Rethinking Home Obligations

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In English law, international human rights obligations under the European Convention of Human Rights have been incorporated into domestic law through the Human Rights Act 1998. In this paper we consider the impact of developing human rights jurisprudence on the law of obligations as it relates to, and is applied in, the specific context of the home. Hence, rather than considering these international and domestic influences as potentially diluting the ‘common’ law, our paper argues that they may instead operate to revitalise and refocus the role of obligations and, in particular, its dynamic relationship with property law.

We take as our focus the domestic mortgage in which the parties’ private law rights drawn from contract and property are already overlaid by a web of hard and soft law through state regulation, creating a tripartite relationship between the owner-occupier, mortgage lender as finance provider and state as regulator. Against this background, more recently the enforcement of the parties’ private law rights has come under scrutiny for compliance with human rights legislation. The result is that the contractual and property rights of the mortgagor and mortgagee are increasingly being marginalised by external norms and standards. Drawing on relational contract theory, progressive property and developments in regulatory theory, we argue that the influence of human rights in these ‘private’ agreements is part of a move away from liberal legal theory and reliance on the autonomous consumer. We consider the consequences of this shift and suggest that it is time to rethink the role of private law obligations and property rights in the context of the home.