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Fundamental Rights and Private Litigation in Europe: Societal Policies and Judicial Governance

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Abstract

The horizontal effect of fundamental rights on the adjudication of private litigation does not depict a neutral legal-policy phenomenon. If one were to attempt to systematise the different policy trends that seem to result from horizontal effect constellations in Germany, England, France, Italy, The Netherlands, Poland, Portugal, Sweden and Spain, then one would recognise six tendencies:

- (1) protection of the weaker party in contract law,
- (2) fight against discrimination,
- (3) economic upgrade of the interests of the individual and social equality in tort law,
- (4) control of media power,
- (5) exercise of political rights in privately managed spaces, and
- (6) environmental protection.

One may argue that the horizontal application of fundamental rights in the adjudication of private litigation is a form of judicial governance. It enables legal actors to deal with the balancing of conflicting interests and policies in private relationships more explicitly, in a broader constitutional and supranational perspective.

I. Introduction

The concept of fundamental rights referred to in this paper embraces the following groups of rights:

- human rights,
- rights enshrined in the Charter of Fundamental Rights of the European Union,
- rights enshrined in the common constitutional traditions of the EU member states,

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- rights enshrined in the Constitutions or in the constitutional traditions of individual states,
- rights otherwise generally acknowledged as fundamental in a national or supranational legal system.

Fundamental rights have an impact on every field of law. This paper deals with their impact on private law. The concept of private law used in this paper embraces all legal rules concerning relationships between private parties, including commercial relationships between undertakings. A private party can be generally defined as a natural or legal person other than a public authority: an individual citizen, a privately owned commercial undertaking, a non-governmental organisation, a trade union, or even (within a democratic system) a political party.

One may distinguish between a vertical and a horizontal effect (or application) of fundamental rights in private law. On the one hand, one may see the relationship between a private party and a public authority as “vertical”, and the relationship between two private parties as “horizontal”. On the other hand, one may consider the impact of fundamental rights on the enactment, abolition and formal amendment of legislative rules as “vertical”, while the impact of fundamental rights on the interpretation and application of formally unchanged rules could be considered as a “horizontal”.

Classic examples of vertical effect of fundamental rights are:

- legislative reforms realised to the purpose of complying with fundamental rights,
- declarations of unconstitutionality of legislative rules,
- condemnations of states by supranational courts on ground of non-compliance with human rights.

The concept of horizontal effect of fundamental rights or constitutional principles generally refers to the recourse made to those rights and principles in order to determine or specify the entitlements or obligations of the parties of a private relationship. In most cases, such references are made by courts while adjudicating private litigations.

II. Common fact patterns of horizontal effect in the EU member states

Significant convergences across the Member States can be observed with regard to the specific private law topics subject to horizontal application of fundamental rights. This

enables us to detect recurrent ‘fact patterns’. Converging, fundamental-rights-based lines of reasoning in similar factual situations have concerned inter alia:

- (a) the conflict between freedom of speech, freedom of information and privacy rights (or other personal rights) in cases of unauthorised use of information concerning public¹ and non-public persons²;
- (b) in particular, the unauthorised publication of photographs of celebrities³ and ordinary people⁴;

¹ For converging cases in England, France, Germany, Italy, and Portugal see *Campbell v MGN Ltd* [2004] UKHL 22 (publication of the story of Naomi Campbell’s attendance at Narcotics Anonymous meetings: balancing of conflicting rights under Art 8 and 10 ECHR); Cass 14 December 1999, (2000) *D372* note B Beigner (publication of a book revealing details about former French President Mitterand’s illness: balancing of conflicting rights of freedom of expression under Art 10 ECHR and privacy under Art 8 ECHR and Art 9 French Civil Code); BGH 29 June 1999, (1999) *GRUR* 1034 (publication of the story of Prince von Hannover’s love affairs and divorce: weighing of freedom of press under Art 5(1) German Constitution against the general personality right under Art 1(1) and 2(1) German Constitution); Cass 20 April 1963 no 990, (1963) *Foro it* 1 877 (publication of embarrassing details about Mussolini’s lover Clara Petacci and her family: award of damages for violation of the fundamental right to freely develop one’s personality under Art 2 Italian Constitution); STJ 19 November 2002 no 02A2028, <http://www.stj.pt> (publication of true but defamatory facts about a famous lawyer: weighing freedom of expression and information under Art 37 Portuguese Constitution against the right of honour, reputation and own image under Art 25 and 26 Portuguese Constitution).

² Cp. English, French, German, Italian, Dutch, Portuguese and Spanish cases: eg *Venables and Thompson v Newsgroup Newspapers and Associated Newspapers Ltd* [2001] WLR 1038 (injunction restricting a publication which could endanger the life or physical integrity of two young men and former criminals: balancing of conflicting rights under Art 2, 3 and 10 ECHR); Cass 9 July 2003, (2004) *D* 1634 (publication of a novel about the true story of a disappeared man, hurting the feelings of his relatives: balancing of conflicting rights under Art 8, 10 ECHR and art 9 French Civil Code); BGH 25 May 1954, 13 BGHZ 334 (*Schacht-Leserbrief* case: acknowledgment of a general personality right based on Art 1(1) and 2(1) German Constitution); Cass 22 June 1985 no 3769, (1985) *Foro it* I 2212 (acknowledgment of a right to personal identity directly based on Art 2 Italian Constitution); HR 6 January 1995, (1995) *NJ* 422 (weighing free speech under Art 10 ECHR against honour and reputation and the right to be left alone); STJ 18 April 2002 no 02B3553, <http://www.stj.pt> (weighing freedom of expression and information under Art 37 Portuguese Constitution against personal integrity, honour and reputation under Art 25 and 26 Portuguese Constitution); STS 23 April 1999 no 330\1999, (1999) *RJ* 4248 (weighing freedom of expression and information against the right to honour, privacy and own image under Art 18(1) Spanish Constitution).

³ See the case law in England, France, Germany, Italy, The Netherlands and Spain: eg *Douglas v Hello* [2003] 3 All ER 996; *Campbell v MGN Ltd* [2004] UKHL 22; Cass 30 June 2004, (2004) *JCP* II 10160 (*Elf affaire* case: balancing of conflicting rights under Art 8, 10 ECHR and Art 9 French Code Civil); BVerfG 15 December 1999, 101 BVerfGE 361 (*Caroline of Monaco III* case: balancing of conflicting rights under Art 1(1), 2(1) and 5(1) German Constitution); Cass 27 May 1975, (1975) *Foro it* I 2895 (*Soraya* case: acknowledgment of the right to privacy as protected by Art 2 and other provisions of the Italian Constitution); HR 4 March 1988, (1988) *Signaal Rechtspraak van de Week* 53 (*Princess Irene* case: balancing of conflicting rights under Art 7, 10 Dutch Constitution and Art 8, 10 ECHR); STS 28 October 1986, (1986) *RJ* 6015 (*Paquirri* case: balancing of conflicting rights under Art 18(1) and 20(1)(d) Spanish Constitution)

⁴ Cp. French, German, Italian, Dutch, Portuguese and Spanish cases: eg Cass 20 February 2001 no 98-23471, (2001) *D* 1199, note JP Gridel (balancing of conflicting rights under Art 10 ECHR and Art 9, 16 French Civil Code); BGH 14 February 1958, 26 BGHZ 349 (*Herrenreiter* case: protection of the general personality right enshrined in Art 1, 2 German Constitution); Cass 20 April 1963 no 990, (1963) *Foro it* I 877 (acknowledgment of the right to personality development as an absolute right based on Art 2 Italian Constitution); HR 1 July 1988, (1988) *NJ* 1000 (interpretation of Dutch private law in the light of Art 8 ECHR); STJ 18 April 2002 no 02B3553, <http://www.stj.pt> (balancing of conflicting fundamental rights under Art 25, 26 and 37 Portuguese Constitution); STC 8 November 1999 no 202, (1999) *RTC* 202 (reference to Art 18(1), 4 and 10 Spanish Constitution as legal bases of privacy protection).

- (c) the landlord's obligation to cease emissions constituting intolerable nuisance, in consideration of the neighbours' fundamental rights to property, private life, health and/or healthy environment;⁵
- (d) the landlord's obligation to tolerate the installation of a satellite dish by a tenant, in consideration of the tenant's fundamental right to information;⁶
- (e) the protection of tenants from termination of tenancy contracts;⁷
- (f) adjustments of the content of imbalanced contracts through general principles of contract law, such as good faith or immorality, which are to be interpreted in the light of constitutional principles;⁸
- (g) more specifically, the invalidity of clauses of employment or agency contracts excessively restricting the employee's or agent's freedom of profession⁹ or the freedom to choose his or her own domicile;¹⁰
- (h) the protection of freedom of religion in employment relationships;¹¹

⁵ Cf the case law in Italy, Poland, Portugal, and Spain: eg Cass civ sez un 9 March 1979 no 5172, (1979) *Foro it I* 2302 (acknowledgment of a fundamental right to a healthy environment enshrined in Art 32 Italian Constitution); Postanowienie Sądu Najwyższego 2002.12.19 V CZ 162/02, OSNC 2004/2/31 (reference to Art 8 ECHR to support a claim against harmful emissions by a quarry); STJ 9 January 1996 (recourse to Constitutional norms to protect the plaintiff against emissions from a butchery); STS 2 February 2001, (2001) *RJ* 1003 (application of the duty to defend and conserve natural resources and to enjoy them under Art 45 Spanish Constitution to protect neighbours from pollutant emissions).

⁶ On which there are major convergences in German, Italian and Dutch cases. See 90 BVerfGE 27 = (1994) NJW 1147 = <http://www.oefre.unibe.ch/law/dfr/bv090027.html> (application of Art 5(1) German Constitution); Cass 16 September 1983 no 7418, (1984) *Foro it I* 415 (application of Art 21 Italian Constitution); for The Netherlands Ktr Assen 25 March 1986, (1987) *NJ* 15 (application of Art 10 ECHR).

⁷ This can be observed in England, Italy, The Netherlands and Portugal: *Shaws (EAL) Ltd v Walbert Pennycook* [2004] EWCA Civ 100, [2004] Ch 296; [2004] 2 All ER 665 (engagement of Protocol 1 Art 1 ECHR in a case of deprivation of the right to renew a tenancy); Corte Cost 24 March 1988 no 404, (1988) *Giur it I* 1627 note A Trabucchi (interpretation of the Italian tenancy law in light of the constitutional principle of solidarity); in The Netherlands Court of Appeal Arnhem 25 October 1948, (1949) *NJ* 331; Court of Appeal Arnhem 24 June 1958, (1959) *NJ* 473 (termination of farming leases on ground of the lessee's new religion); STC 24 July 1992, (1992) *Acórdãos do TC* 21, 495 (indirect application of the right of housing under Art 65 Portuguese Constitution).

⁸ Cf in Germany and Italy 81 BVerfGE 242 = (1990) NJW 1469; 89 BVerfGE 214 = (1994) NJW 36; Cass 20 April 1994 no 3775, (1994) *Giust civ I* 2169; Cass 28 January 1998 no 831, (1998) *Foro it I* 770 (both the latter Italian judgment and the German judgment 89 BVerfGE 214 concern suretyships).

⁹ For convergences in France, Germany and Portugal see Cass Soc 11 July 2000, (2000) *JCP IV*, 2556 (employment contract, reference to the Preamble of the French Constitution); 81 BVerfGE 242 = (1990) NJW 1469 (agency contract, application of Art 12(1) German Constitution); STJ 12 January 1994 no 084387, <http://www.stj.pt> (employment contract, direct application of Art 47(1) Portuguese Constitution).

¹⁰ Cf in France and Germany Cass Soc 12 January 1999, (1999) *D* 645 notes JP Marguenaud and J Mouly (application of Art 8 ECHR to an employment contract); Landesarbeitsgericht Nürnberg 24 June 2003, <http://www.arbg.bayern.de/lagn/6sa676.2htm> (application of Art 2(1) in connection with 1(2) German Constitution to an employment contract).

- (i) and the equal treatment of women and men in employment relationships.¹²

III. Direct and indirect horizontal effect in the jurisprudence of national courts

In many cases, courts have based a private law remedy (e.g. the invalidation of a contract clause, or the award of damages) *directly* on a fundamental right or a constitutional principle. This phenomenon is known as direct horizontal effect. It means on a practical level that some entitlements and obligations within a private relationship directly descend from a fundamental right or constitutional principle, without the intermediation of a classic private law rule. On a theoretical level this may imply that the fundamental right or constitutional principle in question is not only binding upon public authorities but to some extent also upon private parties.

Large part of the cases in which national courts have given direct horizontal application to fundamental rights or constitutional principle concerns labour law. For example, labour courts in Germany and Italy found clauses of employment contracts or dismissals from employment invalid on grounds of their non-conformity with fundamental rights or other constitutionally protected rights.¹³

¹¹ For similar lines of reasoning in France, Germany and Italy see Cass Soc 24 March 1998, (1998) *Bull civ* V no 171, 125 (application of Art 1 and 75 French Constitution to the case of a Muslim employee in a grocery refusing to come into contact with pork meat); for Germany BVerfG 30 July 2003 (2003) NJW 2815 (application of Art 4 and 12(1) German Constitution to declare unlawful the dismissal of a Muslim vendor because she insisted on wearing a veil at work); for Italy Cass 16 June 1994 no 5832, (1995) *Foro it* I 875 (balancing between freedom of opinion and religion and freedom of education, all protected by the Italian Constitution, in a case where a gymnastics teacher was dismissed from a Catholic school because she was not married in a church).

¹² See the case law in Germany, Italy, Portugal and Spain: eg BVerfG 28 January 1992, 85 BVerfGE 191 (application of Art 3 German Constitution); in Italy Cass 25 September 2002 no 13942, (2002) *Dir e giustizia* 37, 32 (application of Art 37 Italian Constitution); in Portugal STJ 25 July 1896 no 001412, <http://www.stj.pt> (application of Art 13 Portuguese Constitution); in Spain STS 10 April 1999, (1999) *RJ* 1877 (application of Art 14 Spanish Constitution).

¹³ See in Germany ArbG Bamberg, 7 November 1950, RdA 1951, 118: the Court found a dismissal from employment due to the employee's membership of the Communist Party invalid on ground of violation of the fundamental right to freedom of expression of political opinions enshrined in Art. 5(1) of the German Constitution (*Grundgesetz*, GG). In Italy see Trib. Firenze, 23 March 1948, Mon. trib. 1949 no. 18: the Court held that the stipulation of a too low remuneration in an individual labour contract was invalid on ground of violation of Art. 36 of the Italian Constitution (*Costituzione*, Cost.), which establishes the right to a remuneration sufficient to ensure a free and dignified existence for employees and their families.

In Germany, the direct horizontal effect doctrine was later on rejected by the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG).¹⁴ The Italian jurisprudence, on the contrary, never challenged this doctrine.

Fundamental rights or constitutional principles may also affect the rights and duties of the parties of a private relationship *indirectly*, through the medium of the application of classic private law rules. This phenomenon is known as indirect horizontal effect. This means on a practical level that a private law remedy is based on a private law rule which is interpreted and applied in the light of a fundamental right or constitutional principle. On a theoretical level this may imply that the fundamental right or constitutional principle in question is only binding upon public authorities who have the duty to ensure and protect it.

The vast majority of judicial decisions that applied fundamental rights or constitutional principles in adjudicating a private litigation are cases of indirect horizontal effect. These cases touch upon a broad spectrum of private law matters, from contract law to family law, from tort law to property law. A typical litigation pattern in tort law, which in several member states is dealt with on the basis of a balancing of different fundamental rights, is the conflict between freedom of press and privacy interests of celebrities. For example in the UK the House of Lords re-interpreted the common law doctrine of breach of confidence in the light of Art. 8 ECHR, in order to enable the award of damages to celebrities whose privacy was intruded by the yellow press.¹⁵

IV. The Horizontal Application of the Charter of Fundamental Rights of the European Union

Between its proclamation in 2000 and its entry into force on 1 December 2009, the Charter of Fundamental Rights of the European Union has been referred to by national courts in a number of cases concerning private parties. Such references can be found in German¹⁶, Italian¹⁷, Polish¹⁸ and English¹⁹ case law. The main function of such references was to

¹⁴ BVerfG 15 January 1958, BVerfGE 7, 198 (Lüth).

¹⁵ *Campbell v. Mirror Group Newspapers* [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] 2 All ER 995.

¹⁶ See Amtsgericht Garmisch-Partenkirchen 16 December 2007, 1 F 293/07, which refers to Art. 24 EU Charter. Cf. C. Busch, 'Fundamental Rights and Private Law in the EU Member States'. in C. Busch and H. Schulte-Nölke (eds), *EU Compendium Fundamental Rights and Private Law. A Comparative Casebook* (Munich: Sellier 2010) 17.

reaffirm that a certain fundamental right or principle was generally recognised throughout Europe.

Interestingly, such references seem to have been more frequent in England than in other European countries. English judges however explicitly stated that the Charter was not a source of law in the strict sense but could be “consulted in so far as it proclaimed, reaffirmed or elucidated the content of those human rights that are generally recognised throughout the European family of nations”.²⁰

A clearly negative statement on the effect of the Charter was pronounced by the Polish Supreme Court in 2005. The Court held that the Charter could not constitute a sole source of individual rights asserted before national courts, nor could it be regarded as an appropriate basis for reviewing the conformity of national law with the fundamental rights incorporated in the Charter.²¹

This position could be still defended after 1 December 2009 for Poland and the UK, which opted out from the Charter. For the other member states, however, the situation will be clearly different: the Charter provisions will have quite a significant impact on national law.

The question of whether national courts could put aside domestic legislation which is inconsistent with provisions of the Charter has already arisen.²² This is however a question of vertical effect, not of horizontal effect.

Article 51(1) EU Charter does not mention private parties among those being bound by the Charter. This has led some scholars to deny the direct horizontal effect of the Charter.²³ Other

¹⁷ See App. Roma (ordinanza) 11 April 2002, www.dirittiuomo.it. Cf. C. Mak, M.D. Sanchez Galera, S. Wünsch, F. Jorge Ramos and C. Kraus, ‘Italy’, in G. Brüggemeier, A. Colombi Ciacchi & G. Comandé (eds), *Fundamental Rights and Private Law in the European Union, Vol. 1: A Comparative Overview* (Cambridge University Press 2010) 325, 386.

¹⁸ Judgment of the Supreme Court of 17 March 2005, III PK 83/2004, (2006) 1-2 OSNP [1]. Cf. A. Jańczuk and J. Krzemińska-Vamvaka, ‘Poland’, in G. Brüggemeier, A. Colombi Ciacchi & G. Comandé (eds), *Fundamental Rights and Private Law in the European Union, Vol. 1: A Comparative Overview* (Cambridge University Press 2010) 485, 532.

¹⁹ *R (on the application of Robertson) v Wakefield MDC* [2002] QB 1052; [2002] 2 WLR 889; *R v Secretary of State for the Home Department, ex parte Howard League for Penal Reform* [2003] 1 FLR 484.

²⁰ So Mr Justice Munby in *R v Secretary of State for the Home Department, ex parte Howard League for Penal Reform* [2003] 1 FLR 484. See also *R (on the application of Robertson) v Wakefield MDC* [2002] QB 1052; [2002] 2 WLR 889, where Mr. Justice Maurice Jay cited Art. 8 of the Charter, which confers the right to protection of personal data. The case related to the commercial selling of electoral registers. Cf. J. Gajdosova and J. Zehetner, ‘England’, in G. Brüggemeier, A. Colombi Ciacchi & G. Comandé (eds), *Fundamental Rights and Private Law in the European Union, Vol. 1: A Comparative Overview*, 119, 173.

²¹ Judgment of the Supreme Court of 17 March 2005, III PK 83/2004, (2006) 1-2 OSNP [1]. Cf. A. Jańczuk and J. Krzemińska-Vamvaka, ‘Poland’, in G. Brüggemeier, A. Colombi Ciacchi & G. Comandé (eds), *Fundamental Rights and Private Law in the European Union, Vol. 1: A Comparative Overview* (Cambridge University Press 2010) 485, 532.

²² ECJ, 19 January 2010, C-555/07 (*Kücükdeveci*).

scholars however have pointed out that many provisions of the Charter are drafted in a manner which suggests their capability of being applied directly to relationships between private parties. This is true for Art. 24, 29, 30 and 32 of the Charter.²⁴ Furthermore, Art. 3(2) and Art. 5 could be also given direct horizontal effect, on ground of the particularly strong need of protection of those interests.²⁵ Potentially capable of producing direct horizontal effect are also Art. 27, 28, 30, 31(1) and (2), 33(2).²⁶

V. The Horizontal Application of Fundamental Rights and Judicial Governance

The horizontal effect of fundamental rights may be seen as a form of judicial governance. Despite of the variety of meanings the concept of governance has acquired in the different academic disciplines, one can identify a minimum content, a common core: Governance may be understood as decision- and policy-making within a group of persons or within an institution, or within a system of institutions. It is, so to say, governing with or without a government, policy-making with or without politics.²⁷

Governance is not a synonym of regulation. Firstly, not all what can be regulated can also be object of governance. Only societies, societal groups, collective entities and human relationships in general can be object of governance. Secondly, governance can be performed through other means than regulation, such as politics or more informal deliberative processes.

Governance structures are often multi-layered. Governance at the local level coexists and interacts with governance at the state level, and these coexist and interact with governance at the supranational, international and global level. The relationship between the layers of such a multi-level system of governance is often a non-hierarchical one. Thus the concept of

²³ M. Cartabia, in: R. Bifulco, M. Cartabia & A. Celotto (eds.), *L'Europa dei diritti*, Bologna 2001, Art. 51 EU Charter, p. 345; S. Magiera, 'Die Grundrechtecharta der Europäischen Union', *DÖV* 2000, 1017-1026 at 1025; T. Kingreen, in: C. Calliess and M. Ruffert, *EUV/EGV*, Munich 2007, Art. 51 EU Charter, No. 18. On this discussion see C. Busch, 'Fundamental Rights and Private Law in the EU Member States'. in C. Busch & H. Schulte-Nölke (eds), *EU Compendium Fundamental Rights and Private Law. A Comparative Casebook* (Munich: Sellier 2010) 18-19.

²⁴ C. Nowak, in Heselhaus and Nowak, *Handbuch der Europäischen Grundrechte* (Munich: Beck 2006) *Allgemeiner Teil*, § 6 para. 57-59.

²⁵ C. Nowak, *ibid.*, para. 59.

²⁶ C. Nowak, *ibid.*, para. 59.

²⁷ A. Colombi Ciacchi, 'Governance Meets Law: Background and Methodology of a Research Project' in A. Colombi Ciacchi (ed), *Governance Meets Law* (forthcoming 2013).

governance often refers to non-hierarchical relationships between decision-makers, and to forms of coordination of societal actors other than command and control.

One of the most important goals in governing both private and public institutions (corporations, owner's associations, religious communities, states, supranational entities...) is that the *interests* of all participants are well represented and realised. Governance is more than organisation, management and coordination: it involves policy. Policies are common interests and goals pursued by a group or institution. Policies refer to a plurality of interests which can come into conflict with each other. Thus governance as policy-making implies dealing with different interests and policy objectives, which can be public interests, semi-public interests (i.e. collective or societal interests not necessarily endorsed by public powers), or private interests.

Policy aspects may concern:

- the policy reasons which have led to a certain regulatory setting,
- the policy arguments which speak pro or contra a certain interpretation/application of a certain regulatory setting,
- the (intended or unintended) social, political and economic consequences of a certain regulatory setting.

Policy aspects can be economic and non-economic interests of human beings or collective entities, efficiency goals, democracy, human rights or constitutional values, etc. A large number of those interests are protected at a national, European or constitutional level as fundamental rights or constitutional principles.

Speaking of *good* (or better) *governance*, four aspects play a major role: efficiency, democracy, rule of law and protection of fundamental rights. The best governance is ideally at the same time the most efficient and the most democratic one, and the one which best respects the rule of law and fundamental rights.

One may argue that the horizontal application of fundamental rights in private litigations is a form of judicial governance. Through this practice, the judiciary opens up the private law legal discourse to embrace the constitutional and international law discourse as well. In doing so, it enables legal actors to deal with the balancing of conflicting interests and policies in private relationships more explicitly, under a broader and supranational perspective. The substantive core of judicial reasoning becomes more transparent, more suitable to cross-border comparison and mutual learning processes.²⁸

²⁸ In favour of the (horizontal) constitutionalisation of private law see O. Gerstenberg, 'What Constitutions Can Do (but Courts Sometimes Don't): Property, Speech, and the Influence of Constitutional Norms on Private Law',

VIII. Policies of Horizontal Application of Fundamental Rights

The horizontal effect of fundamental rights in civil jurisprudence of the member states does not depict a neutral legal-policy phenomenon. If one were to attempt to systematise the different policy trends that seem to result from the constellations of horizontal effect on fundamental rights in Germany, England, France, Italy, The Netherlands, Poland, Portugal, Sweden and Spain, then one would recognise above all six tendencies:²⁹

(1) Protection of the Weaker Party in Contract Law

The first societal policy recognisable in fundamental rights horizontality is the protection of weaker parties or the correction of unequal levels of power in contract law. The courts consistently fall back to fundamental rights to protect the interests of employees against employers, small businesses against bigger corporations, patients against doctors, hospitals, etc., further than they would be protected in an ordinary application of private law.³⁰

Through this special emphasis on the interests of weaker parties by judges in the consideration of colliding interests and fundamental rights positions, it is attempted to compensate for structural inequalities in the bargaining abilities and socio-economic relations of private individuals.³¹ This fits without a doubt to the material paradigm: The socially dissatisfying consequences of a formal application of contract law are being corrected by new, material interpretations which take into account the actual socio-economic situation of the contractual parties. Indeed it would also be theoretically possible to achieve these new interpretations without falling back to the fundamental rights. The use of the fundamental rights argumentation offers, however, two important advantages. First, it creates a new doctrine of civil law which deviates from the consolidated jurisprudence, is more legitimate

(2004) *Canadian Journal of Law and Jurisprudence* 61; and ‘Private Law and the New European Constitutional Settlement’, (2004) 10 *ELJ* 766; G. Brüggeheimer, ‘Constitutionalisation of private law – the German perspective’, in: T. Barkhuysen & S. Lindenbergh (eds), *Constitutionalisation of Private Law* (Koninklijke Brill NV, 2006) 59 at 82.

²⁹ The following sections of this paper draw on A. Colombi Ciacchi, ‘National and European Fundamental Rights in European Private Law: A Shield Against the Instrumentalisation of Private Law’, in C. Joerges & T. Ralli, *European Constitutionalism without Private Law – Private Law without Democracy* (ARENA Report No 3/11, Oslo 2011), 111-125, 116 et seq.

³⁰ See A. Colombi Ciacchi, *ERCL* 2006, 167- 180, 175 et seq. with further references; C. Perfumi & C. Mak in G. Brüggeheimer, A. Colombi Ciacchi & G. Comandé (eds), *Fundamental Rights and Private Law in the European Union, Vol. 2: Comparative Analyses of Selected Case Patterns* (Cambridge University Press 2010) 33- 75 with further references; M. Gagliardi and A. Sukhova *ibid.*, 7- 108 with further references.

³¹ See A. Colombi Ciacchi, in G. Brüggeheimer, A. Colombi Ciacchi & G. Comandé (eds), *Fundamental Rights and Private Law in the European Union, Vol. 2: Comparative Analyses of Selected Case Patterns* (Cambridge University Press 2010) 421- 437, 427.

and is protected from non-fundamental rights argumentation. Second, through the reference to fundamental rights it is made clear that in the handling of conflicting fundamental rights between private parties by legislation and jurisprudence to date, the interests of one party were cut too short, which is why an adjustment is now necessary.³²

(2) The Fight Against Discrimination

The second societal policy in regard to the horizontal effect of fundamental rights is the reduction of discrimination. Since the end of World War II and still today, courts have been using fundamental rights to a large degree to counter unequal treatment (i.e. between men and women³³, Jews and Christians³⁴, legitimate and non-legitimate children³⁵ or homosexuals and heterosexuals³⁶).

On the one hand, one could see the fight against discrimination in private law matters as a materialisation of private law.³⁷ The formalistic understanding of freedom and equality is, at least partially, replaced by a material understanding, which recognises and attempts to compensate for human 'unfreedom' and inequality. On the other hand, anti-discrimination policy is completely compatible with neoliberal market liberalism and with a non-solidary society, as *Alexander Somek* convincingly argued.³⁸

(3) Economic Upgrade of the Interests of the Individual and Social Equality in Tort Law

32 See A. Colombi Ciacchi, ERPL 2005, 285- 308.

33 H.C. Nipperdey, RdA 1950, 121- 128 ('Gleicher Lohn der Frau für gleiche Leistung'). For Italian jurisprudence see Cass. 25. September 2002 No. 13942, Dir. e giust. 202, 32 with a comment by Grassi.

34 See in France Tribunal de la Seine 22 January 1947, D 1947, 126: The court found a clause of a testament which eliminates rights to inheritance for a person who marries a Jew to be invalid because of a violation of public policy (Art. 900 Code Civil). There, the term public policy was interpreted in the light of the French constitution of 1946. For this, C. Herrmann & C. Perfumi, in G. Brügge-meier, A. Colombi Ciacchi & G. Comandé (eds), *Fundamental Rights and Private Law in the European Union, Vol. 1: A Comparative Overview* (Cambridge University Press 2010) 190- 252, 218 et seq.

35 See in Portugal Tribunal Constitucional Ac. TC 99/88 DR, II série, 22 August 1988. For this, G. Kern, in G. Brügge-meier, A. Colombi Ciacchi & G. Comandé (eds), *Fundamental Rights and Private Law in the European Union, Vol. 1: A Comparative Overview* (Cambridge University Press 2010) 547- 609, 577 et seq.

36 I.e. in *Ghaidan v. Godin-Mendoza*, [2004] UKHL 30. The House of Lords affirmed a right of abode of the spouse of a man after his death based on a new interpretation of the Rent Act of 1977 in the light of Art. 8 and 14 ECHR. For this, C. Favilli & N. Ferreira, in G. Brügge-meier, A. Colombi Ciacchi & G. Comandé (eds), *Fundamental Rights and Private Law in the European Union, Vol. 2: Comparative Analyses of Selected Case Patterns* (Cambridge University Press 2010) 374, 349 et seq.

37 For material private law see C. Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union* (Nomos 2010) 27 ff. with further references.

38 *Juridikum* 2/2008, 118- 125.

Like in contract law, also in tort law the horizontal effect of fundamental rights opens the door to a better consideration of social and human needs. Usually, the horizontal application of fundamental rights in tort law serves the purpose of enabling or bettering the ability to compensate for personal damages. Here personal damages mean injuries to the body, health or personality, instead of conventional property damages.

Consequences in tort law due to infringements of one's personality (including privacy) are the most frequent cases of horizontal effect of fundamental rights in German, English, French, Italian, Dutch, Portuguese, Polish, Spanish and Swedish law.³⁹ In this way, the economic value of personal interests that were not or were only limitedly compensable in pre-constitutional tort law has been recognised.

Other damages which have gained relevance through the horizontal effect of fundamental rights are non-property damages caused by bodily or health infractions. In Germany, this has only very seldom resulted in further liability: Using the constitutional protection of personality allowed, for instance, granting compensation to people who could no longer feel pain (because of damage to the nervous system) due to the tortious act.⁴⁰

In Italy, the consequences of this tendency went much further. This is due to two revolutions in liability law. The first was the recognition of compensation for bodily and health damages per se, completely independent of the existence of economic loss.⁴¹ This principle according to the Italian Corte Costituzionale from 1986 follows the constitutionally anchored fundamental right to health (Art. 32 Cost.).⁴² However, thoughts on social equality and personal dignity also fostered this doctrine: It was found unjust and incompatible with the equality of all persons if, for example, two school children were injured by the same unlawful act, one's parents belonging to the upper class and the other's being poor workers, and compensated differently based on their future income potentials.⁴³

39 See J. Krzeminska-Vamvaka & P. O'Callaghan, in G. Brügge-meier, A. Colombi Ciacchi & G. Comandé (eds), *Fundamental Rights and Private Law in the European Union*, Vol. 2: Comparative Analyses of Selected Case Patterns (Cambridge University Press 2010) 111- 164; A. Colombi Ciacchi, *ibid.*, 421- 437 423 et seq.

40 See BGH 13 October 1992, BGHZ 120 1 = NIW 1993, 781 with a comment by E. Deutsch = JZ 1993, 516 with a comment by D. Giesen (Compensation because of a brain injury caused by a doctor's mistake, which is equal to destruction of personality). For a reinterpretation of monetary compensation as civil compensation see G. Brügge-meier, *Haftungsrecht. Struktur, Prinzipien, Schutzbereich: Ein Beitrag zur Europäisierung des Privatrechts* (Springer 2006) 575 et seq.

41 G. Brügge-meier advocates compensation for personal damages (injuries to physical or mental integrity that cannot be restituted), see previous footnote, I.c. 557 et seq.

42 Corte Costituzionale 14 July 1986 No. 184, *Foro it.* 1986 I 2053 with a comment by Giulio Ponzanelli.

43 This argument was triggered by the "Gennarino" case during the 1970s: When the child of a simple worker was the victim of an accident, the Milan court (*Trib. Milano* 18. January 1971) calculated the extent of the compensation based on the assumption that the child would pursue the same career as his father. This decision

In Italian literature and jurisprudence, this doctrine was called *danno biologico* (biological damage).⁴⁴ This is the most frequent and also most known constellation of horizontal effect of fundamental rights in Italian civil jurisprudence.⁴⁵

Finally, the second revolution was brought about by jurisprudence of the highest Italian judges: the principle overcoming of the traditional legal system of very limited compensation of non-material damages. With a set of decisions in 2003, the Corte di Cassazione and the Corte Costituzionale created a new principle, which states that all violations of fundamental rights establish a right, per se, to compensation.⁴⁶

The principle of per se compensation of violations of fundamental rights has the potential to become a pan-European principle of law.⁴⁷ One could see it as a national level equivalent to effective remedy in the case of human rights violations according to Art. 13 ECHR. At any rate, all of the aforementioned developments of member state jurisprudence show a materialisation of tort law towards more humanity and social justice.

(4) Control of the Power of the Media

A fourth societal policy related to the horizontal effect of fundamental rights comes to evidence in cases of conflict between personality rights on the one hand and freedom of opinion and information on the other.⁴⁸ This is the most common constellation of the

was heavily criticised as class justice. See A. Galoppini, *Democrazia e diritto* 1971 255, who provocatively asks how much a worker's child is worth ("Il caso Gennarino, ovvero quanto vale il figlio dell'operaio").

44 For this, F. Busnelli, *Il danno biologico. Dal 'diritto vivente' al 'diritto vigente'* (Giappichelli 2001); G. Alpa, *Il danno biologico. Percorso di un'idea* (Cedam 2003).

45 For the "Europeanisation of *danno biologico*" or rather for the relation between this doctrine and the tort law provisions of the Draft Common Frame of Reference see G. Brüggemeier, in *Festschrift für Erwin Deutsch zum 80. Geburtstag*, 749- 768.

46 Cass. 31 May 2003 No. 8827 and 8828; Corte cost. 11 July 2003 No. 233, *Foro it.* 2003 I 2201. For this, G. Ponzanelli (ed), *Il "nuovo" danno non patrimoniale* (Cedam 2004).

47 In the Draft Common Frame of Reference, a per se damage (injury as such, Art. 6:204 DCFR) can also lead to compensation in cases other than violations of fundamental rights. For a commentary on this norm, see C. von Bar (ed), *Non-contractual liability arising out of damage caused to another* (PEL Liab. Dam.) (Sellier 2009) 986-990.

48 The most known cases in German are BGH 29 June 1990, GRUR 1999, 1034 (Magazine article about Prince of Hanover's affairs and divorce: weighting the fundamental right to freedom of opinion according to Art. 5 Sec. 1 GG against the general personality right according to Art. 1 Sec. 1, Art. 2 Sec. 1 GG); in England *Campbell v MGN Ltd* [2004] UKHL 22 (Magazine article about Naomi Campbell's drug addiction: weighting of the human right of privacy according to Art. 8 ECHR against the human right of information according to Art. 10 ECHR); in France Cass. 14 December 1999, D 2000; 372 with a comment by Beigner (release of a book with details about Mitterand's illness: weighting of the right of freedom of opinion according to Art. 10 ECHR against the right to privacy according to Art. 8 ECHR and Art. 9 Code Civil); In Italy Cass. 20 April 1963 No. 990, *Foro it* 1963 I 877 (release of juicy details about Mussolini's lover Clara Petacci and her family: the granting of compensation because of violation of the fundamental right to free personality development according to Art. 2 of the Italian constitution); in Portugal STJ 19 November 2002 No. 02A2028, <http://stj.pt> (release of true but

horizontal effect in Germany, England, France, Italy, The Netherlands, Poland, Portugal, Sweden and Spain.⁴⁹

Here, the falling back on fundamental rights serves not only to the materialisation of private law: The plural-procedural paradigm also plays in this constellation a role. On the one side, it is a matter of protecting constitutionally safeguarded interests of natural persons from abuses of power by non-state actors (the media). On the other side, it is also an issue of procedural control of processes considered political in a broad sense. With their decisions, the courts help defining the borderline between private and public matters or rather determine some rules of the political discourse.

(5) Exercise of Political Rights in Privately Managed Spaces

A fifth societal policy mirrored in the horizontal effect of fundamental rights offers an even stronger characterisation through plural-procedural elements: the exercise of political rights in spaces that are private property but open to the public. In several European countries, courts are often confronted with suits by people who were banned by the operators of shopping centres, sports stadiums or airports from handing out flyers or practising other forms of political activism.⁵⁰ This is primarily a matter of setting the borderline between the private and the public, and the rules of the political discourse.⁵¹

reputation-damaging facts about a famous lawyer: weighting the fundamental right of freedom to opinion and information according to Art. 37 Portuguese constitution against the fundamental right to reputation, honour, and own image according to Art 25, 26 Portuguese constitution.

49 See J. Krzeminska-Vamvaka & P. O'Callaghan, in G. Brügge-meier, A. Colombi Ciacchi & G. Comandé (eds), *Fundamental Rights and Private Law in the European Union*, Vol. 2: Comparative Analyses of Selected Case Patterns (Cambridge University Press 2010) 111- 164; A. Colombi Ciacchi, *ibid.*, 421- 437 423 et seq

50 In Germany, BGH NJW 2006, 1054 (protests against the German deportation practice on the premises of the Fraport AG), for this, Andreas Fischer Lescano/ Andreas Maurer, NJW 2006, 1394- 1396. A political activist filed a constitutional complaint against this BGH decision, where famous Frankfurt professors Günter Frankenberg and Gunther Teubner were delegated for the process. On 22 February 2011, the BVerfG decided this case in favour of the complainant. It held the prohibition of political demonstrations issued by the Fraport AG to be disproportionate and it declared the unconstitutionality of the BGH decision which considered this prohibition lawful. A classic case of mall litigation, which dealt with the handing out of flyers for a citizens' initiative in an English shopping centre, even required the intervention of the European Court of Human Rights: *Appleby v United Kingdom* (2003) 37 EHRR 38. For this, O. Gerstenberg, *What Constitutions Can Do (But Courts Sometimes Don't): Property, Speech, and The Influence of Constitutional norms on Private Law*, CES Working paper, no. 110 2004, *Canadian Journal of Law and Jurisprudence* 2004, 61-81; *id.* ELJ 2004, 766- 786. In Italy see Trib. Verona 7 July 1999, *Il diritto dell'informazione e dell'informatica* 1999, VI, 1059 (distribution of political flyers in a shopping centre). In Sweden see NJA 1971, 571; in Spain STS 7 november 2001, RJ 2001/ 1025. See J. Gajdosova & S. Banakas, in G. Brügge-meier, A. Colombi Ciacchi & G. Comandé (eds), *Fundamental Rights and Private Law in the European Union*, Vol. 2: Comparative Analyses of Selected Case Patterns (Cambridge University Press 2010) 281- 297.

51 See O. Gerstenberg *Canadian Journal of Law and Jurisprudence* 2004, 61- 81 *id.*, ELJ 2004, 766- 786.

(6) Environmental Protection

Environmental protection is a sixth societal policy related to the horizontal application of constitutional principles. In several European countries, constitutional rules were applied along with private law instruments, especially property law, to protect neighbours of pieces of land and the environment itself from harmful emissions.⁵²

IX. Legitimate Legal Policy or Fundamental Rights Instrumentalisation?

The policy elements of the section above do not represent a complete list. One could insert even more examples. For the purpose of this paper, however, this is not necessary. The question is now, whether and to which extent the falling back on fundamental rights in a horizontal effect in order to achieve policy goals in private law presents an instrumentalisation of fundamental rights.

The understanding of fundamental rights which underlies this paper is based on a legal-philosophical approach which *Dietmar von der Pfordten* calls “normative individualism”.⁵³ According to this approach, legal and political decisions are to be justified in last instance with reference to the concretely concerned individuals. What matters are the single individuals and their concrete wishes, interests and aims. Normative individualism is therefore the clear opposite of normative collectivism which says that legal and political decisions should be justified with reference to a collective: state, society, economy, societal sub-system etc.⁵⁴

This paper takes a stand for normative individualism and against normative collectivism. It follows the idea of the classic, personalist fundamental rights concept of the Enlightenment. According to this concept, fundamental rights were originally and essentially private, subjective-individual rights which operate *erga omnes* and protect the individual against excesses of power by any kind of collective entities (the distinction between public and private entities was only developed later in history).

52 See already, S. Patti, *La tutela civile dell'ambiente* (Cedam 1979). For a detailed comparative study of this subject matter see B. Pozzo (ed.), *Property and Environment* (Staempfli 2007). See also M.D. Sánchez Galera & Judith Zehetner, in G. Brüggemeier, A. Colombi Ciacchi & G. Comandé (eds), *Fundamental Rights and Private Law in the European Union, Vol. 2: Comparative Analyses of Selected Case Patterns* (Cambridge University Press 2010) 298- 321.

53 D. von der Pfordten, *JZ* 2005, 1069- 1080. For the other descriptions in which the main thought of normative individualism emerges (“humanism”, “legitimatory individualism”, “subjectism”, “self-determination”, “autonomy”, “individuality”, “individual value”, “individual” etc.) see *ibid.*, 1069 with further references.

54 D. von der Pfordten, *JZ* 2005, 1069 et seq.

At the time of the Enlightenment, fundamental rights were conceived as instruments protecting the individuals not only against the state, but also against (private) *pouvoirs intermediaires* of the *ancien régime*, e.g. corporations. This function of fundamental rights is more contemporary than ever. Today, we live in a sort of new medieval time, after the crisis and/or transformation of national states and their regulations. This new medieval time is denoted by an ever intricate growth of public and private forms of regulation that are in complex correlation with each other. Thus today we need even more urgently fundamental rights that operate as *erga omnes* rights, which protect every single individual against all public and private powers, rule makers, corporations, functionally differentiated societal sub-systems, anonymous matrices⁵⁵ and others.

This shows that a fundamental rights argumentation is more convincing and legitimate the more closely it comes to the fundamental interests of the individual. Thus far, the legal-political orientation of the horizontal effect of fundamental rights is in so far legitimate and is not an instrumentalisation as long as the horizontal effect strengthens the consideration of fundamental interests of the concerned individual.

This is in the aforementioned constellations of horizontal effect of fundamental rights at the national level also actually the case. Despite its use (also) for purposes of the materialisation of private law, despite its plural and procedural dimension, this effect normally leads to a better, stronger consideration of fundamental interests of the private individual. These interests, i.e. the actual self-determination of weaker contractual parties, or the vital interests of political activists in ‘mall litigation’ cases, were not adequately considered before their breakthrough in the respective private law cases. The interests of the counter-parties, however, such as the economic freedom of banks, were already adequately protected by the private law instrumentarium. Thus some fundamental rights were favoured by private law without a compelling reason, while other fundamental rights were neglected. Exactly this has been corrected by the horizontal effect of fundamental rights. Courts have used the horizontal effect of fundamental rights to protect individuals whose interests were not fought for by a powerful lobby at the legislative level.

In summary, it must be noted that the horizontal effect of fundamental rights is not legal-politically neutral. Yet, the legal-political orientation of this horizontal effect in the case law of national civil courts (at least in all cases I have analysed) has not depicted an illegitimate instrumentalisation of fundamental rights. In fact, in these constellations the genuine content

55 See G. Teubner, *Die anonyme Matrix: Zu Menschenrechtsverletzungen durch “private” transnationale Akteure*, *Der Staat* 2006, 161- 187.

of fundamental rights and fundamental interests of individuals has been actualised. The horizontal application of fundamental rights by member states' courts is therefore a very positive phenomenon.