

Application of the fundamental rights in EU contract law: a brief overview

I. Introduction

The European Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and the respect for human rights, including the rights of persons belonging to minorities². The EU is also bound by its Charter of Fundamental Rights³ and is committed to acceding to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁴ which was opened for signature in Rome on 4 November 1950 and came into force on 3 September 1953. It was the first instrument to give effect to certain of the rights stated in the Universal Declaration of Human Rights⁵, International Covenant on Civil and Political Rights⁶ and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)⁷ and make them binding in the Europe. The effect of fundamental rights in general private and also in contract law have been the subject of academic debate mostly since the coming into force of these mentioned conventions in the aftermath of the Second World War. The fundamental rights laid down in these instruments were originally intended to protect citizens against the State, these rights have gradually extended to relationships between private parties also.

The central question posed by fundamental rights and contract law cases, on the one hand, is how to resolve the tension between the party's autonomy and freedom of contract and the protection of values recognized as fundamental in society, on the other hand. It should also be noted that the freedom of contract is necessarily limited: one party's freedom only goes as far as it does not harm the other's⁸. In particular the general clauses of private law, such as good morals and good faith (Germany, the Netherlands and Italy) or more specific rules that solve situations similar to those governed by such general clauses (England) seem to open the door for fundamental rights to fill in these limitations. The general clauses of private law (good faith, good morals and to some extent also tort) play an important role. Since general clauses give judges the possibility to resolve cases that are not covered by existing rules of contract law, reaching back to the general underlying principles of this field. Moreover, given their relatively flexible nature, general clauses provide the possibility to keep contract law in step with changes in society. Judges have regularly made reference to fundamental rights when filling in the general clauses of private law.

Some effects of fundamental rights on contractual relationships can be seen through case law also. For example, according to the pioneer case law like German interaction between fundamental rights and contract law was well noticed in the judgments of the German Federal Courts, *Bundesarbeitsgericht*, dealing with labour law cases, recognized an immediate effect of several basic constitutional rights on employment contracts as early as the 1950, while the

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² Treaty on European Union (TEU) Article 2.

³ Charter of Fundamental Rights of the European Union, 2000/c 364/01.

⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 3 September 1953

⁵ Universal Declaration of Human Rights, 1948.

⁶ International Covenant on Civil and Political Rights, ICCPR, 23 March, 1976.

⁷ International Covenant on Economic, Social and Cultural Rights, ICESCR, 1966.

⁸ Feldman, Yuval: Control or Security: A Therapeutic Approach to the Freedom of Contract. *Touro Law Review*, Vol. 18, No. 3, 2002, pp. 503-562.

Bundesverfassungsgericht, the Constitutional Court, not long afterwards committed itself to the *theory of the indirect influence of fundamental rights* through the general clauses of private law⁹. It has recognized a reciprocal effect, *Wechselwirkung*, of fundamental, constitutional rights and norms of private law since the 1950s. As for the judiciary, it has to give effect to fundamental rights in contractual relationships in the same way as is done in state-citizen relationships (*direct effect*) and have been recognized on a constitutional level, at the same time judges can and should not do more than take inspiration from fundamental rights when interpreting the rules of contract law (*indirect effect*). Moreover, this *horizontal effect of fundamental rights* in private law, which can now be traced in many European legal systems, makes it possible to accept the *constitutionalisation of private law*¹⁰ and clearly shows that fundamental rights and private law no longer exist in isolation of each other¹¹.

In this regard, proposals for a Draft Common Frame of Reference on European Contract Law (DCFR)¹² for contract law on the level of the European Union (EU) explicitly require the provisions of this DCFR to be read in the light of fundamental rights and to establish the nullity of a contract to the extent that it infringes a fundamental right. Since according to article II the Draft Common Frame of Reference determines that a 'contract is void to the extent that: (a) it infringes a principle recognized as fundamental in the laws of the Member States of the European Union; and (b) nullity is required to give effect to that principle'. Moreover, Article I-1:102(2) provides that the DCFR 'is to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws. Also, Chapter 2 of Book II of the DCFR contains general rules on non-discrimination in private law relationships. In this regards, classical fundamental rights thus seem to offer stronger protection for citizens' freedom from the State.

II. Defining fundamental rights at the EU level

Basically, '*fundamental rights*' refer to all rights and freedoms that are safeguarded by national constitutions or international human rights documents. Legal doctrine is divided as to the question of what a fundamental right encapsulates. The formal criterion usually applied for defining fundamental rights is that of codification in a constitutional catalogue of fundamental rights.

In the 1969, in the *Staude case*¹³, it was the first time when the Court already referred to the fundamental rights as being part of the general principles of Community law and underlined that they are protected by the Court. The Court further clarified in *Wachauf case*¹⁴ that national authorities when implementing EU measures, must indeed comply with EU fundamental rights as they form an integral part of the general principles of EU law.

⁹ BVerfG 15 January 1958, BVerfGE 7, 198 (Lüth).

¹⁰ The term '*constitutionalisation*' has been widely used by Dutch scholars in particular. See, for example, Smits, Jan: 'Constitutionalising van het vermogensrecht', in Preadviezen uitgebracht voor de Nederlandse Vereniging voor Rechtsvergelijking, 2003, p. 1; Cherednychenko, Olha: 'The Constitutionalization of Contract Law: Something New under the Sun?' *Electronic Journal of Comparative Law*, No. 1, 2004.

¹¹ Cherednychenko, Olha: 'Towards the Control of Private Acts by the European Court of Human Rights?' p. 195. *Maastricht Journal of European and Comparative Law*, Vol. 13, No 2, 2006, pp. 195-218.

¹² The development of a CFR was first proposed by the European Commission in its Action Plan on 'A More Coherent European Contract Law' of 2003, COM (2003) 68 final and Communication 'European Contract Law and the Revision of the Acquis: The Way Forward' of 2004, COM (2004) 651 final, 13.

¹³ Case 29/69 Stauder, 1969, ECR 419.

¹⁴ Case 5/88, Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft, Judgment of the Court (Third Chamber) of 13 July 1989.

- According to Article F of the Treaty on European Union¹⁵, the EU was obliged to ‘respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States as general principles of Community law’.
- Also, Declaration on European Identity¹⁶ (Copenhagen European Summit, 14-15 December 1973), in which the principles of democracy, the rule of law, social justice and the respect for human rights were considered a cornerstone of European international identity.
- Later with the entry into force of the Lisbon Treaty on 1 December 2009, the Charter of Fundamental Rights¹⁷ became a legally binding catalogue of fundamental rights within the EU legal order. According to Article 52 of the Charter, any limitation of fundamental rights must be provided for by law, respect the essence of those rights and freedoms and respect the principle of proportionality, failing which EU legislation is to be considered void. The Charter of Fundamental Rights¹⁸ is the point of reference not only for the Court of Justice but also for the EU legislature, notably when EU legislation gives “*specific expression to fundamental rights*”, as is the case for EU policies dealing with anti-discrimination, asylum, data protection transparency, good administration, and procedural rights in civil and criminal proceedings.
- The most famous ECJ judgment dealing with the scope of application of EU law is the *Åkerberg Fransson*¹⁹ case, where the Court, referring to scope of fundamental rights in the EU and to the explanations relating to Article 51 of the Charter of Fundamental Rights. The Court considered that the fundamental rights guaranteed by that Charter must be complied with where national legislation falls within the scope of European Union law. Another one is the *Melloni*²⁰ case that only in a situation where an action of a Member State is not entirely determined by European Union law, do national courts and authorities remain free to apply national standards of protection of fundamental rights.
- For example, in Dutch and German laws the fundamental rights are part of the positive law that has been broadly formulated forming part of a *national Constitution or an international human rights treaty*²¹. In Germany and the Netherlands, fundamental rights included in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)²² and International Covenant on Civil and Political Rights (ICCPR)²³. Moreover, these rights have been entrenched, in the sense that they cannot be modified or can only be modified through a special legislative route. Another example is that right does not necessarily have to be written down or be derived from a written right in order to be

¹⁵ Maastricht Treaty, 1993.

¹⁶ See Declaration on European Identity, Copenhagen 1973.

¹⁷ Charter of Fundamental Rights of the European Union, 2000/c 364/01.

¹⁸ Charter of Fundamental Rights of the European Union, 2000/c 364/01.

¹⁹ Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, Judgment of the Court (Grand Chamber), 26 February 2013.

²⁰ Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, Judgment of the Court (Grand Chamber), 26 February 2013.

²¹ Feldman, David: *Civil Liberties and Human Rights in England and Wales*, second edition, Oxford University Press, Oxford, 2002.

²² European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 3 September 1953

²³ International Covenant on Civil and Political Rights, 23 March 1976.

recognized as fundamental. English common law already encompassed a number of fundamental rights before the ECHR rights were given further effect by means of the Human Rights Act 1998²⁴. Also, English common law recognized several fundamental rights, such as the rights to personal security and personal liberty as well as the rights to private property, to freedom of discussion and to assembly²⁵.

Moreover, fundamental rights can also be at stake in EU legislation covering all other domains of Union competence such as transport, competition, customs and border control. As these policies can also have an impact on citizens and individuals' rights, such as human dignity, privacy, the right to be heard, and freedom of movement, EU law should duly take such situations into account. For instance, on the basis of such justifications as the protection of public order, public security or public health.

Furthermore, it prescribes that contract should be held void to the extent that they infringe '*fundamental principles*' of the EU Member States (Article II.-7:301 DCFR). For example, in *Nold v Commission Case 4/73* the European Court of Justice reiterated that human rights are an integral part of the general principles of European Union law (Maastricht Treaty founded the EU on 'the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law'). So, the efforts made to align the DCFR provisions with fundamental rights represent an important step in the ongoing process of constitutionalisation of European contract law. Similarly, fundamental rights such as freedom of expression, freedom of religion, or the right to privacy may influence the horizontal relationship between private parties.²⁶

III. The direct and indirect effect to fundamental rights in contractual relationships

One of the most discussed aspects of the possible impact of fundamental rights on contract law is undoubtedly the question whether these rights should be given direct or indirect effect in this area²⁷.

The *theory of direct effect* was introduced in German law by Hans Nipperdey, who in the 1950s and early 1960s was the first President of the *Bundesarbeitsgericht*²⁸ (Federal Labour Court). He predicted that basic rights would develop into directly binding provisions instead of mere goals or guidelines. Another argument for direct application, which recalls the traditional common law view of human rights, derives from the idea that fundamental rights in essence are liberties that have their basis in private autonomy²⁹. The problematic side of the direct effect theory seems to be its practical application. Even if it is accepted that private parties in principle are bound by fundamental rights in the same measure as state authorities, the differences between private and public actors require adaptations to fit in the fundamental rights argument in judicial reasoning in contract law cases. Accordingly, the idea of *direct*

²⁴ Human Rights Act 1998, Act of Parliament of the United Kingdom.

²⁵ Wadham, John – Mountfield, Helen – Edminson, Anna: Blackstone's Guide to the Human Rights Act 1998, third edition, Oxford University Press, Oxford, 2003, p. 3.

²⁶ Mak, Chantal: Fundamental Rights in European Contract Law, Wolters Kluwer Law & Business. Austin, 2008, pp. 49-167.

²⁷ Hartkamp, Arthur: On European Freedoms and National Mandatory Rules: The Dutch Judiciary and the European Convention on Human Rights, *European Review of Private Law* 2000/1. p. 111-124.

²⁸ Vogenaue, Stefan: An Empire of Light? II: Learning and Lawmaking in Germany Today, *Oxford Journal of Legal Studies*, Vol. 26, No. 4, 2006, p. 627-663.

²⁹ Barak, Aharon: Constitutional Human Rights and Private Law. In: Friedmann, Daniel – Barak-Erez, Daphne (eds.): *Human Rights in Private Law*, Hart Publishing, Oxford/Portland, Oregon, 2001, p. 13-42.

horizontal effect implies that a private party has, in his action against another private party, a claim or a defence which is directly based on a constitutional right which overrides an otherwise applicable rule of private law.

According to advocates of doctrine of *indirect effect (mittelbare Drittwirkung)*³⁰, citizens are not the addressees of fundamental rights and are therefore not directly bound by these rights. So, it means that it may influence private law through the interpretation of open norms such as ‘good morals’ and ‘good faith’³¹. With supporting this view I emphasize that a distinction should be made between the public and the private sphere: fundamental rights have been developed for the former context, that is to protect citizens against the State, and can therefore not directly be applied in the latter sphere. Since relations between citizens are essentially different from those between the citizens and the State, fundamental rights that have been designed to serve public interests cannot be equally applied in contract law. They should be taken into account indirectly, in particular as sources for filling in the open-textured norms of private law. At the same time, values and concepts such as good faith, reasonableness and negligence reflect, *inter alia*, an appropriate balance of opposing human rights³². The judges should consider the rules of private law that are applicable in the specific case in the light of the fundamental values that lie at the heart of the problem addressed in the case. In the continental legal systems, such as Germany, the Netherlands and Italy, this form of indirect effect may be especially realised by means of the general clauses of private law (‘good morals’ and ‘good faith’).

According to the distinction between direct and indirect effects in the case law there was an impression and a conclusion that cannot fully explain the role of fundamental rights in European contract law³³.

IV. Some case law analysis

The European case law demonstrates a tendency to guarantee the compliance of provisions of contract law with fundamental rights.

German case law

The German Constitutional Court, the *Bundesverfassungsgericht*, as early as 1958 established that the rules of private law should be interpreted in the spirit of the order of constitutionally protected values, indicating the general clauses as the ‘inroads’ for fundamental rights in private law³⁴. The following case law clearly show impact of fundamental rights on private law, as the *Lüth* decision of 1958³⁵ and judgments in contract cases such as *Handelsvertreter*, 1991³⁶ and *Bürgschaft*, 1993³⁷ and, two cases on life insurance contracts (2005)³⁸.

³⁰ Smits, Jan: Constitutionalisering van het vermogensrecht. In: Preadviezen uitgebracht voor de Nederlandse Vereniging voor Rechtsvergelijking. Kluwer, Deventer, 2003, p. 49.

³¹ Dürig, Günter: Grundrechte und Zivilrechtsprechung. In: Vom Bonner Grundgesetz zur gesamtdeutschen Verfassung: Festschrift zum 75. Geburtstag von Hans Nawiasky, Isar Verlag, München, 1956, pp. 157-190.

³² Barak: *supra* pp. 21-22.

³³ Mak, Chantal: Fundamental rights in European contract law: a comparison of the impact of fundamental rights on contractual relationships in Germany, the Netherlands, Italy and England. (Private law in European context series; Vol. 12). Kluwer Law International, Vol 12, 2008, https://pure.uva.nl/ws/files/28980543/175437_Mak_FREEC.pdf

³⁴ BVerfG 15 January 1958, BVerfGE 7, 198, (Lüth).

³⁵ BVerfG 15 January 1958, BVerfGE 7, 198 (Lüth).

³⁶ BVerfG 7 January 1990, BVerfGE 81, 242 (Handelsvertreter).

³⁷ BVerfG 19 October 1993, BVerfGE 89, 214 (Bürgschaft).

³⁸ BVerfG 26 July 2005, NJW 2005, 2363 and 2376.

In the 1990s, the Court extended this doctrine to include the judicial review of the contents of contracts, based on the interpretation of 'good morals' and 'good faith' in the light of fundamental rights. The *Bundesverfassungsgericht*, the German Federal Constitutional Court, established that all private law should comply with the objective order of values protected by the Constitution. In case law, this could be realised especially through the interpretation of the general clauses of private law (*Wechselwirkung*).

Italian case law

The Italian law demonstrates how fundamental rights have affected the development of private law doctrines from the 1950s onwards. The Italian Constitutional Court (*Corte Costituzionale*) and Supreme Court (*Corte di Cassazione*), after a tentative start³⁹, have established a steady practice of reading provisions of private law in the light of constitutionally protected rights. For example, judgments of the *Corte Costituzionale* on the recognition of non-pecuniary damages⁴⁰ (*Corte cost.*1986, *Corte cost.* 2003, n. 233. *Cass. civ.* 2003. *Foro it.* 2003, I, 2273). In contrast to German law, the influence of the Italian Constitutional Court is a more indirect one, given that the *Corte Costituzionale* does not handle individual complaints of unconstitutionality, but adjudicates the compliance of laws with the Constitution in cases that are referred to it by the civil courts. So, in Italy, case law also shows a line of examples of the application of constitutional rights and principles, such as the principle of solidarity (Article 2 *Cost.*), in combination with rules of private law. For example, requirements of good faith or the rules on tortious liability and immaterial damages.

British case law

In English law the framework for the entrance of fundamental rights into contract law differs. Freedom of contract is considered a background norm of contract law and the courts stick to the formal doctrines that have been developed in the nineteenth century. Therefore, English common law system seems considerably to be averse to the use of general clauses. According to the case for example, *Wilson v. First County Trust Ltd*⁴¹ it remains unclear what is or will be the role of fundamental rights in English contract law adjudication. The coming into force of the Human Rights Act 1998 (HRA), as of 2 October 2000 signified an important change in the status of fundamental rights in British law. Before the HRA came into force, fundamental values in English common law were expressed in liberties as well as in a number of fundamental rights. Besides these liberties, English common law included several fundamental rights, such as the rights to personal security and personal liberty as well as the rights to private property, to freedom of discussion and to assembly. So, English law has recognized a number of common law liberties and has given further effect to the ECHR through the Human Rights Act 1998.

Case law examples taken from German, Italian, and English contract law have shown that type of fundamental rights argumentation may have harmonizing effects on the rules governing specific topics. So, in case of many different types and of varying social importance, these examples have in common that they require an assessment of the contractual interests involved as well as the consideration of certain interests that on the constitutional level, in the relation between the State and citizen, have been recognized as being in need of protection by means of fundamental rights. Moreover, the national legal systems have developed different manners of giving effect to fundamental rights in contract law.

³⁹ *Cass. civ.* 10 August 1953, *Giust. civ.* 1953, 2687.

⁴⁰ *Corte cost.* 14 July 1986, n. 184 and *Corte cost.* 11 July 2003, n. 233. The latter judgment affirms the Italian Supreme Court's decisions *Cass. civ.* 31 May 2003, n. 8827 and 8828, *Foro it.* 2003, I, 2273.

⁴¹ *Wilson and others v. Secretary of State for Trade and Industry*, UKHL40, 2003

V. Conclusion

Contract law is probably the most dynamic area of European Private Law in all national member states' legal systems. Today, fundamental rights also have an impact on the relationship between private parties. Particularly, fundamental rights have direct and indirect binding effect on private parties.

A direct effect implies that a fundamental right is applied to a case between private parties in the same way as it would be applied to a case involving the State. The theory of indirect effect rejects this view, arguing that private parties in principle are not addressees of fundamental rights and cannot be requested to take into account matters of public interest in their interprivate relations⁴². Indeed, it is held that fundamental rights may be infringed by private parties in a similar way as by the State and should therefore be given effect in contract law as in public law. For example, for Germany, the rights of the *Grundgesetz* are thus the most relevant, while the ECHR generally is less influential because of its overlapping with constitutional rights. In the Netherlands, on the other hand, the Convention figures prominently beside the *Grondwet*, especially in the case of judicial review. In Italy, like in Germany, the ECHR plays a smaller part, given its non-constitutional status and, besides that, the constitutional review of laws conducted by the *Corte Costituzionale* on the basis of the *Costituzione*. English law, finally, has recognized a number of common law liberties and has given further effect to the ECHR.

Brief comparison of this above European legal systems shows different approaches and different stages in the development of case law on the effects of fundamental rights in contractual relationships which is related to the policy questions also. For example, in its rulings on *Schmidberger*⁴³ and *Omega*⁴⁴, the ECJ accepted that EU economic freedoms could be superseded when, respectively, the principle of human dignity and freedom of expression are at stake at national level.

The examination of the effects of fundamental rights in contract law in terms of autonomy and solidarity brings into play the politics of contract law, since it engages the choices made by legislature and judiciary regarding the extent to which parties should take each other's interest into account. The consequences of legislation infringing fundamental rights standards, have led the EU institutions to develop a consistent strategy to take into account the fundamental rights dimension when drafting, amending or assessing the impact of future legislation. Although the legislator might have given a framework within which the cases should be resolved, the specific circumstances of the disputes require the courts to consider the actual consequences of the contractual arrangements on the party's interests protected by fundamental rights. In additional, harmonisation of contract laws in the European Union usually takes place by means of legislation: that is, through regulations and directives. EU institutions should respect fundamental rights when drafting such instruments.⁴⁵

⁴² Barak: supra pp. 13–42.

⁴³ Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich, Judgment of the Court of 12 June 2003.

⁴⁴ Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, Judgment of the Court (First Chamber) of 14 October 2004.

⁴⁵ Weatherill, Spethen: Cases and Materials on EU Law, Oxford University Press, Oxford, 2006, pp. 66-77.