-argument and so inevitably have a high profile in the working-out of legal solutions.

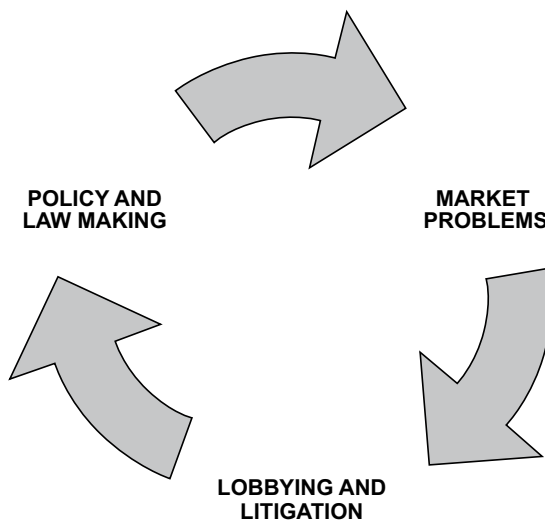


Figure I.1 Rights discourse within the cycle of political and legal processes

Fourth, it is of course also necessary to identify the *main types of actor* occupying the economic, political and legal stage which is the subject of discussion here. In the first place, there are the main protagonists asserting a range of rights, and these actors may perhaps be most usefully viewed along an economic continuum of supply and demand, ranging through stages of supply and consumption of economic commodities, from the producer to the ultimate end-consumer. This continuum includes the more obvious players on the stage of supply and demand (such as manufacturers, wholesalers, retailers and end-purchasers), but also some market participants who may fit less neatly within that spectrum (such as lenders, shareholders and other investors). Alongside these principal protagonists, there are other types of actor who may in some sense be seen as secondary, although their role is increasingly significant. In particular, reference should be made to interest groups who may be used by collectively by producers, retailers or consumers, to represent more collectively their respective interests, and to the public (or wider) interest regulators who are entrusted with the implementation or enforcement of broader economic policy, at both the national and international levels (for instance, competition and fair trading authorities). Both of these latter types of actor may be regarded as playing a representative role in relation to the primary interests of the main economic actors, but this representative and managing function has of itself acquired increasing significance and, it may be argued, some autonomy within the economic and legal orders.

This leads finally to some consideration of the role and process of legal regulation of economic activity and more specifically the identity and role of those agencies entrusted with the enforcement of such regulation. The activity of such regulators symbolises the ‘public’ intervention in the market place and as such these enforcement agents provide the most evident presence of a broader public interest in the commercial field. But it is important to pose more probing questions about the interests actually represented by this kind of agency – more precisely, what is this broader ‘public’ interest? It may be asked, for example, in relation to EC competition policy whether it serves ultimately the interests of consumers or small traders as economic actors, or a more diffuse interest encapsulated in the dominating idea of the ‘single market’. Or, if it serves both, in what proportions, and how do the two kinds of interest relate to each other in the process of regulation? Finally, it is interesting to speculate on the increasingly *protective* role of such regulators – especially in the context of rights-argument – as these agencies acquire more initiative in the management of policy and law enforcement. Arguably, this is a development which reprises the historically earlier process by which the State took over the control and management of criminal proceedings, becoming eventually the predominant legal actor within that field.