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Constitutionalisation of Private Law

Edited by Tom Barkhuysen
and Siewert D. Lindenbergh

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Constitutionalisation of Private Law

by

TOM BARKHUYSEN AND SIEWERT LINDENBERGH

Editors

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INTRODUCTION

The Editors
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Constitutionalisation of private law: an 'enrichment of legal discourse', or 'nonsense on stilts'? The issue of the influence of fundamental rights in private law can be localized in the middle of this friction. There appear to be passionate 'believers' as well as persistent 'sceptics'. Therefore, constitutionalisation of private law is, at least, of importance from an academic point of view. The influence of fundamental rights in private law is, however, not 'just' a matter of academic discourse.

This publication opens with two fundamental contributions, by representatives from both ends of the spectrum, Hans Nieuwenhuis and Jan Smits. Vino Timmerman illustrates that fundamental rights are already clearly influencing private law, even in the 'hard-core' area of company law.

The influence of fundamental rights in private law depends, partly at least, on the constitutional framework created by the legislator. When creating the Netherland's constitution (Grondwet) in 1983, the legislator took a rather reluctant position towards the horizontal effect of fundamental rights. Therefore, from a (national) constitutional point of view, the freedom of the judiciary to allow a horizontal effect to constitutional rights is substantially limited, as is set out by Wim Voermans. On the other hand, the reluctance towards the influence of the national constitution on private law, has – at least in the Netherlands – served as a strong incentive to invoke in private law issues the fundamental rights laid down in the European Convention on Human Rights. The difficult relationship between the ECHR and private law is explored and illustrated by Tom Barkhuysen and Michiel van Emmerik.

The issue of the influence of fundamental rights in private law is universal in the sense that it is recognized in most western jurisdictions. Therefore, it is inspiring to examine the development of this topic in different legal families. Since constitutionalisation of private law can be located on the verge of public and private law, it is not surprising that culture and history appear to be important parameters for the development of the concept within the German,

English and Dutch jurisdictions. The contributions of Gert Brüggemeier, Stathis Banakas and Siewert Lindenbergh illustrate that each country has its own history and habits in this respect. They also illustrate that constitutionalisation of private law is a fundamental issue of academic, systematic and practical importance in each of the jurisdictions. This is what justifies the choice of constitutionalisation of private law as the subject for this scholarly debate.

Although the many different viewpoints and developments that are illustrated in the various contributions make it difficult to draw general conclusions, two main features can be derived from the debate on constitutionalisation of private law. First, fundamental rights cannot simply be considered as public law concepts 'invading' private law: often they have their origins in concepts that precede this legal-conceptual distinction and articulate values which underlie the legal order as a whole. Second, fundamental rights, whether from a public or from a private law origin, can serve in private law as sources of inspiration and as warning signs that human dignity may be at risk. Both features support the conclusion that fundamental rights have substantial added value in private law, or perhaps better: private law has substantial added value in the realization of fundamental rights.

This publication is the result of a conference on constitutionalisation of private law, held in Leiden on June 3rd 2005. Conference and publication are activities within the private law research program '*Constitutionalisation, Transnationalisation and Unity'*, as facilitated by the E.M. Meijers Institute of Legal Studies at Leiden University's Faculty of Law. We owe specific gratitude to Professor Walther van Gerven (Belgium), who served as a professional, dedicated and inspiring chair for the conference on this enthralling issue.

Amsterdam/Leiden/Rotterdam, February 2006

1

FUNDAMENTAL RIGHTS TALK
An enrichment of legal discourse in private law?

Hans Nieuwenhuis[1]

In her book RIGHTS TALK, *the impoverishment of Political Discourse*[2] Mary Ann Glendon attacks the predominance of the rhetoric of rights in American political discourse. What is conspicuously lacking, according to her, is the rhetoric of responsibility:

> Thus far, in our investigation of American rights talk, we have observed a tendency to formulate important issues in terms of rights; a bent for stating rights claims in a stark, simple, and absolute fashion; an image of the rights-bearer as radically free, self-determining and self-sufficient; and the absence of well-developed responsibility talk.[3]

In this paper I advocate an opposing view: FUNDAMENTAL RIGHTS TALK, an enrichment of legal discourse in private law.

With regard to the American preoccupation with rights Glendon complains:

> The new rhetoric of rights is less about human dignity and freedom than about insistent, unending desires.[4]

1 Professor of Civil Law, Faculty of Law, Leiden University.

2 Mary Ann Glendon, *Rights Talk, the impoverishment of Political Discourse*, New York 1991.

3 Rights Talk p. 107.

4 Rights Talk p. 171.

Tom Barkhuysen and Siewert Lindenbergh (Eds), *Constitutionalisation of Private Law.*

In private law the most insistent and unending desire is the desire for money; money to be collected by means of claims for damages. In the Netherlands this eagerness to claim compensation is commonly labeled 'The Claim Culture', or simply 'The American Way' (*Amerikaanse Toestanden*).

A woman gives birth to a child because an operation intended to sterilize her husband had failed. She claims the costs for bringing up the child from the doctor who has performed the operation. Isn't this a striking example of highly inflated rights talk? Rights talk completely lacking the rhetoric of responsibility towards the unwanted child? What if, growing up, the child discovers that his parents considered the costs of bringing him up as 'damage'? How are we to assess the language of the German *Bundesgerichtshof* awarding compensation for the cost of bringing up the child by explaining that 'the concept of damage as such is value-free' (*der Schadensbegriff als solcher is wertfrei*).[5] Can we improve our rights talk by transforming it into *fundamental* rights talk? Does invoking the European Convention on Human Rights improve the quality of the debate on how to apply our current Tort Law?

Mrs. G. lives in Edam (say: cheese). She receives state benefit. K., one of her neighbors, suspects her of deceiving the authorities by not telling them that she lives with a friend in a manner closely resembling married life. K. keeps her under close observation and informs the authorities that she walks with this man hand in hand in public places and that his car is parked all night in front of her house. Mrs. G. considers this relentless attention a violation of her right to privacy.

The judge in the summary proceedings agreed, but on appeal his decision was quashed by the Court of Appeal in Amsterdam. The sole fact that Mrs. G. felt spied upon after having discovered that she had been kept under close observation by her neighbor did not amount to a violation of her privacy, according to the Court of Appeal. Mrs. G. again appealed to a higher court and at the Supreme Court (*Hoge Raad*) she complained that the Court of Appeal had not given due consideration to Article 8 of the European Convention:

> (i) Everyone has the right to respect for his private and family life, his home and his correspondence.
> (ii) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being

5 Bundesgerichtshof 27 June 1995, NJW 1995, p. 2407.

> of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The *Hoge Raad* ruled that the existence of a right to respect for one's private life must be accepted. The content of this right is determined, at least in part, by Article 8 of the European Convention on Human Rights. This Article also applies to the relationships between citizens, according to the *Hoge Raad*. Violation of this right might justify a claim based on Tort Law. But this doesn't necessarily mean that K. has committed a tort. In connection with Article 8, section 2, a reason justifying K's actions may exist if the interference with the private life of G. was necessary in a democratic society in the interest of the economic well-being of the country. The *Hoge Raad* referred the case to the Court of Appeal in The Hague to decide whether the violation of G's right to respect for her private life was justified by the public interest that the authorities would have in knowing the facts concerning the private life of Mrs. G.[6]

Article 8 of the European Convention on Human Rights also applies to relations between citizens; a clear example of 'constitutionalisation' of private law by giving 'horizontal effect' (*Drittwirkung*) to constitutional rights conferred on citizens with regard to their relations with the public authorities. The verticality of the original structure of constitutional rights such as privacy (Article 8) is shown by the way in which the text of Article 8 section 2 addresses the State as the one who should respect these rights. 'There shall be no interference by *a public authority* with the exercise of this right except …'.

According to the *Hoge Raad*, the content of Mrs. G's right to respect for her privacy is determined, at least in part, by Article 8. By this the *Hoge Raad* cannot have had the *text* of Article 8 in mind, as this text contains no clue whatsoever to the meaning of the concept of private life. So it must be the way in which Article 8 has been interpreted by the European Court on Human Rights. But the Court can only deal with complaints against States. The way in which a State may interfere with the private lives of its citizens differs greatly from the interference allowed to private individuals. Even if I have a reasonable suspicion that my neighbor is growing several hundred cannabis plants in the cellar of his house, I am not allowed to break into his house and search it, but the public authorities certainly may. The benchmark for the success of the State's defense against a complaint that it breached the right to privacy is to be able to say that the interference was 'necessary in a democratic society in the interests of national security, public safety or the economic well-being of

6 HR 9 januari 1987, NJ 1987, 928.

the country (…)'. This is not a suitable test with regard to relations between citizens. A divorced husband trying to collect evidence that his ex-wife is cohabitating with a new partner, does not, in order to be discharged from his duty of providing maintenance, have to show that his spying on her was necessary in the interests of the economic well-being of the country.

One must conclude that simply transplanting the method of reasoning applicable to the vertical relationships (public authority – citizen) to the debate concerning horizontal relationships (citizen – citizen) is not very helpful when it comes to lending proper weight to the role of fundamental rights in private law disputes.

So, how should we handle fundamental rights in a horizontal setting? One could choose a different approach: fundamental rights contained in the Basic Law (*Grondwet, Grundgesetz*) or the European Convention constitute an objective system of values which offers insight in case one has to apply open ended private law norms like the 'unwritten' rules pertaining to proper social conduct, the most important criterion for liability in Dutch Tort Law (Article 6:162 DCC). This approach is very similar to the path followed by the German *Bundesverfassungsgericht* with regard to the horizontal effect of the fundamental rights in the *Grundgesetz*:

> Far from being a value-free system the Basic Law (Grundgesetz) erects an objective system of values in its section on basic rights (…) This system of values centering on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system (Translated by Tony Weir).[7]

The German Grundgesetz of 1949 has erected an objective system of values, according to the Bundesverfassungsgericht. The Court does not say that the Grundgesetz *created* an objective system of values, but that it *set* it *upright* (*hat aufgerichtet*). The Court does not suggest that from 1933 to 1945 these values did not exist in Germany, but that they were trodden underfoot by the NS-regime. It is important to note that legal values such as human dignity, freedom of expression and privacy are not *created* by the Constitution but

7 Bundesverfassungsgericht 15 januari 1958, BverfGE, 1958, p.198: 'Das Grundgesetz, das keine wertneutrale Ordnung sein will, hat in seinem Grundrechtsabschnitt auch eine objektive Wertordnung aufgerichtet (...). Dieses Wertsystem, das sein Mittelpunkt in der innerhalb der sozialen Gemeinschaft sich frei entfaltenden menschlichen Persönlichkeit und ihrer Würde findet, muss als verfassungsrechtliche Grundentscheidung für alle Bereiche des Rechts gelten.'

recognized by it. This raises the question: what is fundamental about fundamental rights?

One answer could be that their fundamentality derives from their position in a fundamental document, such as the Grundgesetz or the European Convention, but a better answer would be that fundamental rights are fundamental because they articulate values which underlie the legal order in its entirety (both public and private law). Understood in this way, fundamental rights are fundamental since they *precede* the distinction between public and private law. Is the right to life, enshrined not only in Article 2 of the European Convention but also in Exodus 20:13: 'Thou shalt not kill' public or private law?

This precedence is a logical matter, and not chronological. Provisions concerning insults in private law (Article 6:106 Dutch Civil Code) and in criminal law (Article 261 Dutch Criminal Code) may be much older than a newly emerging right to human dignity (see Lord Millett, *infra*) but human dignity takes precedence because, in the words of the *travaux préparatoires* of the European Charter of Human Rights, human dignity 'is not only itself a fundamental right, it is also the foundation of all other fundamental rights.'

One might argue that this foundation rests on quicksand because the Charter is not, as yet, positive law. But on the other hand, the rights, freedoms and principles 'recognized' by the European Union in the Preamble to the Charter belong without doubt to the existing 'inner morality' of the law (Fuller):

> To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults. Every departure from the law's inner morality is an affront to man's dignity as a responsible agent.[8]

Human dignity serves as a framework within which competing claims based on more specific fundamental rights can be balanced. How do you weigh for instance the freedom of the press to publish photographs showing that the fashion model Naomi Campbell lied about her drug addiction against Miss Campbell's privacy and the right to 'informational autonomy'?[9] Lord Hoffmann on the nature of dignity and private information:

8 L.L., Fuller, *The Morality of Law*, New Haven 1969, p. 162.
9 Campbell v. MGN Ltd. [2004] UKHL 22.

> What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity (…) the new approach (…) focuses upon the right to control the dissemination of information about one's private life.

A recent decision by the *Hoge Raad* in a case concerning a *Wrongful Life* claim highlights this latter view of the proper role of fundamental rights in private law. Kelly, a girl, was born severely handicapped. If the obstetrician would have performed her prenatal diagnosis more diligently a hereditary genetic defect would have come to light and Kelly would not have been born at all, because the mother would have decided to have her aborted. The *Hoge Raad* awarded a whole range of damages, the most controversial being the compensation awarded to Kelly herself on the ground that the obstetrician had breached a duty of care towards the unborn child. Apart from the costs of bringing up Kelly, the *Hoge Raad* also awarded non-economic damages to the mother:

> The law recognizes within certain limits the right of the mother to terminate her pregnancy. This recognition rests on the fundamental right of the mother to self-determination. If, by the negligence of the obstetrician, the mother is deprived of her choice to prevent the birth of a severely handicapped child, this constitutes a serious violation of her right to self-determination.[10]

The *Hoge Raad* derives the right of the mother to choose whether or not to have a severely handicapped child from her fundamental right to self-determination. In the Dutch Constitution (*Grondwet*) one can look in vain for this 'fundamental right to self-determination'. It lacks a provision equal to Article 2 of the German Grundgesetz (*Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit*).

What is the use of such an autonomous fundamental right that is not backed by an explicit provision in the Constitution? Could the *Hoge Raad* not have dispensed with invoking a fundamental right to self-determination by simply stating that the obstetrician had breached a duty of care towards the mother?

American *political* discourse may be lacking the rhetoric of responsibility, as Mary Ann Glendon insists, but European Tort Law certainly does not. Both the very central concepts of *faute* in French Tort Law and *duty of care,* the key element in *negligence*, the most prominent tort in English law, are embedded in the rhetoric of responsibility.

10 *Hoge Raad* 18 maart 2005, RvdW 2005, 42; Kelly.

To give just one example: The House of Lords in Donoghue v. Stevenson, *per* Lord Atkin:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question: who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour.[11]

A *duty* of care towards another person entails the other person's *right* to this care. On this point the law must join the forces with the rhetoric of responsibility and the rhetoric of rights. How can one determine the limits of the duty of care of a doctor towards a pregnant woman? Does he have a duty to find out whether there is any chance of her having a baby with a cleft lip, in order to enable her to decide to have it aborted? One cannot answer these questions without discussing the limits of the right to self-determination in matters like these. What modern Tort Law urgently needs is a larger share of high quality fundamental rights talk.

As we have seen, Mary Ann Glendon's main objection to 'the new rhetoric of rights' is that it is 'less about human dignity and freedom than about insistent, unending desires.' This is no longer true with regard to fundamental rights talk. An interesting development took place in the *Wrongful Birth* cases decided by the House of Lords. While denying the parents compensation for the cost of bringing up the child, the Lords award the mother non-economic damages. But the reasoning differs. Compare for instance Lord Slynn in *Macfarlane v. Tayside Health Board*, [2002] 2 AC 59:

> It seems to me that (…) the wife, if there was negligence, is entitled by way of general damages to be compensated for the pain and discomfort and inconvenience of the unwanted pregnancy and birth (…).

And Lord Millett:

> Unlike your Lordships, I consider that the same reasoning leads to the rejection of Mrs. McFarlane's claim in respect of the pain and distress of pregnancy and delivery. (…) It does not, however, follow that Mr. and Mrs. McFarlane should be sent away empty handed. (…) They have been denied an important aspect of their personal autonomy. Their decision to have no more children is one the law should respect and protect.

11 Donoghue v. Stevenson, (1932) A.C. 562, 580.

In *Rees v. Darlington Memorial Hospital* [2004] 1 AC 309 Lord Millet reiterated his view, intensifying his fundamental rights talk:

> I still regard the proper outcome in all these cases is to award the parents a modest conventional sum by way of general damages, not for the birth of the child, but for the denial of an important aspect of their personal autonomy, viz. the right to limit the size of their family. This is an important aspect of human dignity, which is increasingly being regarded as an important human right which should be protected by law.

In *Kelly*, the Dutch *Wrongful Life* case, the *Hoge Raad* emphasized its consideration that awarding the mother non-economic damages did not mean that Kelly's existence was a cause of discomfort and suffering for her, but that her right to compensation was based on the fact that her right to self-determination had been violated.

From pain and suffering to the violation of the right to self-determination as the reason for compensation; this certainly is an improvement of the legal discourse concerning wrongful birth and wrongful life cases. Even women who do not feel bound by Genesis 3:16 'In sorrow thou shalt bring forth children.' will concede that the real reason for claiming damages is not the amount of pain suffered during pregnancy and birth but the violation of their freedom of choice. In a Dutch case concerning medical malpractice resulting in an unwanted pregnancy and the birth of a healthy child, the woman told the press that the sole reason for claiming damages had been the fact that the doctor had said to her that she must not complain because she had a healthy child.

Fundamental rights talk, *an enrichment of legal discourse in private law?* It is time to replace the question mark by a full stop. Private law is, and ought to be, based on a set of ideas about fundamental rights. Property and contract can only be understood as concepts stemming from the fundamental right to self-determination (which is not the same as selfishness). Life, liberty, privacy and property focus our view of Tort Law. From this pivotal role of fundamental rights in private law it follows that the 'constitutionalisation' of private law by giving horizontal effect to vertical public law rights (citizen's rights against the State) cannot be but a transitional affair. For the time being it may be useful to borrow the concept of privacy from the European Convention, but at the end of the day private law must stand on its own two feet and must be able to articulate the fundamental right to privacy on its own terms. When the house is built the scaffolding must be removed.

2

PRIVATE LAW AND FUNDAMENTAL RIGHTS: A SCEPTICAL VIEW

Jan Smits[1]

1 INTRODUCTION

The applicability of fundamental rights to private law is a vexed question. Over the last decade or so, many countries have seen a growing influence of fundamental rights in contract, tort and property law. This development, sometimes referred to as the 'constitutionalisation' of private law,[2] is often regarded as highly beneficial. It seems after all to be a noble idea to allow fundamental rights to play a role in relationships between private persons. However, the application of universal standards of what is regarded as fair in the relationship between the State and the citizen – which is of course what fundamental rights were originally designed for – to private parties can also be looked at with suspicion. The aim of this contribution is to reflect on the desirableness of the constitutionalisation of private law and to show the adverse effects of this development. It is therefore not intended to describe the present state of affairs in this area; instead, the focus will be on the normative questions of the desir-

1 Professor of European Private Law, Faculty of Law, Maastricht University; in the academic year 2005-2006 also visiting professor, Louisiana State University

2 The term was used by, *e.g.*, Basil Markesinis, Comparative Law – A Subject in Search of an Audience, Modern Law Review 53 (1990), p. 10; Gabriela Shalev, Constitutionalisation of Contract Law, in: A. Gambaro and A.M. Rabello (eds.), Towards a New European Ius Commune, Jerusalem 1999, p. 205; Lord Reed, The Constitutionalisation of Private Law: Scotland, Electronic Journal of Comparative Law Vol. 5.2 (May 2001).

Tom Barkhuysen and Siewert Lindenbergh (Eds), *Constitutionalisation of Private Law.*

ability of fundamental rights influence and the best way in which this influence is accommodated.

There are two important restrictions to be made. First, the phenomenon of constitutionalisation of private law is usually associated with case law: it is, in particular, the growing reference to fundamental rights by national courts that has received a lot of attention. This contribution is also limited to this topic: I will not discuss the sometimes far-reaching influence of national legislation in this area. Second, no attention is paid to the so-called European freedoms. These freedoms, such as the right to free movement of persons, have had an enormous influence on national legal systems as well. Sometimes, this influence is also described in terms of 'constitutionalisation', but it will not be discussed here.[3]

This contribution has the following structure. The next section is devoted to a definition of constitutionalisation of private law. It is highly important to define what is meant by it before saying anything about its value. Section 3 contains the main arguments why – in my view – fundamental rights have only limited value in deciding private law cases. Finally, and by way of a general conclusion, the room still left for reference to constitutional rights is discussed in section 4.

2 What is 'constitutionalisation of private law'?

Generally speaking, the constitutionalisation of private law can be described as the increasing influence of fundamental rights in relationships between private parties, fundamental rights being those rights that were originally developed to govern the relationships between the State and its citizens. These rights can be codified in a national constitution or in a human rights treaty (like the ECHR) or can be unwritten. Still, this definition is rather broad; it needs to be refined in at least two different ways. First, the question is what type of relationships between private parties are usually meant when one discusses the constitutionalisation process. Second, the definition is vague as it leaves open what exactly is to be understood by 'influence' of fundamental rights.

3 On which, e.g., T.O. Ganten, Die Drittwirkung der Grundfreiheiten, Berlin 2000.

The first refinement to be made is that in the rapidly growing literature on private law and fundamental rights,[4] constitutionalisation is usually referred to as the increasing influence of fundamental rights in the fields of contracts, tort and property. Family law is often left out. Of course, the influence of art. 8 ECHR on the protection of 'family life' has been extremely pervasive for most of the European national legal systems,[5] but there is good reason to leave it aside when one talks about the constitutionalisation of private law. Family law is characterised by a high level of public policy considerations that make it difficult to compare it to other areas of private law where private autonomy is much more important. In addition to this, one cannot deny that the whole debate on constitutionalisation as it has developed over the last decade was initiated in particular by private law scholars who neglected to some extent the already well-developed public law doctrines on the 'horizontal effect of human rights' and 'positive obligations' of the State.[6] These doctrines look at exactly the same problem that we are concerned with in the constitutionalisation debate, though it is seen from a different angle; it is unfortunate if this is forgotten. A topic from the borderline between private law and public law scholarship should benefit from both.

Second, it is essential to clarify that fundamental rights can influence private relationships in several different ways; they are not only dependent on the field of the law (contracts, tort or property) and who is applying fundamental rights (the legislator or the court) but also on the method of reasoning. To illustrate this, it is useful to look at several examples of constitutionalisation.

In the field of contract law, the influence of fundamental rights is particularly apparent in cases of onerous, one-sided, contracts. Fundamental rights like freedom of contract and human dignity can then be used to regard such a contract as non-binding for the weaker party. Perhaps the most famous ex-

4 Cf. for general overviews e.g. Claus-Wilhelm Canaris, Grundrechte und Privatrecht, Berlin 1999 and Daniel Friedmann and Daphne Barak-Erez (eds.), Human Rights in Private Law, Oxford 2001. For Dutch law cf. S.D. Lindenbergh, De constitutionalisering van het contractenrecht, Weekblad voor Privaatrecht, Notariaat en Registratie 2004, p. 977 ff, J.H. Nieuwenhuis, De Constitutie van het burgerlijk recht, RM Themis 2000, p. 203 ff and J.M. Smits, Constitutionalisering van het vermogensrecht, Deventer 2003.

5 Cf., e.g., Francis G. Jacobs and Robin C.A. White, The European Convention on Human Rights, 2nd ed., Oxford 1996, p. 122 ff. and the special issue of Rabels Zeitschrift 63 (1999), p. 409 ff.

6 Also see the contributions of Tom Barkhuysen and Michiel van Emmerik to this book.

ample[7] of this is the *Bürgschaft*-case decided by the German constitutional court.[8] A bank had offered a businessman a loan of 100.000 DM (now approximately 50.000 Euro) on condition that his daughter, then 21 years old, would accept the provision of a personal guarantee to the bank. She did so and on signing the contract of suretyship, the employee of the bank told her she needed to sign the contract for the bank's files and that she did not take any major obligation upon herself in doing so. When some years later her father went bankrupt, the bank claimed the 100.000 DM from the daughter. She refused to pay, claiming she did not know this was the consequence of her signing the contract. The *Bundesgerichtshof*, the highest court in civil cases in Germany, held that the bank could invoke the guarantee, saying that a contract is a contract. But the daughter succeeded in her appeal to the German constitutional court: she claimed that the civil court had violated the German constitution, in particular her right to human dignity (art. 1) and to party autonomy (art. 2). It is in this respect important to consider her personal situation: she was uneducated, and most of the time unemployed; when she did work, she earned no more than 1150 DM (500 Euro). If the bank could have enforced the contract, the daughter would probably have stayed on a minimum income for the rest of her life, as only the monthly interest alone on the 100.000 DM would have been 708 DM (350 Euro). The constitutional court, in line with its previous case law on the indirect effect of fundamental rights, held that a civil court must intervene on the basis of the general clauses of private law (like the provisions on contracts contrary to good faith or good morals) if a structural imbalance in bargaining power led to a one-sided onerous contract. If a civil court does not do so, it may violate human dignity as protected by art. 1 of the German constitution.

In these types of cases, fundamental rights influence private relationships in a subtle way: they are applied *indirectly*, meaning they are only of importance *through* the rules of private law. Open-ended concepts like good faith, good morals and public policy are filled-in by these fundamental rights and more specific rules of private law can often be considered as applications of fundamental rights for relationships between private parties as well. This doctrine

7 There are more cases. See, for example, Bundesverfassungsgericht 81, 242, Neue Juristische Wochenschrift (NJW) 1990, 1469 (Handelsvertreter) and Bundesverfassungsgericht 103, 89, NJW 2001, 957.

8 Bundesverfassungsgericht 19 October 1993, NJW 1994, 36 (Bürgschaft).

of indirect effect is now accepted in many countries, including Germany,[9] the Netherlands,[10] the United Kingdom[11] and South Africa.[12]

There is a second way in which fundamental rights are of importance to contract law. These rights cannot only enlighten us about how private law norms should be interpreted, they can also be used to set limits to freedom of contract in a more direct way. Freedom of contract itself can be seen as a fundamental right, even when it is not contained in a national constitution,[13] but it is widely accepted that this right is limited by other fundamental rights such as freedom of speech, freedom of religion or bodily integrity. It is generally held that a contract in which someone gives up his or her freedom of religion cannot be enforced as it is a violation of a fundamental right. Abundant case law confirms this view. In the Dutch case of *Protestant Association v. Hoogers*[14] for example, a landlord had let land to a lessee under the condition that the lessee would remain active for the Protestant Church. After a few years the lessee joined the Jehovah's Witnesses and the landlord subsequently terminated the lease contract. The court simply held that the condition in the contract was a violation of the freedom of religion and could therefore not be enforced.

In tort law, the influence of fundamental rights takes a somewhat different form. Traditionally, tort law is associated the most with the influence of fundamental rights because of the fact that the so-called personality rights are traditionally protected by tort or delict. Violations of bodily integrity or privacy are typical examples of violations to both human rights and tortuous conduct. One could also say that particularly in tort law fundamental rights have a great

9 Bundesverfassungsgericht 7, 198, NJW 1958, 257 (Lüth) and compare Christian Starck, Human Rights and Private Law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court, in: Friedmann and Barak-Erez (eds.), o.c., p. 98.

10 Cf. for an extensive overview Smits, p. 30 ff.

11 Cf. Hugh Beale and Nicola Pittam, The Impact of the Human Rights Act 1998 on English Tort and Contract Law, in: Friedmann and Barak-Erez (eds.), o.c., p. 137.

12 Art. 8 of the Constitution (on which Smits, o.c., p. 41); cf. Du Plessis and others v. De Klerk and another, [1996] 3 South African Law Reports 850.

13 It is part of a general right to 'personality': see for example Bundesverfassungsgericht 8, 274, NJW 1959, 475 (Preisgesetz); compare Shalev, o.c., p. 211 and Smits, o.c., p. 67 ff.

14 Court of Appeal Arnhem 25 October 1948, Nederlandse Jurisprudentie (NJ) 1949, 331 (Protestant Association v. Hoogers).

influence as tort law is to a large extent mandatory law, closely connected to the general interest.[15]

In addition to these more traditional cases, fundamental rights are now often used in tort cases to establish what is in conformity with human dignity and what is not. This is particularly apparent in cases where difficult moral issues are at stake, such as in wrongful birth cases. The German, English and Dutch highest courts have all – like their colleagues in other countries – referred to the general argument of human dignity in relation to a general personality right to decide whether the parents of a healthy child can claim damages from the person who is held responsible for the child being born (see below, section 3.3).[16] Also in answering the question whether immaterial damages should be allowed in cases not covered by statute, an argument based on the personal right of the victim can be brought forward.[17]

In property law the constitutionalisation process is usually associated with the protection offered by art. 1 of the first protocol to the ECHR.[18] It is rather seldom that in private relationships courts refer to the protection of property offered by their own national constitution.[19] This is quite logical as the private law rules on property usually offer much more elaborated norms than the constitutional protection of property vis-à-vis the national State.

15 *See* Christian Von Bar, The Common European Law of Torts, Vol. 1, Oxford 1998, p. 577 and Christian Von Bar, Der Einfluss des Verfassungsrechts auf die westeuropäischen Deliktsrechte, Rabels Zeitschrift 59 (1995), p. 207. On this: Smits, o.c., p. 120.

16 Cf. Walter van Gerven, Ius Commune Casebooks: Tort Law, Oxford 2000, p. 92 ff.

17 Cf. the German cases published in Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 26, 349 (Herrenreiter) and 35, 363 (Ginseng) and for Dutch law for example A.J. Verheij, Vergoeding van immateriële schade wegens aantasting in de persoon, Nijmegen 2002, p. 387 ff. and *Hoge Raad* 18 March 2005, Rechtspraak van de Week 2005, 42 (wrongful life).

18 Cf. T. Barkhuysen et al, De eigendomsbescherming van art. 1 van het Eerste Protocol bij het EVRM en het Nederlandse burgerlijk recht, Deventer 2005; Jan-Peter Loof (ed.), The right to property, Maastricht 2000.

19 Not every national constitution offers property protection. Art. 14 of the German *Grundgesetz* and art. 16 of the Belgian constitution do. However, art. 14 of the Dutch *Grondwet* only recognises the right implicitly; in France, the 1958 Constitution refers to the *Déclaration des Droits de l'Homme et du Citoyen* of 1789 with its property as 'droit inviolable et sacré'.

3 THE LIMITED VALUE OF FUNDAMENTAL RIGHTS IN DECIDING A CASE AMONG PRIVATE PARTIES

3.1 Introduction

If one looks for a commonality in the above examples, it is that fundamental rights are increasingly invoked by the courts to help decide a case. Even though there may be rules available that traditionally belong to the area of private law, courts are inclined to find arguments based on fundamental rights. The question to be answered is how to assess this development. How to look at the use of fundamental rights in relationships between private parties? Is the shift in reasoning to be assessed positively? There are three arguments that, taken together, should explain why one can be sceptical about this development.

3.2 First argument: subsidiarity in reasoning

The first argument why the use of fundamental rights can only have limited value lies in the idea of indirect effect itself. In section 2, it was explained that the doctrine of indirect effect means that fundamental rights can only be of importance *through* the rules of private law. This means in essence that the rules designed for relationships between private parties have priority over fundamental rights. Private law can be interpreted in the light of fundamental rights, but can in the end *not* be absorbed by these rights: the private law rules remain decisive for deciding the case. A different view would be counterproductive as the existing knowledge about the best way to solve an issue would be discarded. What would be the use of replacing the existing private law on protection of property by new rules based on the constitutional protection of this right? If there is a conflict between two neighbours, one can certainly solve this conflict by reference to their fundamental rights to property. But this would be a step back because one would then neglect the well-developed rules about nuisance and the rules on how neighbours should behave. In my view, the essence of the doctrine of indirect effect is that the existing private law is to a very large extent already an expression of the values behind fundamental rights and therefore one should apply private law and not fundamental rights. This means that reference to fundamental rights does not offer anything extra most of the time.

The *Bürgschaft*-case offers a nice illustration of this viewpoint. The German constitutional court held that the civil court should simply apply private law

taking into account the constitutional values *underlying* this private law.[20] The court had all the instruments it needed available, for example, in rules on good faith and good morals that are in themselves already applications of the values underlying the constitution. If the court would have done things properly, it would not have needed to turn to the Constitution at all. This is confirmed by the way similar cases to the *Bürgschaft*-case were decided in other countries. Dutch case law has shown that the bank should simply have informed the daughter about the risk of standing surety. In English law, the House of Lords also found it a pre-contractual obligation of the bank to inform the weaker party about the risks of signing the guarantee.[21]

This argument of subsidiarity makes clear that it is private law that already defines the values of a just society among private persons. Even in South Africa, where the new Constitution of 1996 is generally used as a 'development tool'[22] towards a more just society, there is fear that private law will in the end be absorbed by constitutional rights. Yet, the correct viewpoint is aptly summarised by Judge Kentridge of the Constitutional Court of South Africa, where he held: 'I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.'[23]

3.3 Second argument: fundamental rights do not offer enough guidance

The second argument for my scepticism on the use of fundamental rights in private law issues has to do with the diffuse character of such rights: they do not offer enough guidance to decide a case. We should keep in mind that if a private person invokes the protection of a fundamental right (say: privacy),

20 Thus loyal to its Lüth-decision (see section 2 above), in which fundamental rights were regarded as creating an 'objektive Wertordnung.'

21 Cf. *Hoge Raad* 1 June 1990, NJ 1991, 759 (Van Lanschot/Bink) and Barclays Bank plc v. O'Brien [1994] 1 Appeal Cases 180, on which Olha Cherednychenko, The Constitutionalisation of Contract Law: Something New Under the Sun?, in: Jan Smits and Sophie Stijns (eds.), Inhoud en werking van de overeenkomst naar Belgisch en Nederlands recht, Antwerpen 2005, p. 231 ff.

22 Cf. Hanri Mostert, Die invloed van die grondwetlike eiendomsklousule op die eiendomskonsep in die Suid-Afrikaanse reg, in: Jan Smits and Gerhard Lubbe (eds.), Remedies in Zuid-Afrika en Europa: bijdragen over privaatrecht en constitutioneel recht in Zuid-Afrika, Nederland en België, Antwerpen 2003, p. 119.

23 Constitutional Court, S. v. Mhlungu, [1995] 7 Butterworths Constitutional Law Reports 793, per J. Kentridge.

the other party can almost always also invoke a fundamental right (in this case freedom of speech). In the *Bürgschaft* decision, the daughter could invoke human dignity or her right to exercise her private autonomy, but as a defence the bank could invoke its autonomy or freedom of contract. It is difficult to solve such a collision of fundamental rights. The truth is that among private parties both of these rights are expressions of what we consider to be just norms of society: we value both autonomy *and* human dignity. But what should prevail among these private parties is often unclear and in any event something one cannot decide at the level of constitutional rights themselves. Balancing these rights in case of a conflict between two private parties is typically a private law exercise.[24]

The limited guidance provided by fundamental rights can be illustrated by reference to the wrongful birth cases.[25] Even though the highest courts of the United Kingdom, Germany and the Netherlands referred to the argument of human dignity in relation to the general personality right of the healthy child in deciding whether the parents had a claim for damages, it is far from the truth to say that this provided the court with a criterion to decide the case. Since 1980, the German *Bundesgerichtshof* has allowed such claims for damages for raising a child, without paying much attention to the human dignity argument.[26] The first senate of the *Bundesverfassungsgericht* is of the same opinion,[27] but the second senate of the same court has, in a case on abortion,[28] held that to regard the existence of a child as a ground for damages is contrary to human dignity and therefore a violation of art. 1 of the German constitution. This uncertainty about what human dignity requires – and whether human dignity should play a role at all – is also apparent from a comparison of the Dutch and English wrongful birth cases. While the Dutch *Hoge Raad* allowed the claim for damages on the basis of the argument that it is not the child itself that is being regarded as damages but only the costs for raising that child,[29] the House of Lords expressed the opposite view. In MacFarlane, Lord Steyn held:[30]

24 This argument is also brought forward by Bydlinski: F. Bydlinski, Kriterien und Sinn der Unterscheidung von Privatrecht und öffentlichem Recht, Archiv für die civilistische Praxis 194 (1994), p. 319 ff.

25 Also see section 2 above.

26 Bundesgerichtshof, NJW 1980, 1450.

27 Bundesverfassungsgericht 96, 375, NJW 1998, 519 (Sterilisation).

28 Bundesverfassungsgericht 88, 203, NJW 1993, 1751 (Schwangerschaftsabbruch II).

29 *Hoge Raad* 21 February 1997, NJ 1999, 145.

30 MacFarlane and Another v. Tayside Health Board, [1999] 4 All ER 963.

> 'Instinctively, the traveller on the Underground would consider that the law of torts has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing. (…) Relying on principles of distributive justice I am persuaded that our tort law does not permit parents of a healthy unwanted child to claim the cost of bringing up the child from a health authority or a doctor. (…)'

My point is that the notion of human dignity or of the child as a 'valuable and good thing' is inherently vague. It can play a role on the way towards a proper outcome of a case but it can never be a decisive argument that decides a case. The different views of the highest courts are evidence of this.

Now, one could of course argue that the example of wrongful birth is not a good one as 'human dignity' is probably the most vague fundamental right there is and that if other fundamental rights are concerned they do offer guidance. This view is wrong. This can be illustrated by reference to the conflict between the more specific fundamental rights of freedom of the press and privacy. In this respect, a similar case was decided in Germany and in the Netherlands. In both cases, there was a criminal that was convicted to a long sentence. At the time of the crime and the conviction, the case received a lot of publicity and pictures of the criminal were published in the national newspapers. A few years after the conviction, the question arose whether it would infringe upon the criminal's privacy to publish these pictures again. The Dutch *Hoge Raad* decided this conflict between privacy and freedom of the press by holding that privacy should prevail.[31] The German *Bundesverfassungsgericht* on the other hand held, making use of the same arguments but weighing these in a different way, that the freedom of the press was superior.[32] My point is that in weighing fundamental rights in private law cases, these rights do not offer the guidance the court needs.

31 *Hoge Raad* 21 January 1994, NJ 1994, 473 (Ferdi E./Spaarnestad).

32 Bundesverfassungsgericht 35, 202; also see Christian Von Bar, Der Einfluss des Verfassungsrechts auf die westeuropäischen Deliktsrechte, Rabels Zeitschrift 59 (1995), p. 227.

3.4 Third argument: private parties are not bound by fundamental rights

The two arguments discussed in the above are of a technical nature: they deal with the role of fundamental rights in *deciding* a case by a court. The third argument why the role of fundamental rights in private law is limited is an argument of substance. It denies, as a matter of principle, that private parties are bound by fundamental rights. Any other view would be a violation of the autonomy of the private person. In order to substantiate this view, it is useful to look first at the distinction between public and private law from an historical perspective and then to provide some examples.

The function of fundamental rights is closely connected to the separation of public and private law as has been developed over the last two centuries. Montesquieu was among the founders of this sharp distinction. He distinguished between a private sphere, governed by the *lois civiles*, and a public sphere governed by the *lois politiques*.[33] The subjects in the private sphere (private persons) have other interests than the State. A free sphere for private persons can emerge only by separating these two spheres. The consequence of this is that private persons do not need to pursue the public interest: they are autonomous and can make their own choices about what they consider to be just. It is private law that makes this possible. In the public sphere, these private persons can be forced to respect decisions they do not like, but this is justified as these decisions are democratically legitimised.

In this traditional view, fundamental rights have the function of guarding against the public from meddling with private affairs: the State cannot always intervene when public interest requires so. The fundamental rights protect this free sphere. In particular John Locke[34] elaborated on this idea of fundamental rights as inalienable rights vis-à-vis the State. It follows from this that it is in the nature of fundamental rights that they control State power. The enforcement of fundamental rights in private relationships can thus never find its justification in the same reason why fundamental rights can be enforced vis-à-vis the State. It also explains why private parties are never directly bound by fundamental rights. At most – this is the core of the doctrine of indirect effect – they are bound by the values *underlying* the fundamental rights that are also part of the

33 De l'Esprit des Lois (1748), in particular Book XXVI, Chapter XV and XVI (GF-Flammarion-edition, Paris 1979: part II, p. 193 ff.).

34 Two Treatises of Government (1690), in particular Book II (P. Laslett (ed.), revised edition, New York 1965).

private order. This is why private parties sometimes need to comply with the principle of equality or the protection of privacy as these are then *also* part of the values to be adhered to among individuals. A modern version of this essential difference between the public interest and private law is provided by Ernest J. Weinrib.[35] For Weinrib, it is essential to distinguish sharply between law and politics and therefore between corrective and distributive justice. Distributive justice is the home of the political, the constitution must be obeyed by the State. Corrective justice on the other hand does not deal with collective goals: there is no other purpose of private law than simply being private law.

The question is whether present case law fully appreciates this difference between private law and considerations of public interest. In the above, reference was made to cases in which someone gives up a fundamental right in return for a certain benefit. Thus, in the case of *Protestant Association v. Hoogers*,[36] a future tenant agreed not to give up his religion in return for a lease contract. The general view is that such contracts cannot be enforced: if the lessee does alter his religion, the lease contract remains valid. However, one can express doubts whether this is the proper view under all circumstances. The fundamental right to freedom of religion is a right that can be enforced against the State, but that in a private relationship will always have to be weighed against other fundamental rights such as freedom of contract. It seems rather paternalistic to say that fully capable private persons could never be allowed to contract their fundamental rights. If one is allowed to contract with a doctor about undergoing surgery, thus allowing a violation of one's bodily integrity, why would it not be possible to agree to give up expressing one's religion in public? This is not to say that contracting away fundamental rights is always possible. If it is clear that the person giving away his rights was in a dependent position when he did so, then of course he should be protected. If a female employee agrees with her employer that she will not get pregnant, this is a void contract: the economic interest of her employer is outweighed by her personality right.[37] But there are cases in which it is possible to 'contract away' one's fundamental rights. In private relationships, the values of a just society are decisive and these values may entail that in certain cases freedom of contract is valued more than other fundamental rights.

35 Ernest J. Weinrib, The Idea of Private Law, Cambridge Mass. 1995, p. 208 ff.
36 Section 2 above.
37 *See*, in more detail, Smits, o.c., p. 97 ff.

What is defended here for contract law is already accepted in inheritance law. The testator is in principle not bound by fundamental rights in deciding who is going to inherit. This is apparent in both English and German law where discriminatory conditions are allowed in wills. In the English case of Blathwayt v. Baron Cawley,[38] the last will of Baron Cawley stated that the beneficiary was not to become a Roman-Catholic if he wanted to inherit. This clause was regarded as valid. Lord Wilberforce held that 'discrimination is not the same thing as choice, it operates over a larger and less personal area, and (…) private selection (has not) yet become a matter of public policy'. In Germany, art. 14 of the constitution explicitly protects the freedom to dispose of one's assets.[39] In case of a conflict with the freedom of religion (art. 3) or the right to marry (art. 6), German courts almost invariably regard the right of the testator as prevalent. In a case where the condition for inheritance was that the son of the testator would separate from his disloyal wife, the clause was considered valid.[40] If a member of a noble family marries without having complied with the family rules (for example because he did not obtain the permission of his father or because his future wife is not *ebenbürtig*), this is also a reason to disallow a claim to the family fortune.[41] The freedom to pass-on property under a will includes the freedom to dispose differently of one's assets than what is in line with the general norms of society. Here, considerations of a public law nature are not apt.

4 Do fundamental rights give any added value to private law?

The scepticism expressed in the above about the use of fundamental rights in deciding cases among private persons should not lead us away from the functions that fundamental rights may still have. There are two functions that fundamental rights can fulfil in the private law debate.

The first function was already mentioned. Fundamental rights can be a source of inspiration for what is considered to be a just society, also among

38 [1975] 3 All England Law Reports 625.

39 *See* Andreas Heldrich and Gebhard M. Rehm, Importing Constitutional Values through Blanket Clauses, in: Friedmann and Barak-Erez (eds.), o.c., p. 117.

40 Bundesgerichtshof 28 January 1956, Zeitschrift für das gesamte Familienrecht 1956, p. 130.

41 Bundesgerichtshof 2 December 1998, NJW 1999, 566 ff (Hohenzollern) and Bundesverfassungsgericht 21 February 2000, 1937/97 (Leiningen). Also see Heldrich and Rehm, o.c., p. 122.

private persons. This is the essence of the doctrine of indirect effect: the values behind fundamental rights reflect our norms for society and are thus an important source of knowledge about how to assess a private law case. But again, it has to be emphasised that this does not mean one should decide a private law case on the basis of these rights. They are too vague for this purpose. Even if one would directly apply a fundamental right to a case, this leads as such to nothing as the other party can always invoke another fundamental right in his favour. It is best to leave the weighing of interests to deal with this collision to private law.

The second function of fundamental rights is that they can serve as a warning sign to the court that human dignity is at stake. A reference to a violation of a fundamental right by one person vis-à-vis another may make clear how serious the matter is. Thus, in the *Bürgschaft*-case, counsel was right to refer the court to the fact that the 'Existenzgrundlage' (the very reason for her existence) of the daughter was at stake if, given her personal situation, she had to stand surety for her father. To make clear that enforcing the contract would have left her with no more than 200 Euro per month to live on, while she did not know this was what she had agreed upon, made clear the conditions for a reasonable human existence were in danger. Thus, reference to fundamental rights can have an important rhetoric function: it does impress upon the court how serious the matter is. But, to end with, it should be repeated this does *not* mean a court should in the end base its decision on it. That is, for the three reasons set out in the above, a task for the rules designed to have effect among private parties: private law.

3

SOME THOUGHTS ON THE IMPACT OF FUNDAMENTAL RIGHTS ON DUTCH COMPANY LAW

Vino Timmerman[1]

1 FLEXIBILISATION AND PROCEDURALISATION OF DUTCH COMPANY LAW

Many Western European national legislators would like the law governing private companies ('b.v.') to be more liberal and less mandatory than the present law. Last year, an official report came out in the Netherlands advocating a more liberal and more flexible company law. The Dutch legislator is currently implementing some of the ideas suggested in the report. The Dutch Ministry of Justice has in the meantime issued two consultation papers containing a draft Bill that will make the Dutch law on private companies indeed less mandatory. One such document will follow with further proposals to render company law more flexible.

I anticipate that, should the Dutch legislature offer the shareholders less protection by making company law less mandatory, the shareholders (I am in particular thinking of oppressed shareholders, often minority shareholders) will more than ever invoke the fundamental rights of their position. By 'fundamental rights' I mean the special position that shareholders derive from the protection of ownership guaranteed by Article 1 of the First Protocol to the European Human Rights Convention.

On two occasions, the European Court of Human Rights ruled in 2002 that shares in a company fell under the protection of the fundamental right of

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ownership. According to the Court, shares are an economic position worthy of the protection offered by Article 1 First Protocol.[2] As a result, a decision taken by the company to weaken certain powers attached to shares or to weaken other rights, such as financial rights – which is a type of decision that in a flexible company-law regime could be taken by a majority shareholder – constitutes a deterioration of the title incorporated in the share in question with all its consequences. I would like to make some comments on this subject.
There is a second topic which I would like to discuss: Dutch company law is increasingly shaped by the courts in contentious proceedings. In an international context, this is referred to as the "proceduralisation of company law". This phenomenon is to be understood as the legislator, less and less, formulating strict norms that do not require interpretation in specific cases and instead imposing vague norms to be interpreted and applied by the courts in specific cases. This, therefore, needs to be done in court proceedings. The most applied example of such proceedings are in the Netherlands the so called inquiry proceedings.[3] In addition to these, there is, d&o liability, to be ultimately established by the courts. In inquiry proceedings, particularly on the request of one or more shareholders, it is determined whether a company is guilty of mismanagement. It must be clear that the policies pursued by the company's managing directors and supervisory board members need to be assessed in such proceedings. It is in these cases in particular that directors quite frequently invoke the principle of proper procedure laid down in Article 6 European Convention. If a court rules that a company is guilty of mismanagement, this often constitutes, at the same time, a negative opinion on the policies pursued by the directors. Developments in this type of proceedings are strongly influenced by invoking Article 6 ECHR by the directors and the members of the supervisory board. I will come to speak of this as well.

2 The pre-emption right and the protection of shares

Traditionally, the Dutch legislator tries to protect the shares in a company and the powers attached to these against dilution. This is exactly the aim of the protection laid down in Article 1 First Protocol. This traditional protection is offered by the statutory pre-emption right. It implies that, when the company

2 ECrt HR 25 July 2002, Jurisprudentie Onderneming en Recht 2003, 111 en 7 November 2002, Jurisprudentie Onderneming en Recht 2003, 112.

3 *See* par. 344-359 of Book 2 of the Dutch Civil Code.

issues new shares, a shareholder is entitled to buy shares proportionate to his shareholding. By exercising this pre-emption right, a shareholder may retain his relative interest in the capital and the voting rights. Under current Dutch law, this pre-emption right has been given a rather flexible form where private companies are concerned.[4] It is possible to override it in the articles of association. This means that in general shareholders may be denied a pre-emption right on the basis of, for instance, a clause to that effect in the articles of association. It is also conceivable, deviating from the current statutory regime, that a clause in the articles of association permits that an organ of the company decides on a case-by-case basis whether, in the event of an issue of new shares, pre-emption rights will not be operative. It seems, therefore, that this statutory pre-emption right is not a powerful right. This is not the case, however.

Two factors render the statutory pre-emption right rather stronger than it looks at first sight. In the first place, the Dutch Civil Code provides that the same rights are attached to all shares according to their par value.[5] However, it is possible to provide otherwise in the articles of association. This does not mean that there is no mandatory rule prescribing that if all shares are alike, that is to say, if in the articles of association no special class of shares has been created, all the shares carry the same rights. This was made clear in a judgment by the Netherlands Supreme Court.[6] The issue was whether it was allowed to allot some shareholders new shares and others not, where all the issued shares were of the same class. The Netherlands Supreme Court held, and correctly so in my view, that selective allotment of shares contravened the statutory equality rule, in spite of the fact that the organ of the company so authorised had decided to bypass the pre-emption right: those shareholders holding the same class of shares had to be treated in the same way by the company, irrespective of what had been decided within the company with regard to the applicability of the pre-emption right.

Furthermore, it is, of course, always possible for a shareholder who is of the opinion that the pre-emption right has been bypassed incorrectly, to request a court to nullify this decision on the grounds that it violates the principles of reasonableness and fairness. Especially in view of the principle of equal treatment, the company will have to put forward good arguments if it is to prevent nullification. As a result of such proceedings, the pre-emption right may have to be applied when shares are issued. This in turn will protect the property and

4 *See* par. 206a of Book 2 of the Dutch Civil Code.
5 *See* par. 201 of Book 2 of the Dutch Civil Code.
6 HR 31 December 1993, Nederlandse Jurisprudentie 1994, 436.

control interests attached to the shares. In my opinion, this entails that it is not very likely that, when issuing new shares, a Dutch private company will breach the right of ownership as protected by the ECHR. There is for the Dutch state or a Dutch private company little chance of getting wrapped on the knuckles by the ECHR, as was the case with the Ukrainian state and a Ukranian company in 2002, when a shareholder complained about the dilution of his shareholding.[7]

As a consequence of making the law on Dutch private companies more flexible, the rights attached to shares may undergo change and a company may tamper with existing rights. This is not a new phenomenon –it can also happen under current company law-, but it will probably happen on a larger scale in the future, as legislation will be less strict in this respect. And here lies indeed a difficult problem, in my opinion, in connection with Article 1 First Protocol. In order to put these problems in their proper perspective, I will first discuss two judgments that show that not all prejudice to shareholders' rights immediately cause problems in relation to the protection of the right of ownership of Article 1 of the Protocol.

3 Direct infringement of a share necessary

In 1995, the ECHR passed judgment in the *Agrotexim* case.[8] This case was about the expropriation, without compensation, by the State of Greece of certain goods owned by an English company, called Fix Brewery. The shareholders of the company, which had been wound up in the meantime, protested against this, alleging that expropriation of any of the company's property resulted in a decrease in the value of their shares in contravention of the protection guaranteed by Article 1 First Protocol. The Court did not share this view. It considered expropriation a measure that related to the possessions of the company and not to those of the individual shareholders. According to the Court, the company, not the shareholders, had to take action against the expropriation. This decision implies that an indirect –namely through the assets of the company- deterioration of the share does not constitute an infringement of the right of ownership within the meaning of Article 1 First Protocol. There has to be a direct infringement of the title incorporated in the share. The right of ownership protected by Article 1 First Protocol is not at issue, if the value of the shares decrease as a result of the deterioration of certain ownership rights

7 ECrt HR 25 July 2002, Jurisprudentie Onderneming en Recht 2003, 111
8 ECrt HR 24 October 1995, Nederlandse Jurisprudentie 1996, 375

of the company. Remarkable here is that the Court also expressly reasoned that the fact that the shareholders could neither seek an injunction nor bring an action for damages for acts detrimental to their company -which in consequence led to a decrease in the value of their shares- did not constitute a violation of Articles 6 and 13 ECHR. The Court set up a partition wall between the company that has to ensure that its possessions are not prejudiced and the shareholders whose only option is to ensure through internal measures that the company responds to such a prejudiced act.

4 THE SQUEEZE OUT OF A SHAREHOLDER UNDER THE FIRST PROTOCOL

If Article 1 First Protocol is to apply, the title attached to the shares must have been directly prejudiced. Before I proceed with my argument, I would like to point out a decision by the Netherlands Supreme Court on the compatibility of the Dutch statutory dispute settlement rules with Article 1 First Protocol. This judgment equally shows that not all deterioration of shares falls within the scope of Article 1. Under the Dutch statutory dispute settlement rules,[9] a shareholder may force another shareholder to transfer the latter's shares to him, if the former is able to demonstrate that the actions by a shareholder to be squeezed out are prejudiced against the interests of the company to the extent that in all reasonability continuation of his shareholding cannot be tolerated. The Netherlands Supreme Court decided that this far-reaching measure of squeezing out a shareholder is compatible with Article 1 First Protocol, because continuation of permanent situations of conflict between shareholders in joint-stock companies may be contrary to the general interest of a well-functioning business community to the extent that the legislator had good reasons to consider the right to squeeze out a shareholder to be in 'the general interest'.[10] According to the Netherlands Supreme Court, the legislature had acted within its 'margin of appreciation' by considering the solution of terminating the shareholders' rights of one or several shareholders as preferable to other solutions. It cannot be argued that the instrument of squeezing out chosen by the legislature does not reasonably relate to the objective of the dispute settlement rules, now that these rules bring about a final solution to an on-going situation of conflict by forcing the party which by its action has caused the conflict, to transfer its shares against a price to be fixed by independent experts, subject

9 *See* par. 335-343 of Book 2 of the Dutch Civil Code.
10 HR 8 December 1993, Nederlandse Jurisprudentie 1994, 273.

to assessment by an independent court. This is a correct decision in my view. The legislature could prescribe the forced abandonment of the shareholding under certain circumstances, because of the interest of the company and because of the scrutiny by an independent court, which also fixes the price of the shares to be transferred, upon appointing independent experts who will advise it on the exact price.

5 The protection of a shareholder who has legitimate reasons to exit the company

There is nonetheless a problem, in my view, where the court fixes the price of the shares that need to be transferred within the context of the dispute settlement rules. This problem is not related to the squeezing out of the shareholder, as discussed above. The dispute settlement rules also apply to the situation in which the shareholder wishes to exit, because, as the law provides, one or more shareholders prejudice his rights and interests to such an extent that continuation by him of his shareholding cannot be reasonably expected. He may desire to exit, if a certain shareholder by, for instance, undertaking competing activities prejudices the company's interest. As a result of the prejudice to the company's interest, the company's assets may have decreased in value, as a result of which the value of the shares of the exiting shareholder has decreased over time. It is precisely this decrease in value that may be the reason why a shareholder wishes to exit. The statutory rules governing dispute settlement imply that the court is to determine the value that the shares represent at a particular moment in time which is as close as possible to the moment at which the shares are transferred. This means that, under the current law, the loss of value in the shares, which was the reason for the shareholder to exit and which was due to the conduct of a specific co-shareholder, will not be compensated for. Under the present law, the exiting shareholder receives just a low price. Is that reasonable? My answer would be: 'no'.

Is the low price in conformity with the protection of the share offered by Article 1 First Protocol? It is a tricky question to answer. The decrease in the value of the shares has occurred as a result of the decrease in the value of the company's assets. What we have here is an indirect deterioration of the share. The judgment in *Agrotexim* referred to earlier seems to exclude protection under Article 1 First Protocol. However, should this also apply, if a shareholder is about to withdraw from the company? In that case, he will no longer be able to benefit from the action taken by the company against a co-shareholder who

has prejudiced the company's interest. This is precisely the point the European Human Rights Court heavily stressed in *Agrotexim*. If it has been established that a shareholder, as a result of his exit, can no longer benefit from an action taken by the company, should he not also be compensated for the amount of the decrease in the value of his shares? Is this not required under the right to protection of ownership laid down in Article 1 First Protocol? Is this also the case notwithstanding the judgment in *Agrotexim*? This decision was not about shareholders who wished to leave the company. I am inclined to answer these questions in the affirmative, especially so since, under the Dutch system, a shareholder wishing to exit mostly addresses his claim to the shareholder that has prejudiced his rights and interests.

6 Dutch plans for a more flexible company law and the first protocol

What sort of deterioration of the shareholding may occur once the law governing private companies is made more flexible? Under the current Dutch law, imposing additional obligations beyond the obligation to pay up a share requires the consent of the shareholder in question.[11] To a considerable extent, the voting right attached to shares is governed by mandatory law. It is proportionate to the number of shares one holds.[12] On the basis of the statutory equality principle referred to above, the same holds true for the right to dividends.

In an effort to make Dutch company law more flexible, these in itself simple mandatory premises will probably be abandoned. The intention is to afford companies the freedom to introduce additional obligations attached to the share by including these into the articles of association. The requirement that the individual shareholder must consent, will be abolished. This is not a problem, of course, if such an additional obligation is imposed at the time of establishment. Each shareholder knows in that case from the very beginning where he stands. A tricky problem arises, however, if the company introduces such an additional obligation in the course of the company's existence and not all shareholders are charmed by the idea. The protection of the obstructionist shareholder who does not give his consent to imposing the additional obligation, will probably consist in his having the possibility to request an independent court permission to exit the company and being entitled, providing the court

11 *See* par. 192 of Book 2 of the Dutch Civil Code.
12 *See* par. 228 of Book 2 of the Dutch Civil Code.

grants his exit request, to a price for his shares which is fixed by the court on the advice of independent experts. Can this, in view of Article 1 First Protocol, be done "just so"?

I referred to the voting right and the right to receive dividends. The consultation document shows that a change in the voting right may only be established through altering the articles of association and requires the approval of all shareholders. Thus, the violation of Article 1 First Protocol has been prevented. What is in store for the right to dividends has not been made very clear. In any case, it is intended to create the possibility, through amendment of the articles of association, of not paying dividend on certain shares. It is obvious: such a clause can only be introduced if the shareholder in question agrees to its introduction in order to prevent violation of Article 1 of the First Protocol.

Back to the difficult problems related to the imposition on shareholders of additional obligations. Examples of this are: rendering it more difficult to make shares transferable, and attaching an obligation to a share to buy certain goods or services from the company. Is this allowed under Article 1 First Protocol?

7 The case of additional obligations

An additional obligation imposed on shareholders under the Articles of Association may lead to a decrease in the value of the share. This type of decrease in value does not come about by way of the company's assets, but relates directly to the share. It is my view, therefore, that in imposing an additional obligation the title in the share would be prejudiced within the meaning of Article 1 First Protocol. As I see it, a considerable problem is that the rules thus far proposed include no right to exit for the shareholder who does not agree with the imposition of an additional obligation, but instead a possibility to exit has been created, in which the court decides whether the circumstances of the case justify such an exit. Is this sufficient? Perhaps it is. However, I can imagine that the European Court will rule that the imposition of an additional obligation through an alteration of the Articles of Association, leading to a considerable decrease in the value of the share involved, must have a right to exit as a necessary correlate.

8 THE PROCEDURALISATION OF DUTCH COMPANY LAW

Now some observations on the inquiry proceedings and the European Human Rights Convention. The Dutch inquiry procedure is quite intricate. A shareholder satisfying certain requirements, who doubts the wisdom of the policies pursued within his company, may request the Enterprise Section of the Amsterdam Court of Appeal to have an investigation conducted into company policies and the state of affairs within the company. If the Enterprise Section deems that there is good reason to do so, it orders an investigation by independent investigators. At the request of, among others, the original applicant, the Enterprise Section may rule that there is a case of mismanagement, on the basis of what has been uncovered in the investigation, and impose measures on the company to put a stop to the mismanagement. The inquiry procedure has given rise to a number of questions relating to the Convention. If the Enterprise Section establishes mismanagement in a particular case, a new legal situation is created: in terms of company law, a company that is guilty of mismanagement is a different company from the company that is not at fault. The new legal position of the company may form the basis for the Enterprise Section to impose certain measures on the company. Assuming mismanagement constitutes the determination of a civil right or obligation within the meaning of Article 6 ECHR. This means, in my view, that in the mismanagement stage the company can claim that proceedings be conducted according to the standards of Article 6 ECHR. This conclusion corresponds with a judgment by the ECHR of 2002, in which it decided that in the inquiry stage, in which the investigation is conducted, no rights or obligations within the meaning of Article 6 ECHR are determined.[13] From this it follows that Article 6 ECHR is not applicable to the first stage of the inquiry proceedings. This makes it clear that the company cannot claim observance of Article 6 ECHR in the investigation stage, whereas it may do so in the mismanagement stage.

Nonetheless, this is not the major bottleneck in the inquiry proceedings. The problem lies elsewhere. If the Enterprise Section holds that there is mismanagement, it often indicates in so doing that the directors have run the company badly and improperly. On occasion, the Enterprise Section expresses this to underpin its conclusion of mismanagement. The conduct of the directors is imputed to the company. As a consequence of this, the directors play an important part as the interested parties throughout the inquiry proceedings.

13 ECrt HR 19 March 2002, Jurisprudentie Onderneming en Recht 2002, 127.

Experience has taught us that in addition to the company they often contest the sense and need of an investigation at the stage in which it must be decided whether an investigation is to take place. If an investigation is conducted, they continually wish to be heard by the investigators. In the mismanagement stage, they attempt to demonstrate that the company was not mismanaged and that the investigation into mismanagement was defective. During the inquiry proceedings, the directors are this assertive, because they fear a mismanagement judgment passed on the company may cause third parties or the company itself to institute liability proceedings against them. In a recent judgment, the Netherlands Supreme Court has tried to somewhat reassure company directors: a director who is being sued in liability proceedings may demonstrate by all possible means that his directorship is in no way at fault. In other words, passing a mismanagement judgment determines the legal position of the company, but not that of the directors, however frequently they are referred to by the Enterprise Section in the mismanagement judgment.[14]

9 Conclusion

As a result of Dutch company law being made more flexible and more subject to procedure, it is my expectation that fundamental rights are becoming increasingly important in practising company law. A new subject for our company practitioners has been born.

14 ECrt HR 8 April 2005, Jurisprudentie Onderneming en Recht 2005, 119.

4

APPLICABILITY OF FUNDAMENTAL RIGHTS IN PRIVATE LAW: WHAT IS THE LEGISLATURE TO DO?

An Intermezzo from a Constitutional Point of View

Wim Voermans[1]

1 EMANCIPATION OF FUNDAMENTAL RIGHTS

In the middle of a scholarly debate on private law, a small and modest constitutional perspective on our current theme 'the constitutionalisation of private law' may be helpful. What are we talking about when we discuss constitutionalisation? Co-contributor Prof. Jan Smits, defines the scope of the subject in a more or less generally accepted way. According to him the constitutionalisation of private law entails the 'increasing influence of fundamental rights in relationships between private parties, fundamental rights being those rights that were originally developed to govern the relation between the State and its citizens.'[2] Influence or effect of fundamental rights in private law is a relatively new phenomenon in legal history, a development spurred by the flux of (treaty based) human rights and basic rights over the last decades. Still fundamental rights – to a certain extent – remain the proverbial 'odd balls' in private law. Some have argued that fundamental rights are exclusively written for the relations between a State (or its government) and its citizens. Others have pointed out that in fact fundamental rights are and always have been engrained in private law. Or, as Stathis Banakis puts it in his contribution: 'In its Roman law origins, private law already encompassed the protection of certain aspects of human

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2 *See* Jan Smits' contribution Private law and Fundamental Rights: a skeptical view, p. 10.

Tom Barkhuysen and Siewert Lindenbergh (Eds), *Constitutionalisation of Private Law.*
 pp. 33-41.

dignity'.[3] Indeed citizens' rights – a lot of them closely resembling modern day fundamental rights – were in Roman times protected by private law and only to be claimed in civil law proceedings.[4] Though historically fundamental rights may have evolved from private law, today they are a distinctly separate set of rights, set within a different legal hemisphere and with a different function. What then is the present day position of fundamental rights in private law?

2 Positions on the effect and bearing of fundamental rights in private law

In modern discussions on the effects or impact of fundamental rights (be it basic rights, human rights, or human rights related principles) on private law there are, – at least as far as I can oversee – basically two positions. Either fundamental rights appear as an *exogenous* factor to the system of private law or as an *endogenous* factor. Some have argued that fundamental rights are – strictly speaking – alien to private law, and that, although interests of private citizens disguised as fundamental rights can be relevant in private law cases, they do not bear upon the system of private law as such.[5] Within this line of thinking it is a question of appreciation whether one feels that judges are going too far in labeling private party interests as fundamental rights-derivatives, or, on the contrary, are not going far enough. In the opposite line of thinking, the *endogenous* position for short, fundamental rights are embedded in private law as

3 *See* Stathis Banakis, The Constitutionalisation of Private Law in the UK: Is there an Emperor inside the New Clothes? p. 73.

4 As is very vividly depicted in Tom Holland's novel *Rubicon*; the Decline and Fall of the Roman Republic. Abacus: London 2003. Lawyers like Cicero were especially well skilled in fingering citizen's dignities as the underlying principles of private law rights and demonstrating that in fact these dignities were the very foundations on which these rights were based. This constituted a sort of a 'Lüth-doctrine'- avant-la-lettre (see Gert Brüggemeier, Constitutionalisation of Private Law – the German Perspective -, p. 51. Romans were very susceptible to these notions of citizen's or human dignity as the core of their law and flocked to public show trials where these issues were at stake in civil law proceedings. They reveled in the public display of legal wit of great lawyer-orators. Much has changed since.

5 Dworkin said that they sometimes act as 'trumps' and by this means that they have a decisive impact on who wins in a case where the positive private law is clearly set. *See* J. Penner, Law and Adjucation: Dworkin's critique on positivism', in J. Penner, D. Schiff and R. Nobles (eds), *Jurisprudence and Legal Theory,* Butterworths, London 2002, 350. As cited by Stathis Banakis in his contribution, p. 73.

underlying or *integrated* principles. Confronted with a case in which one of the parties invokes or claims a fundamental right, a judge may mine relevant private law for the roots or (remnant) strands of fundamental rights or principles and use them – by way of evocation – when interpreting or applying these norms. One may debate the proper degree of mining and interpreting (e.g. judges should resist 'Hineininterpretierung') but these discussions present themselves as variations to a single theme. If we take a closer look at the discussion whether fundamental rights are an exogenous or an endogenous factor as regards private law it really boils down to the question whether judges need to perceive arguments as to the relevance of fundamental rights in cases under private law as questions of fact or questions of law.

3 Aim of this contribution

If we want to progress in this latter debate it may prove useful to see and assess how legislatures – for instance under Dutch constitutional doctrine – do or do not feel the urge to explicitly enshrine fundamental rights principles into private law. Activism on the part of the legislature may be a tell-tale sign contributing to the notion that fundamental rights in fact are exogenous to modern day private law. Strong reliance on case law and jurisprudence as the mechanism for fundamental rights protection in private party relations on the other hand may support the endogenous position. In this contribution I will try to give a very sketchy survey regarding this question. The analysis will be based on developments in recent Dutch constitutional history and doctrine.

4 A new Dutch constitutional doctrine on horizontal effect

During the discussions leading up to a substantial revision of the Dutch Constitution in 1983 the question whether fundamental rights affect private party relationships under Private Law was addressed by the government in the explanatory memorandum to the proposed revision. An elaborate and new doctrine on the effect of fundamental rights in different sorts of relations between government, its citizens and citizens *inter se* was formulated. To understand it some background information on the position and status of fundamental rights in the Dutch Constitution of 1983 is needed. Before the reform of 1983 funda-

mental rights were scattered all over the Dutch Constitution[6] in an unsystematic way. During the 1983 reform a new integrated catalogue of fundamental rights was put into place in the opening chapter of the Constitution, systematically joined together firmly based in a consistent system. To the catalogue of already existing rights new fundamental rights were added.[7] The catalogue consists of 24 fundamental rights, 23 of them brought together in Chapter 1 and one (article 114 prohibition of the death penalty) in Chapter VI.

According to the new doctrine the fundamental rights in the Dutch Constitution primarily apply to relations between the government and its citizens. But it does not stop there. The applicability of fundamental rights – in principle – also extends to:

- persons without legal capacity (e.g. minors, persons with a disabling mental disease, etc.);
- special status groups closely linked to government (civil servants, the military, and prisoners);
- government in private guise (i.e. government using private law to further public policies, c.a.);
- relations between private parties and organizations *inter se*.

Especially the last tenet is interesting concerning the present topic. This third party applicability of fundamental rights (what the Germans call *Drittwirkung*) may give horizontal effect to these rights. According to the explanatory memorandum accompanying the 1983 Constitution the responsibilities ensuing from this third party applicability have to be elaborated either by the legislature or the judiciary.[8]

5 Realizing horizontal effect

Who needs to do what in order to realize this horizontal effect of fundamental rights? The Dutch1983 Constitution envisions a sliding scale of third party applicability.

On the first level fundamental rights present themselves as instructions to the legislature to realize – through dedicated legislation – fundamental rights

6 Which dates back to 1814.

7 Among them the so-called 'social rights'.

8 *See* E.A. Alkema, Constitutional Law (Chapter 16), in: J. Chorus, P.-H. Gerver, E. Hondius, A. Koekkoek, (Eds) Introduction to Dutch Law, Kluwer Law International, The Hague/London/Boston, 1999, p. 296.

or principles in private party relationships. On the second level fundamental rights present themselves to the judiciary as guiding principles in interpreting and applying private law. This concept is commonly referred to as the concept of indirect applicability, or, derived from German legal doctrine, *mittelbare Drittwirkung*.[9] Since fundamental rights represent fundamental values underlying the legal system, it affects all areas of law. These values are also inherent to and present in private law as guiding principles and therefore the judiciary needs to take due notice of these underlying principles when interpreting private law. On the third level fundamental rights present themselves as such in private party relationships (unmittelbare Drittwirkung, or direct application). This for instance means that disregard for a fundamental right in private party relationships would of its own accord constitute tort, and that a judge, weighing the relevant interests is bound by the constitutional confines of limitation of the fundamental right involved. Direct effect entails that the fundamental right in question is applied in a horizontal relation (private party relationship) in more or less the same way as it would have been applied in a vertical relation (i.e. government-citizen). I will not ponder too long on direct applicability, but the issue as to whether or not Dutch judges have to and do give direct effect to fundamental rights in private party relationships is debated. In a recent publication Vos has demonstrated that not only are Dutch judges reluctant to give direct effect to fundamental rights in cases to be decided under private law, in case law that is believed to provide examples of direct applicability[10] fundamental rights are not truly applied directly; in most of these cases – Vos argues – the rights serve as important corroborating sources, points of reference or mere formal elements in the motivation of a judge.[11] The constitutional restraints set on limitation of fundamental rights resist a more active judicial approach concerning direct applicability, according to Vos.

9 Derived from the BundesverfassungsGericht judgement in the 'Lüth'-case. BverfGE 7, 198; *NJW* 1958, 257. *See* the contribution of Gert Bruggemeier, p. 51.

10 The judgement in de Goeree-case is often portrayed as an example of direct applicability of the freedom of religion (article 6 of the Dutch Constitution) in private party relationships. HR (Supreme Court) 2 February 1990 *NJ* 1991, 289, annotated by E.A. Alkema.

11 B.J. de Vos, 'Constitutionalisering: een overschat vraagstuk?, in: E.M. Hoogervorst e.a. (Eds), *Rechtseenheid en het vermogensrecht,* Kluwer; Deventer 2005, p. 287-304.

6 The legislature's commission to give effect to fundamental rights

How does the Dutch legislature follow up on its constitutional commission to realize horizontal effect of fundamental rights by way of enshrining them into dedicated private law legislation? Legislative activism, I hypothesized earlier on, may indicate concerns or lacking effectiveness of the mechanism of direct or indirect applicability. Generally speaking there are two types of legislative implementation of fundamental principles into Dutch private law: direct implementation and indirect implementation.

The General Equal Treatment Act,[12] for instance, provides an example of a direct implementation of the fundamental right on equal treatment of article 1 of the Dutch Constitution. In much the same way articles 2:26 through article 52 of the Dutch Civil Code implement elements of the right to free association of article 8 of the Constitution, and article 2 of the Law on Donor Data Artificial Insemination implements an element of the right to privacy under article 10 of the Constitution. Not only so-called 'classic' fundamental rights are implemented into private law, even elements of social rights, such as the freedom to choose an occupation (article 19 Constitution), are being progressively implemented in private law (article 7:653 of the Civil Code in this example).

Fundamental rights are also implemented into private law in more indirect ways, for instance by removing procedural obstacles for the right to a fair trial by an independent and impartial tribunal under article 6 of the European Convention on Human Rights, or by establishing a claimable right to relieve inequities (i.e. special consumer protection and consumer rights as an instance of contract law, special rights and protection for tenants, etc.) or the establishment of special remedies to relieve inequities (e.g. to allow group action). If we look at the last two decades we must concede that the Dutch legislature has been quite active in the field of fundamental rights implementation into private law. What, however, does that tell us?

For Vos it is but all too clear. Since direct applicability of fundamental rights in Dutch private law cases is – in his view – virtually impossible because of the frustrating restrictions set to it by the strict regime of limitations on fundamental rights[13] the only possible escape route for judges confronted with

12 Algemene wet gelijke behandeling.

13 To avoid implicit limitations on fundamental rights the 1983 Constitution introduced a strict (and restrictive) system of limitations of fundamental rights. Limitations are only allowed in so far as explicit constitutional provisions accompanying these fundamental

fundamental rights claims in private law cases is to rely on indirect applicability. In a system that adheres to the (theoretical) possibility of direct application this sometimes prompts judicial acrobatics, lots of fog and smoke screens. The general idea behind the 1983 Constitution and ensuing doctrine was, of course, to give maximum effect to fundamental rights not only in vertical but also in horizontal relations. By overdoing it with a paralyzing system of limitations the Constitution has more or less blocked the path for direct applicability of national fundamental rights, with contra-productive results: the constitutional system does not – as intended – give maximum effect to fundamental rights, but in effect sizes them down. One might argue that this puts the ball in the corner of the legislature. Commissioned by the 1983 Constitution to realize (the effect of) fundamental rights or principles in private party relationships this is the institution that holds the key to bridge the gap caused by the mishap of the virtual impossibility of direct application of fundamental rights.

7 THE PROPER BALANCE BETWEEN THE JUDICIARY AND THE LEGISLATURE

The Dutch example does reveal an interesting element in the discussion on fundamental rights in private law. If the legislature has the power and responsibility to integrate fundamental rights (or integrate fundamental right-principles) into private law, is the judiciary then (still) free to read fundamental rights into private law (or extract them from private law)? In a continental system, like the Dutch one, clearly a judge is not totally free to read fundamental rights in private law, if the legislature did not insert or integrate these rights in private law in the first place. There may be all kinds of arguments to allow judges some discretion (e.g. the fact that judges do have a role in elaborating the law, or the argument that some private law was enacted at a time when modern day fundamental rights notions did not exist as yet), but the fact remains that continental judges cannot freely read fundamental rights in private law norms where the legislature willfully or obviously did not integrate them in the norm when is was enacted. This makes a strong case for those who believe that fundamental rights are in fact exogenous to private law. If the legislature did not integrate fundamental rights into private law – or in a way that made fundamental rights private law – judges cannot treat fundamental

rights permit them. In most cases this means that some form of explicit and (sometimes) dedicated legislation is necessary before the exercise of a fundamental right be made subject to any form of legal restriction.

rights *as private law*. These rights would, according to this line of reasoning, only present themselves as questions of fact to a judge: fundamental rights support the claim that truly substantial interests are in play. They can be played as trumps in cases, as Dworkin put it. The Dutch case offers even more evidence in support of the exogenous position. The 1983 doctrine introduced a new system of limitations to fundamental rights. The bottom line of this system is that implicit limitations are no longer possible and that (the exercise of) fundamental rights can only be limited in the way foreseen by the Constitution itself. To this effect the Constitution put into place a number of provisions expressing the exclusive way in which a fundamental right may be limited. In most of the cases fundamental rights limitations are only allowed after legislative intervention. Clearly the 1983 Constitution did not give the power to limit (the exercise of) fundamental rights to the judiciary. In this respect the doctrine of the explanatory memorandum to the Constitution is flawed where it foresees the possibility of direct effect of fundamental rights. This is to some degree contradicting the tenet on limitations. The exogenous position then finds the Dutch case in its favor.

Does this mean that a judge in the Netherlands, confronted with a fundamental rights claim in a dispute under private law, is left empty handed? I would argue he is not, but that he has limited options. When a judge is confronted with a fundamental right that can – on warrant of a constitutional provision – only be limited by the legislature, and the legislature did not yet enact, I feel a judge should refrain from giving direct or indirect effect to this right in private law. Clearly the constitution intended to empower the legislature here and not the judiciary. One might argue that this leaves the judiciary at a loss here – a hostage to the legislature – since Dutch judges cannot warrant legislation.[14] On the other hand the primacy of the legislature entails that the legislature takes precedence over judge made law. In cases, however, where the Constitution did not commission the legislature to elaborate the legal regime for the exercise of the fundamental right (e.g. by way of hammering out the details of limitations, or integrating it into private law), the judge, to my mind, has more room to maneuver. Direct application of treaty-based human rights, for instance, is – I feel – less problematic. The same applies for the government using private law, in order to further public policies. Clearly government is neglecting its responsibilities if it uses private law or private law arrangements to undermine fundamental rights-obligations towards citizens/private parties. Government

14 *See* for instance (Supreme Court) HR 21 March 2003, *NJ* 2003, 691; *AB* 2004, 39 Waterpact-case.

is always a qualified private party, that cannot and may not elude its responsibilities in whatever corner of the law.

All this however does not alter the fact that the 'exogenou-ists' are on high and firm systematic and theoretical ground. They are right in thinking that fundamental rights are, in fact, alien to private law. That does not prevent fundamental rights-effects in private law cases, but it cannot be treated *as law* in deciding these cases. Indeed, in the long run, it is up to the legislature to really make fundamental rights endogenous to private law.

5

CONSTITUTIONALISATION OF PRIVATE LAW: THE EUROPEAN CONVENTION ON HUMAN RIGHTS PERSPECTIVE

Tom Barkhuysen & Michiel van Emmerik[1]

1 INTRODUCTION

Some say that human rights are not relevant to private law because these rights are effective only in the relationship between a state and its citizens. Others might say that human rights do not affect the right of private parties to enter into contracts or to draw up wills that are entirely arbitrary and contrary to human rights.

This article need not be written if these statements turn out to be correct. After all, we are supposed to discuss the role of the European Convention on Human Rights – a human rights convention to which all European states are parties – in the development termed the constitutionalisation of private law.

But are these statements correct, or should we conclude rather that human rights are increasingly relevant to private law, as others say? The answer to this question is not evident and it is interesting to examine the role played in private law by human rights.

The focus of this article therefore is the question whether and if so, and to what extent, human rights influence private law (not considering procedural law) and thus contribute to the constitutionalisation of this area of law. We confine ourselves to the European Convention on Human Rights (ECHR or

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Convention), because the rights contained therein apply to all European states. Moreover, we will only examine to what extent the Convention finds – directly or indirectly – application in private law, without considering whether the standards of the Convention are a material addition to the effective national private law standards. As practitioners of constitutional and administrative law as well as European law we are not equipped to answer this last question. This we would like to leave to civil law practitioners.

To come straight to the point: the conclusion of this article will be that the ECHR definitely plays a role in private law. Partly for that reason it can no longer be said that private individuals are entitled to arbitrariness. Although this role of the ECHR should not be overestimated, it should certainly not be underestimated.[2]

Below we will explain this statement step by step. For a good understanding we will first make some general comments about the extension of the human rights concept (paragraph 2). This will be followed by a general discussion of the different ways in which human rights affect private law relations (paragraph 3). More specifically, the ECHR will be discussed, in which context first the status of this Convention in the national legal system will be considered (paragraph 4), with a focus on the significance of the ECHR for private law (paragraphs 5 – 8). We will end with some concluding remarks (paragraph 9).

2 Extension of the human rights concept

First some general comments about the development of the human rights concept.

Anchored in national, European and international documents, human rights have gained importance over the past few decades. Human rights are invoked increasingly in legal practice and the interpretation of human rights standards become ever more refined. Parties hope to reinforce their position in legal proceedings by invoking human rights. They think – in Dworkin's words – of human rights as trumps.[3] Judges in turn are forced to pronounce a judgment

2 This article is partly based on our consultative report for the Dutch Civil Law Society, De eigendomsbescherming van artikel 1 van het Eerste Protocol bij het EVRM en het Nederlandse burgerlijk recht: het Straatsburgse perspectief, Deventer 2005, p. 1-101 (with many detailed references to case law and literature).

3 R. Dworkin, Rights as trumps, in: J. Waldron (ed.), Theories of rights, Oxford 1992 (1984), p. 153-168.

about the alleged violation of human rights. As a result more and more rights and interests acquire a human rights aspect.

Part of this development results in the application of human rights outside the context for which they were originally intended. Human rights are invoked not only in the – classic – relations between state and citizens but more and more in the relations between private individuals. Judges then appear prepared, whether or not because they feel compelled, to apply human rights, directly or indirectly, to the legal relations between citizens. In addition, through his laws the legislator, too, declares human right standards applicable to these legal relations. An example is anti-discrimination legislation.

This outline shows already in a general sense how human rights can contribute to the constitutionalisation of private law. By the way this development could also be qualified as the 'privatisation of human rights'.[4] It should be noted that the influence of EU law can also be regarded as a form of constitutionalisation of private law. This will not be discussed here.

3 Effect of human rights on private law: some basic models

It would be wise to consider first the effect of human rights on private law, in a general sense, in order to fully fathom the significance of the ECHR on private law –this article's central theme.

A lot has been written about the effect of human rights on private law and a full report would exceed the scope of this article. It is relevant, however, that several basic models for this effect can be distilled from the literature available.[5] These models are as follows:

4 See S.D. Lindenbergh, Constitutionalisering van contractenrecht, Over de werking van fundamentele rechten in contractuele verhoudingen, WPNR 2004, p. 977-986 (p. 977).

5 K. Rimanque (ed.), De toepasselijkheid van de grondrechten in de private verhoudingen, Antwerp 1982 (with several relevant contributions); A.K. Koekkoek, De betekenis van grondrechten voor het privaatrecht, WPNR 1985, p. 385-389 (volume 1), p. 405-412 (volume 2) and p. 425-434 (volume 3); L.F.M. Verhey, Horizontale werking van grondrechten, in het bijzonder van het recht op privacy (diss. Utrecht), Zwolle 1992, p. 135-145; J. Mestre, L'influence de la Convention européenne des droits de l'homme sur le droit français des obligations, ERPL 1994, p. 31-45; E.A. Alkema, De reikwijdte van fundamentele rechten – de nationale en internationale dimensies, consultative report NJV, Zwolle 1995, p. 22-32 and p. 115-122; D. Spielmann, L'effet potentiel de la Convention européenne des droits de l'homme entre personnes privées, Bruxelles 1995; A. Barak, Constitutional Human Rights and Private Law, in: D. Friedmann & D. Barak-Eretz (eds.), Human Rights in Private Law, Oxford/Portland 2001, p. 13-42; J.M. Smits,

- Direct effect of human rights on private – horizontal – relations, also called direct effect on third parties. This means that human rights affect private relations as directly applicable standards in exactly the same manner as classical vertical relations. For instance, the same conditions apply to the lawful restriction of human rights as arises from limitation clauses. The rationale behind this is primarily that public and private law cannot be strictly separated, that human rights standards are of such consequence that they should be binding on private actors as well, while it is at the same time conceivable that these latter actors do not always observe these standards.
- Indirect effect of human rights on private relations through the interpretation of applicable general open legal standards such as good faith, reasonableness and fairness and due care, for instance in the context of tort. Here the rationale is acceptance of the principle that human rights are intended only for the relationship between the state and citizens. As, however, these human rights also reflect certain values in society that might be relevant to private relations, this view implies a certain effect of the applicable standards.[6]
- Indirect effect through legislation that implements human rights that apply in private relations. These may be standards of a various nature that result in a specific application of human rights in private relations, such as the protection of ownership, privacy and the principle of equality.
- Indirect effect of human rights by reading these in, as it were, a generally applicable (personal) right, which affects overall law including private legal relations.[7]
- A certain effect of human rights through the involvement of the (state) court in disputes between private parties. The basic principle is that human rights as such are valid between private parties neither directly nor indirectly but that if these parties in a dispute turn to the court the latter will be bound

Constitutionalisering van het vermogensrecht, consultative report NVvR, Deventer 2003, p. 14-64 (with detailed references).

6 This idea that might imply that private law must be confronted constantly with civil rights can be found also, in: J.M. Polak, Dient de wet bijzondere regelen te bevatten ten aanzien van de civielrechtelijke werking van de grondrechten, en zo ja, welke? Consultative report NJV, Zwolle, 1969. Cf. H. Drion, Civielrechtelijke werking van de grondrechten, NJB 1969, p. 585-594.

7 Cf. R. Nehmelman, Het algemeen persoonlijkheidsrecht, Een rechtsvergelijkende studie naar het algemeen persoonlijkheidsrecht in Duitsland en Nederland (diss. Utrecht), Deventer 2002; Lindenbergh 2004 (WPNR), p. 979.

by human rights. This may have repercussions on the measures the court may take in the dispute.
- No effect at all of human rights on private relations. In this model the effect of human rights is reserved strictly for the relationship between the state and citizens and there is no question of any form of bearing on private legal relations.

Siewert Lindenbergh is right in pointing out that indirect effect does not necessarily result in fundamental rights having 'less bearing' than the direct effect also referred to above. He further sets out that different forms of application may well co-exist and that human rights – even where strictly speaking their application is not required – may contribute to the articulation of parties' interests and an adequate weighing of these interests.[8] In the above outline of the basic models it should be noted that the position of the state, as a participant in legal transactions under private law, is not clear. The different models are based on the assumption that the parties in private law are not governmental authorities. Still, they frequently are. The basic principle is that – at any rate in the Dutch legal system – the state in private law transactions is fully bound by public law standards and thus also – directly – by human rights.[9]

4 The status of the European Convention on Human Rights

Before the significance of the ECHR for private law is discussed, it would be wise to first sketch a more precise – but still general – image of the status of this Convention.

The ECHR has established a human rights system that is essential to all European countries. The member states of the Council of Europe – which includes all EU members – are under obligation to respect the rights contained in the Convention.[10] This goes for all government powers: judge, legislator and administration. They will be liable under international law if they fail to comply with this obligation to guarantee the result. Citizens who, after national rectifications have been exhausted, hold the view that in their case the ECHR has been violated can file a complaint against the state (thus not against

8 Lindenbergh 2004 (WPNR), p. 979-986.

9 With regard to civil rights see, for instance, the ruling of the Dutch Supreme Court of 26 April 1996, NJ 1996, 728, annot. EAA (Rasti Rostelli).

10 The Council of Europe consists of 46 member states (January 2006).

citizens!) with the European Court of Human Rights in Strasbourg. States are then required to comply with this Court's binding rulings, which may imply that the violation should be discontinued and/or that damages should be paid. National legal systems should follow the European Court of Human Right's case law. Today the EHRC the leading European human rights document that is relevant to all European countries. It is the intention that the EU, too, will eventually become a party and subject itself to the jurisdiction of the European Court of Human Rights, although this has become a little unsettled by the rejection of several EU member states to the European Constitution, which provided for this possibility. The EC Court of Justice, however, already follows the Court in Strasbourg as far as the interpretation and application of human rights are concerned.

5 The influence of the European Convention on Human Rights on private law

Now on to the specific influence that the ECHR has on private law. Research into the ECHR and the case law of the Strasbourg Court shows that this Convention gives rise to an obligatory and a non-obligatory influence on relations governed by private law. Before discussing this in more detail, we should like to emphasise that even in situations where the ECHR requires incorporation into national law, it does not prescribe how the rights contained in the Convention should be implemented. The sole purpose, after all, is to attain a result that conforms with the ECHR. That means that these rights may be applied directly, but that indirect application through the interpretation of open standards like good faith and reasonableness and fairness or the interpretation of generally applicable rights and principles could be sufficient as well.

Below, two situations will be considered in which the ECHR has obligatory influence on private law, i.e. if the state uses private law, and in which positive obligations arise from the ECHR. This will be followed by a consideration of the non-obligatory application of the Convention.

5.1 The State Using Private Law

It follows from the ECHR and the case law of the Strasbourg Court first of all that the state (whether legislator, judge or administration), under public or private law, is bound, in its actions, by the standards set by the ECHR. In this

context it should be noted that the state regularly uses private law. This means, for instance, that if the state sells land, it may not act contrary to the ECHR. As a result, the standards contained in the Convention are applied in – vertical – private law relations between the government and citizens.

The ruling in Stretch v. United Kingdom, in which the Court concluded that the property right of Article 1 of the First Protocol to the ECHR (FP) had been violated, is extremely interesting to civil law practitioners in this context.[11] In this case, the Court brings within the scope of protection of property rights a private individual's legitimate expectation based on an option in a building lease with a local authority to renew the lease for a specific period. The Court ruled that in this concrete case it did not matter that in the meantime it had been established that the local authority did not have the statutory power to include such an option in the lease. The applicant, however, was entitled to expect that the option would be honoured, for he had made the necessary investments on this basis. Moreover, neither public interest nor the interests of third parties oppose such renewal *contra legem*. The Court therefore assumed a violation of Article 1 of the First Protocol.

5.2 Positive Obligations and Effective National Legal Protection

In addition, within private law the rights contained in the ECHR may have a certain effect on – horizontal – legal relations between citizens through the concept developed by case law of positive obligations and the requirement based on Article 13 of the Convention of effective national legal protection. These positive obligations are assumed with respect to several rights contained in the Convention and imply that the government has the obligation not only to refrain from violating such rights, but also has the obligation to protect citizens against infringements of these rights by other citizens. Again these positive obligations apply to legislator, administration and judiciary. In the Netherlands, for example, the right to family life contained in Article 8 of the Convention, in connection with the prohibition of discrimination contained in Article 14, has had a major impact on the updating of Dutch laws on persons and family law. For instance, the right of unmarried parents to joint parental authority has been recognised. The judge has the responsibility to offer legal protection pursuant to Article

11 European Court of Human Rights, 24 June 2003.

13 of the ECHR when legislator and administration fail to adequately protect the human right in question in legal relations between citizens.

An example of a case showing that positive obligations under the Convention even allow the assumption of a restriction of property rights is Appleby v. the United Kingdom.[12] This case shows that the ECHR does not exclude that the freedom of expression contained in Article 10 of the Convention gives rise to a positive obligation for the state to ensure that an owner should tolerate certain statements on his private property. This case concerned the private owner of a shopping mall who did not give permission to hand out flyers with a public message. In this case the Court did not assume a violation of Article 10 of the Convention as the applicants had had sufficient alternative means of communicating their views in publicly owned property.

Further to these positive obligations national courts may be required even to interpret private law rights and obligations between private individuals in conformity with the Convention. This, in turn, could have a reflex effect on agreements made by private individuals among themselves in the sense that they only make agreements that are enforceable in a court of law.

This is also illustrated by a case against Andorra (Pla and Puncernau) in which the majority of the European Court of Human Rights assumed a violation of Article 8 (respect for family life) in conjunction with Article 14 (prohibition of discrimination) of the ECHR. In the view of the Court the national court had wrongly interpreted a will that children 'born out of wedlock' and thus adopted children were deprived from their inheritance rights.[13] A minority within the European Court, including the English judge Bratza, opposed this view and argued that private individuals, unlike the government, do have some latitude to discriminate in the context of legal acts under private law. It was this minority's view that the judge should cooperate in enforcing this, unless the most fundamental core of the Convention would be at risk. At this point we will have to wait and see whether the ruling of the Andorran court will be reconsidered on appeal by the Grand Chamber of the European Court. The majority's opinion, however, appears to fit in with a general line of judgments that have already been made final.

The viewpoint of the majority of the European Court in the Andorran case seems to allow the conclusion that the national judge is bound by similar obligations under the ECHR in disputes about the execution of multilateral legal acts such as an agreement. The argument that parties have thus waived their

12 European Court of Human Rights, 6 May 2003.
13 European Court of Human Rights, 13 July 2004.

rights does not appear to exclude such an evaluation in advance. This will be discussed below in more detail.

If no positive obligations are at stake and private parties turn to the courts, for instance to enforce an agreement between them, these courts do not seem required to test this agreement for conformity with the ECHR, although the courts may, at their own discretion, use the Convention as an additional source of law. Case law, however, is not yet entirely clear on this point. Be this as it may, the involvement of a court in private disputes at any rate creates the possibility of filing a complaint in Strasbourg, which would bring such a dispute within the scope of the ECHR.

5.3 Non-Obligatory Execution

Even where execution is not strictly legally required, judge, legislator and administration may have themselves led, or inspired by the Convention when setting standards in private law. The rights laid down in the ECHR after all reflect certain values in society that can and perhaps should be relevant in a general sense. In that context it might be significant that in some cases the question presents itself whether a strict distinction between government parties and private parties is justified with regard to the binding force of the rights contained in the Convention or similar standards. Why for instance should the government, when issuing land, not be allowed to discriminate, when major private property developers are allowed to do so?

6 What room does the framework set by the European Convention on Human Rights leave private individuals to violate human rights?

To get an even better impression of the effect of ECHR standards on private – horizontal – relations, it is important to dwell on the question whether and if so, to what extent, private individuals may violate these standards when entering into relations under private law.

Jan Smits believes that citizens in private law relations are ‘entitled to arbitrariness’: in principle they may make contracts and last wills as they deem fit and in doing so, for instance, violate the prohibition of discrimination. Jan Smits rightly qualifies his argument by pointing to the incorporation of human rights in, for instance, the Dutch Civil Code (such as the principle of equality

in Article 7:646), which of course should be obeyed by private parties as well.[14] Still, Jan Smits skirts the concept of positive obligations set out above that may require the national courts to let the ECHR have bearing on horizontal relations, for instance in the interpretation of agreements and testamentary dispositions.

To put it in a more particular way, with regard to the latter point, reference is made to the Andorran inheritance case Pla & Puncernau, which is illustrative and in which the European Court of Human Rights put forth some noteworthy considerations on this topic. First the case. In 1939 Carolina Pujol Oller drew up a will stipulating that her son and heir, Fransesc-Xavier Pla Pujol, was to pass on his inheritance to a son or grandson from a legitimate and canonical marriage. In the event of failure to satisfy these conditions, the estate was to pass to the testatrix's other children and grandchildren, if they were born from such a marriage. Her son married Roser Puncernau Pedro in a legitimate and canonical marriage. The couple adopted two children. In 1995 Fransesc-Xavier bequeathed the property he had inherited from his mother in 1949 to his wife and upon her death to his adopted son Antoni. When Fransesc-Xavier Pla Pujol died in 1996, two great grandchildren of Caroline Pujol Oller initiated civil proceedings before the *Tribunal des Battles.* They argued that the adopted grandson could not inherit under the will made by the testatrix in 1939. The *Tribunal des Battles* dismissed their claim, which was honored on appeal. The judges on appeal interpreted the testatrix's will in the light of the legal traditions and the society in Andorra in 1939. According to these judges adoption was a rare phenomenon in Andorran society at the time when the will was drawn up (1939) and at the time of devolution of the estate (1949). The children who had been adopted at that time were seen outside the family context, both legally and socially, and were thus considered illegitimate. Appeal (*empara*) against this decision was dismissed by the Andorran Constitutional Court. The adopted son and his mother then filed a complaint with the European Court of Human Rights, invoking Article 8 (right to respect for family life) in conjunction with Article 14 (prohibition of discrimination) of the ECHR. In their opinion the Andorran court was wrong to interpret the will by making a distinction between adopted children and other (legitimate) children, contrary to the articles referred to above. The European Court of Human Rights concluded – although not unanimously – that the interpretation and application by the Andorran court of the will constituted a *forbidden* discrimination of an adopted child contrary

14 Smits 2003, p. 21-23.

to Articles 8 and 14 of the ECHR. According to the Court the will does not contain any indication that the testatrix intended excluding adopted grandsons from her estate. The Court reasoned that, in theory, it does not concern itself with settling disputes between private individuals. However, the European Court of Human Rights is entrusted with the European enforcement of human rights and cannot take a passive stance when the interpretation by a national court of a legal act, like a clause in a will, an agreement under private law, a public document, a statutory provision or an administrative practice appears unreasonable or arbitrary or, as in this case, clearly in breach of the prohibition of discrimination contained in Article 14 of the ECHR and in a broader sense of the principles on which the Convention is based. The Court reiterated that the ECHR is a dynamic instrument that carries with it positive obligations. The Court called the Convention 'a living instrument' to be interpreted in the light of present-day conditions and mentioned that great importance was currently attached in the member states of the Council of Europe to the question of equality between children born in and out of wedlock regarding their human rights. In view of these developments the Andorran judges, in interpreting the will, should consider not only the social conditions that existed when the will was made and when the estate passed to the heirs in 1939 and 1949 respectively. With five votes against two the Court decided that Article 14 in conjunction with Article 8 of the ECHR had been breached. In a dissenting opinion Judge Bratza emphasized that private individuals – unlike the government – are free to discriminate, for instance when disposing of their property (in a will). He agreed with Judge Garlicki, another dissenter, that this freedom of the testator is precisely protected by Article 8 of the ECHR (it is likely that they refer to the right to private life as contained in that Article) and Article 1 of the First Protocol (right to peaceful enjoyment of one's possessions). Judge Bratza held that pursuant to these articles the state should implement, in principle, through its judicial bodies such a discriminatory provision in private relations. If the national court effects such a discriminatory obligation, it does not act in breach of the ECHR. In Judge Bratza´s view this is different only under exceptional circumstances in which the implementation of the discriminatory provision would be in breach of the Convention's fundamental ideals or if its object were to 'destroy' the rights and freedoms laid down in the Convention, which does not apply here.

As mentioned earlier, the ruling of the Court's Chamber is not yet final and the case may be reviewed by the Grand Chamber in the context of an internal appeal. It is hard to say what the outcome will be. If the Grand Chamber, however, were to adopt the Chamber's view that a positive obligation of

the state is at stake with regard to the prohibition of discrimination and the right to respect for family life – which could be assumed given earlier case law – adoption of the Chamber's opinion seems obvious. The dissenters are wrong in assuming that positive obligations should be fulfilled by the legislator and administration only and that they would not lie with the judge as well – in full and therefore not only where very serious breaches of the most important fundamental rights are concerned – when confronted with agreements between private individuals or wills. Article 13 of the ECHR also speaks against the dissenters' opinion that requires that a legal remedy be provided precisely at a national level if the legislator or administration fails on this point to prevent this type of cases from being submitted to Strasbourg directly. It should be emphasized, however, that the dissenters do not wish either to grant unlimited options to private individuals to violate rights contained in the Convention and in extreme cases even deem intervention by the European Court of Human Rights desirable.

Jan Smits is right that from the viewpoint of the ECHR private individuals are strictly speaking confronted with standards arising from positive obligations only if the legislator, in the implementation of the Convention, sets rules that apply to private relations or if a dispute arises between private individuals about an agreement or will and they must submit that dispute to the court. It is also conceivable that the administration becomes aware of private arrangements that are contrary to the standards contained in the ECHR from which positive obligations arise and *ex officio* takes action to protect the rights concerned. The result is, however, that the relevant standards in a sense cast their shadow on private relations and thus may actually affect these relations even though no government body is involved yet. In view of disputes that may arise, it is very conceivable that private individuals only lay down arrangements that are legally enforceable. In this context Spielmann has used the phrase 'secondary positive obligations'.[15]

7 Waiver of rights in private relations?

The above consideration should include the question whether private individuals can waive rights arising from the standards contained in the ECHR and what the relevance of such a waiver would be to the state's positive obligations

15 Spielmann 1995, p. 88.

related to these standards. It should be noted that Strasbourg case law shows that, in principle, the waiver of rights under the Convention is allowed in relations with governmental authorities, but that a strict test applies regarding the voluntariness and unambiguousness of such a waiver.[16] The freedom to set restrictions on human rights is, in principle, greater in relations between private parties. However, limitations may be imposed by the concept of positive obligations referred to earlier, as has become apparent in the Andorran inheritance case mentioned before. Although this case concerned a unilateral legal act under private law (i.e. a will), the European Court of Human Rights explicitly mentioned that in the context of its responsibility to the European enforcement of human rights it is also entrusted with testing the national courts' interpretations of various legal acts, which could be understood to include multilateral acts such as an agreement under private law. Where positive obligations arising from the ECHR are concerned (such as the prohibition of discrimination in connection with the right to respect for family life), the European Court therefore deems itself competent to call the state in question to order, even if it concerns arrangements that were made originally in a relationship governed solely by private law. Of course the opinion of the European Court of Human Rights is relevant only if the matter concerns, in any way whatsoever, a government body at a national level. Usually this will be the judge who becomes involved in a dispute between private individuals in which, for instance, one of the contractual parties doubts the voluntariness of the waiver of his human rights or reconsiders this waiver. In evaluating the voluntariness of this waiver the judge will probably consider to what extent a very fundamental right is at issue that could be regarded as a vital principle on which the Convention is based, such as the prohibition of discrimination between legitimate and illegitimate children that was at issue in the Andorran case. If such a right is at issue, it would be natural for the European Court to have a tendency to break the arrangements originally made between private individuals in favor of the fundamental right concerned. Positive obligations are usually at stake with such fundamental rights, although Strasbourg case law has not yet taken definite shape on this point. In that respect the positive obligations could indirectly affect private relations and thus seem to show some similarity to the standard contained in the Dutch Civil Code, i.e. a legal act that by its contents and purport is contrary to good morals or public order is null and void (Article

16 See, for instance, E.A. Alkema, Contractvrijheid als grondrecht; de vrijheid om over grond- en mensenrechten te contracteren of er afstand van te doen, in: T. Hartlief & C.J.J.M. Stolker (ed.), Contractvrijheid, Deventer 1999, p. 33-46.

3:40). In this context there is a parallel with the lease cases from the forties and fifties of the 20th century discussed in detail by Jan Smits. The arrangement that the lease agreement could be dissolved if the leaseholder changed religion was held to be null and void because of the freedom of religion and thus was contrary to good morals or public order.[17]

8 Article 1 of the First Protocol as defence shield: the constitutionalisation paradox

To complete the picture the fact should be mentioned that the property right of Article 1 of the First Protocol, in particular, also protects contractual and testamentary freedom. Thus it can be regarded as a shield against the application of public law standards in legal relations between private individuals and thus against the constitutionalisation of private law.

This could be characterised as the 'constitutionalisation paradox'. On the one hand, the standards of the ECHR and Article 1 of the First Protocol may be applied in private legal relations through the concept of positive obligations (like in the Andorran inheritance case). On the other hand, such an application can be prevented by reliance, in particular, on Article 1 of the First Protocol.

9 Conclusion

The conclusion is that the ECHR definitely plays a role in private law, as the state is required to comply with this Convention in private law relations. At the same time the state may be required to safeguard rights contained in the Convention in relations between citizens. This, in a sense, implies supervision from Strasbourg on private law, also when legal relations between citizens are concerned. This means that the case law of the European Court of Human Rights should also be closely monitored by civil law practitioners, because of its potential implications for private law.

The ECHR thus finds application in private law and contributes to its constitutionalisation. The Convention after all defines certain boundaries within which private law can develop. The boundaries are there but it is up to civil law practitioners to decide for each country whether or not these boundaries

17 Smits 2003, p. 34-35.

are exceeded and what the ECHR means to national private law. This area comprises many important research questions. Let us hope that this article contributes to crucial further research into this area.

6

CONSTITUTIONALISATION OF PRIVATE LAW – THE GERMAN PERSPECTIVE

Gert Brüggemeier[1]

1 INTRODUCTION

The notion 'horizontal effect' deals with the question whether and how far human rights also have legal effect on private relations between citizens. In the U.S. aspects of this problem have been discussed under the 'state action doctrine' since at least 1876.[2] The point of departure there is the *due process clause* of the Fifth Amendment of the U.S. Constitution (1787), which operates in conjunction with the XIVth Amendment (1868) and thereby is also binding upon the many states. In Germany this problem has only arisen since the coming into force of the West German Constitution (*Grundgesetz*) in 1949. However, the preconditions for the controversies on the horizontal effects of fundamental rights in Germany developed much earlier, even as far back as the late 19th and certainly by the first half of the 20th century. A brief reference to that seems indispensable in order to understand the specific constraints of the German discussion and to rediscover the underlying structure of the problem.

1 Professor at the Faculty of Law, University of Bremen.

2 Uni*ted States v. Cruikshank*, 92 U.S. 542 (1876). Cf. thereto the German language monograph of Giegerich, *Privatwirkung der Grundrechte in den USA*, 1992.

Tom Barkhuysen and Siewert Lindenbergh (Eds), *Constitutionalisation of Private Law.*

1.1 Historical background

Germany never knew a revolutionary declaration of human rights such as the French *Déclaration des droits de l'homme et du citoyen* of 1789[3] or the U.S. Bill of Rights of 1791.[4] Attempts to establish a democratic constitution with human rights was undertaken from the mid-19th century (the '*Paulskirchen* Constitution'), but with the failure of the Revolution of 1848 these attempts remained unfulfilled.[5] The second limitation to the enactment of a constitution was the absence of a German nation state. Germany in the 19th century was a crazy patchwork quilt of diverse Kingdoms and principalities, which were linked in the German Confederation (*Deutscher Bund*: 1815-1866), and this was inaugurated at the Congress of Vienna as the successor to the Holy Roman Empire (800-1806). The German Confederation was, to a large extent, incapable of action internationally because it was blocked by its two largest member states – Prussia and Austria-Hungary. The unification of (lesser) Germany only occurred much later under the leadership of Prussia after two wars with Austria (1866) and France (1871).[6] The Constitution enacted in Versailles in 1871 was simply an organisational statute for a federation of principalities (and three city-States), named the 'German Empire'. The then Prussian King stood at the head of the empire as emperor. This imperial constitution of 1871 contained no fundamental rights.

The constitutional political process in 19th century Germany was accompanied however by a sub-cutaneous constitutionalisation of private law. The natural law theories of the 17th and 18th centuries influenced both the Prussian and Austrian codification of 1794[7] and 1811,[8] but lost influence from then on in the remainder of Germany. The dominant historical school (*F.C. von Savigny*) broke from this tradition and instead took up the fundamental concepts of the Kantian legal philosophy, that all law arises out of and seeks to fulfil the inherent moral freedom of human beings. Anchoring human freedom in private law did not however lead to the recognition of civil personality rights. Instead, in connection with the wave of market liberalism, it led to grounding

3 It is still law in force in France; cf. the preamble of the Constitution of the Ve République of 1958.
4 It is here a matter of the famous first 10 Amendments to the U.S. Constitution of 1787.
5 Cf. Stolleis, Geschichte des öffentlichen Rechts in Deutschland, vol. 2, 1992, p. 371 et seq.; Kröger, Grundrechtsentwicklung in Deutschland, 1998.
6 Verfassung des Deutschen Reichs of 16.4.1871 (RGBl. 1871, p. 64).
7 Allgemeines Landrecht für die Preußischen Staaten (ALR).
8 Allgemeines Bürgerliches Gesetzbuch (ABGB).

private law in the concept of private autonomy and subjective alienable economic rights (*Vermögensrechte*). These subjective private rights, especially the corporeal property right, were understood as the sphere of sovereign individual will. In this manner the German Civil Code (*BGB*) of 1896 became, to a certain extent, a 'substitute civil constitution' of the German Empire: 'a liberal private law in a non-liberal state'.[9] This tendency was reinforced by the fact that the supposedly closed system of the pandecticist civil law and its scientific method led, under conditions of a separation of private law (*market*) and public law (*state*), to the domination and independence of private law. Thus, the starting points for developments in the 20th century were laid out.

The first democratic constitution of Germany, the Weimar constitution of 1919,[10] had no influence on the development of private law. 'Constitutional law changes, but private law stays the same'.[11] That proverbial saying proved all too quickly to be a perfectly accurate description of the Weimar Republic. The Weimar constitution had, unlike the Imperial constitution of 1871, a section on fundamental rights (Art. 109 et seq.). However, the rights therein were seen as purely declaratory. No legal obligation was given to them. However, from 1925, the *Reichsgericht* did begin to grant limited judicial review against the constitution.[12] This was confined to the ordinary acts of Parliament and did not concern Acts amending the constitution. Most importantly however, no test whatsoever could be made of a legislative act to check whether it was consistent with general constitutional principles, including fundamental rights.[13]

The end of the Weimar republic arrived on January 30, 1933.[14] In the same year the fundamental rights of the Weimar constitution were formally annulled by a regulation of the *Reich*'s President on the 'Protection of People and State'.[15] The ideology of National Socialism quietly and inexorably infiltrated private law. The closed system and autonomous rationality of private law proved to be a myth. The demystification of this myth had already been a task of the

9 K. Hesse, Verfassungsrecht und Privatrecht, 1988, p. 10.

10 RGBl. 1919, p. 1383.

11 Modification of the well known phrase of the administrative lawyer O. Mayer (1924): 'Verfassungsrecht vergeht; Verwaltungsrecht besteht.' ('Constitutional law passes, but administrative law remains.')

12 RGZ 111, 322; cf. thereto Festgabe 50 jähriges Bestehen des Reichsgerichts, vol.1, p. 171 et seq.

13 Cf. thereto Carl Schmitt, Der Hüter der Verfassung, 1931, p. 12 et seq.

14 Cf. as a stock-taking in English: Caldwell & Scheuerman (eds), From Liberal Democracy to Facism: Legal and Political Thought in the Weimar Republic, 2000.

15 The so-called Reichstag's fire decree of 28.2.1933 (RGBl. 1933 I, p. 83).

Free Law Movement at the turn of the century.[16] This process of alienation of the civil law after 1933 has often been described in legal literature.[17]

1.2 The new beginning of 1949

The new democratic beginning of 1949 was every bit as clear, decisive and dramatic as the end of the so-called Third *Reich*. The West-German constitution, the '*Grundgesetz* for the Federal Republic of Germany' of May 23, 1949,[18] begins with a catalogue of binding fundamental rights (Arts. 1 to 19 *GG*). None of these fundamental rights may be derogated from in their essential content (Art. 19 (2) *GG*). The recognition of the inviolable dignity of a human being stands right at the beginning: 'The duty of all state power is to regard and protect' the dignity of a person (Art. 1 (1) (ii) *GG*). Art. 1 (3) *GG* clearly states that 'the following fundamental rights are directly binding law for legislation, for state authorities and for the judiciary.'

At the same time, a federal constitutional court was inaugurated (Arts. 93, 94 *GG*), which, via judicial review, tested the constitutionality of federal statutes. The possibility was given to citizens to bring individual complaints for unconstitutionality when their fundamental rights were violated through 'public power' ('*öffentliche Gewalt*': Art. 93 (1) N° 4a *GG*). 'Public power' means acts of the legislature, the executive and judiciary. Thus began one of the most remarkable chapters of recent German legal history. The German Federal Constitutional Court has become one of the most important and best-regarded actors in German democratic society. Oriented on its origins of American constitutionalism, it has in the meantime itself become a model of functioning constitutional adjudication and an indispensable element of the constitutional state. Thus, from both substantive law and from institutions and processes, a fundamentally altered starting-point for a new definition of the relation between fundamental rights and private law has come into force. The tendencies in the post-war era were not however in all instances unitary. The constitution established a clear normative frame. In parallel thereto, many references to traditional

16 Herget & Wallace, The German Free Law Movement as the Source of American Realism, 73 Va. L. Rev. 399 (1987); Fikentscher, *Methoden des Rechts*, vol. 3, 1976, p. 365 et seq. with further references.

17 Cf., inter alia, Rüthers, Die unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus, 5th edn. 1997.

18 BGBl. 1949, p. 1.

natural law were also to be found.[19] In civil law, on the other hand, there were strong currents trying to turn back to the supposedly intact world of the pre-democratic pandecticist private law and the 'legal method' of the 19th century. The discourse on horizontal effect in the second half of the 20th century in Germany was developed out of all of these sources.

2 Horizontal effect (drittwirkung) in the German legal discussion

2.1 The breaking through of horizontality: personality rights (BGHZ 13, 334)

While the normative impact of the German constitution was self evident, the first accent-mark was placed not by the Federal Constitutional Court, but in 1954 by the highest civil court (the Federal Court of Justice, hereafter *Bundesgerichtshof / BGH*[20]), with an outright judicial *coup de main*. The facts of the case mirrored the typical context of the times. A weekly journal in Hamburg published a critical article about the latest commercial activities of *Dr. Hjalmar Schacht*. Mr. *Schacht* was, during the national socialist regime, president of the *Reichsbank* (1933-39) and a *Reich*'s minister for the economy. On behalf of *Schacht* the plaintiff, a lawyer, filed a brief in which he demanded various rectifications to the article. The journal published this document, without however noting that it was the lawyer's brief, under the name of the plaintiff in the section 'Letters to the Editor' ('*Leserbriefe*'). As a result, the plaintiff appeared, under a false light, to be a political sympathiser of *Schacht* – and of National Socialism. The plaintiff sued the journal demanding a correction of the facts. The Hamburg court of first instance (*Landgericht*) ruled in favour of the plaintiff on a conventional basis: breach of a protective statute (§ 823 (2) *BGB* in connection with the criminal provisions of defamation: §§ 186, 187 *StGB*). The appellate court (*Hanseatisches Oberlandesgericht*) rejected the claim on the basis of lack of damage to professional reputation. On appeal, the First Civil Division of the *Bundesgerichtshof* looked instead at an entirely new basis

19 Cf. Coing, Die obersten Grundsätze des Rechts: ein Versuch zur Neugründung des Naturrechts, 1947; Hubmann, Das Persönlichkeitsrecht, 1953; Maihofer (ed.), Naturrecht und Positivismus, 1962.

20 The highest German court in civil and criminal matters with its residence in Karlsruhe (as successor to the Reichsgericht located in Leipzig).

of liability: infringement on a personality right of the plaintiff. The deciding passage of the decision is succinct, circular, and ambiguous:

> 'Moreover, now that the Grundgesetz has recognised the right of a human being to have his dignity respected (Art. 1 GG), and the right to free development of his personality also *as a private right,* to be universally respected [!] in so far as it does not infringe another person's right or is not in conflict with the constitutional order or morality (Art. 2 GG), the general personality right must be regarded as a constitutionally guaranteed fundamental right.'[21]

However it is not stated here what the basis is for the introduction of the horizontal effect of fundamental rights. How is a 'constitutionally guaranteed fundamental right', which – internationally – is, in the view of the majority, regarded as a defensive right of the citizen *against the state*, at the same time a 'private right, to be universally respected'? Were the constitutionally inexperienced civil law judges, only five years after the coming into force of the Constitution (*Grundgesetz*), simply unaware of this distinction? There were no reasons given for any horizontal effect in the text cited: rather it was, to a certain extent, simply described as a constitutional requirement. However this constitutional requirement does not and did not in fact exist! Art. 1 (1) (ii) *GG* in all cases is clear and incapable of being misunderstood: the addressee of the duty to respect the dignity of persons is the state ('*öffentliche Gewalt*') – and the historical background of fascism supports and justifies that understanding. Art. 1 (3) *GG* declares the fundamental rights to be directly effective law with respect to the three branches of *state* power – Legislative, Judiciary and Executive. Art. 94 *GG*, again, opens the possibility of constitutional claims against acts of state power ('*öffentliche Gewalt*'). The constitution clearly concerns itself only with the vertical relation between state and citizen – and not the horizontal relations between citizens. Where the constitution (*Grundgesetz*) – exceptionally – directly effects private legal relations, it says so explicitly, e.g.

21 BGHZ 13, 334, at 338: 'Nachdem nunmehr das Grundgesetz das Recht des Menschen auf Achtung seiner Würde (Art. 1 GG) und das Recht auf freie Entfaltung seiner Persönlichkeit auch als privates, von jedermann zu achtendes Recht anerkennt, soweit dieses Recht nicht die Rechte anderer verletzt oder gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt (Art. 2 GG), muss das allgemeine Persönlichkeitsrecht als ein verfassungsmäßig gewährleistetes Grundrecht angesehen werden.' In English available by UCL, Law School, Institute for Global Law, http://www.ucl.ac.uk/laws/global-law/german-cases.

Art. 9 (3) (ii) *GG*.[22] Otherwise the effect of fundamental rights on the horizontal relations of citizen-to-citizen is seldom – if ever – found in the constitution itself.

In defence of its thesis on horizontal effect the *Bundesgerichtshof* only drew on three sources: two textbooks on the Civil Code (*BGB*), and one pre-constitutional (!) article published in 1947.[23] The new author of the textbook of *Enneccerus* on the First Book ('General Part') of the Civil Code, *Prof. Nipperdey*, was in fact a defender of the direct horizontal effect of fundamental rights. In the 1954 edition of this classic textbook he did argue that 'these provisions' (Art. 1 and 2 *GG* – G.B.) 'bind not only state authorities, but also citizens. Inherent dignity and the right to free development of the person are however integral parts of general personality rights which are guaranteed through the legal order as a subjective (public *and* private) right.'[24] In the second textbook cited on the Law of Obligations by *Ennecerus & Lehmann*, in contrast, a general *civil* personality right is rejected which moreover corresponds with the majority opinion up until then.[25] No more, no less.[26]

This judgment, together with a preceding and less outspoken decision from 1952,[27] is conventionally regarded as the 'birth certificate' of the so-called direct horizontal effect (*unmittelbare Drittwirkung*) in German private law. But maybe this is a misinterpretation. The original intention of the Judges of the

22 Cf. also Art. 48 (2) (ii) GG (Invalidity of termination of employment because of Federal parliament mandate).

23 Coing, Das Grundrecht der Menschenwürde, der strafrechtliche Schutz der Menschlichkeit and das Persönlichkeitsrecht des bürgerlichen Rechts, SJZ 1947, 641 (with reference to the prior constitutions of post-war German states).

24 Enneccerus/Nipperdey, Allgemeiner Teil, 14. edn. 1954, § 78 I 2 (emphasis added); cf. from the same author, Grundrechte and Privatrecht, in *Festschrift Molitor*, 1962, p. 17. Nipperdey was the main representative of the doctrine of direct horizontal effect of fundamental rights. Also cf. Leisner, *Grundrechte and Privatrecht*, 1962.

25 Enneccerus/Lehmann, Schuldrecht, 14. edn. 1954, § 233 2 c (p. 908; there is only one reference to Nipperdey); Larenz, Das allgemeine Persönlichkeitsrecht im Recht der unerlaubten Handlungen, *NJW* 1955, 521.

26 Nipperdey was not just anyone. As president of the federal labour court (Bundesarbeitsgericht) he also influenced its case law in the sense of direct horizontal effect doctrine. Cf. BAGE 1, 185 (advertisement of political party at workplace); 4, 274 (celibacy clause in employment contracts).

27 BGHZ 6, 360: A wife is through Art. 6 GG [Protection of marriage and family] protected against invasion or taking up of the lover of her husband in the marital residence. There it can still be asked 'whether her right to this zone is an absolute right in the sense of § 823 (1) BGB or whether it is a legal good*, the protection of which is guaranteed via Art. 6 GG , made directly applicable by Art. 1 (3) GG* .' (at p. 366 – emphasis added).

Bundesgerichtshof was to definitely break with the private law tradition that focused on economic rights and neglected the protection of personality interests. They were not bothered by methodological questions; but they knew exactly what they were doing in substance, and moreover wanted to do so![28] The new constitution provided the grounds for making this shift in the law towards an acknowledgment of personality rights. The logical way to do so was through the civil law recognition of a corresponding personality interest which would step in alongside the traditionally protected interests like life, body, health, and freedom. An injury to this newly protected personality interest through private actors would be remedied through the same sanctions of Tort Law, in particular damages and injunctions. This had two effects: (1) Judges thus developed private law further in front of the backdrop of constitutional demands (state's protective duty); and, (2) by doing so, they acknowledged the influence of the constitution on the legal relations between citizens. It is this dual-dimensionality which constitutes the problematic nature of horizontal effects – both on the national and European level.

Whether it was a question there of 'indirect' or 'direct' effect appears not – happily – to have been driven further by the judges of the *Bundesgerichtshof*. Exactly this constructive question would, in the following years, inch towards the centre-point of bitter academic controversies.

The question of the recognition of *damages for non pecuniary losses* in cases of injuries to personality rights presents a special problem in German civil law. This followed from one of the most famous judgments of post-war German legal history – the '*Gentleman Rider*' case.[29] The plaintiff was co-owner of a brewery and an impassioned horse rider. A photo was taken as he jumped an obstacle on horseback during a regional riding competition. The photo was – without authorisation – used as an advertisement for a sexual potency medicine. The 'gentleman rider' demanded damages for non-economic loss from the defendant, a pharmaceutical company. The *Bundesgerichtshof* upheld the claim. One should think that it was a matter here merely of a further logical step from the tort-law recognition of personality rights: if one places the protection of personality interests on the same level as the protection of

28 A more extensive justification for the holding that fundamental rights also effect private relations among individuals is not to be found later in time. In 1957, in BGHZ 24, 72, a unique and overdue statement follows, namely, that the newly forged private right of personality is to be qualified as an 'other right' in the sense of § 823 (1) BGB.

29 BGHZ 26, 349; NJW 1958, 827 – Herrenreiter; in English available on the website of UCL Law School (cf. fn. 21).

the person's physical body and freedom then the sanctions which hold for the last also find application in cases of protection of personality interests. As a result the respective provision of the German Civil Code, § 847 *BGB*,[30] which provided compensation for pain and suffering, would be applicable to infringements of personality rights. The *BGH* however even took pains to use the verbal crutch of a 'deprivation of *intellectual* liberty' in order to underline the analogy with an infringement of the freedom to move.

The reaction of German private law scholars was however different. *Larenz* still argued against the recognition of a general personality right in 1955, because of the indeterminacy of such a right.[31] Once again the different wording of § 823 (1) and § 847 *BGB* played the deciding role. In § 823 (1) *BGB* the openness of the legal concept of 'other right' allegedly allowed the recognition of personality *rights* – but in all events it was completely clear that the personality rights did not have the structure of an absolute *property right* – which in § 823 (1) would be required.[32] In contrast, § 847 *BGB* contained only the enumeration of the legal interests protected by § 823 (1) *BGB* and did not provide any 'opening' clause into which other personality interests could be developed. Thus the 'gentleman-rider' decision has often been seen as judicial law making *contra legem*! However, the German Federal Constitutional Court later explicitly declared this case law to be constitutional.[33] But that could not stop some *BGB* commentators from holding on tight to their position rejecting it.[34] A narrow, neo-pandecticist understanding of the *BGB* as merely a code of alienable economic rights here defends the independence of civil law against the supremacy of constitutional law.

One could just as well have thought that the case law, which in the intervening years became solidly established, would be left as it was had not – some 40 years after the '*Leserbrief*' and '*Herrenreiter*' cases – the *Bundesgerichtshof* itself reopened the discussion.[35]

30 Repealed by the Damages Law (Amendment) Act 2002.

31 Larenz, Das 'allgemeine Persönlichkeitsrecht' im Recht der unerlaubten Handlungen, *NJW* 1955, 521; cf. also his critical note, *NJW* 1958, 571.

32 Insofar Larenz was completely right; but only insofar. Cf. id., *NJW* 1955, 521.

33 BVerfGE 34, 269; *NJW* 1973, 1221 – Soraya; as harsh critique by a civil lawyer cf. Diederichsen, *AcP* 198 (1998), 171, 193 et seq.

34 Palandt/Heinrichs, *BGB*, § 253 para. 1 (till the 55th edn. 1996); MünchKomm/Grunsky, *BGB*, vol. 2, 3rd. edn. 1994, § 253 para. 6; Medicus, *Bürgerliches Recht*, 19. edn. 2002, para. 615 ('questionable').

35 BGHZ 128, 1 – *Caroline von Monaco I.*

In the manner of the French *Cour de Cassation* – '*La cour décide, elle ne discute pas*!' – the *Bundesgerichtshof* decreed in 1994:

> 'In the case of fair compensation of infringements to the general right of personality it is a matter, in the proper sense, not of compensation for pain and suffering under § 847 BGB, but rather of a legal remedy which is based on the protective demand of Art. 1 and 2 (1) GG. The award of monetary indemnification touches on the idea that without such a right, injuries to the dignity and honour of persons would often go without sanction, with the consequence that the legal protection of personality would waste away.'[36]

The earlier judgments of the *Bundesgerichtshof* in the fifties, which led to the right substantive result, were perhaps ignorant of the correct methodological approach. In constrast, the 1994 *Bundesgerichtshof* is doing the wrong thing substantively but is using the right method. The earlier decisions up to the 'gentleman-rider' case led to an integration of the constitutionally commanded protection of the personality interests into the system of civil Tort Law. Henceforth the (correct) insight – that the court by doing so is fulfilling a state duty of protection – leads to the (incorrect) result: namely to treat the protection of personality interests as a legal protection *sui generis* and to separate it from the general law of tort and damages. The first visible consequences of the new case law soon revealed themselves in the Damages Law (Amendment) Act of 2002, as regards fair monetary compensation for non-economic loss (§ 253 (2) *BGB*), injuries to personality interests remain excluded. But there are not in fact two civil laws – one influenced by fundamental rights, and another putatively free of fundamental rights!

2.2 Indirect horizontal effect: freedom of speech (BVerfGE 7, 198)

This lasted until 1958. Then the Federal Constitutional Court (*Bundesverfassungsgericht / BVerfG*) intervened with a ground-breaking decision in the discourse on horizontal effect.[37] Again, the scenario of the case had to do with the recent past. In 1950 the head of the state press office in Hamburg, *Erich Lüth*, called for a boycott of a recently completed new film by the National

36 BGHZ 128, 1, 15.

37 BVerfGE 7, 198; *NJW* 1958, 257 – Lüth; in English available: http://www.ucl.ac.uk/laws/global-law/german-cases.

Socialist movie director *Veit Harlan* (who directed, among other films, the anti-semitic movie '*Jud Süß*'). The film's producer and distributor obtained a court order by the *Landgericht* of Hamburg, which was affirmed by the appellate court (*Hanseatisches Oberlandesgericht*), which enjoined *Lüth* from calling for a boycott. The court of first instance as well as the appellate court saw in the conduct of *Lüth* an act against good morals and intentionally interfering with the business of the claimants under § 826 *BGB*. The court order was affirmed through a legally binding judgment of the court of first instance. *Lüth* filed a constitutional complaint against this decision. The *Bundesverfassungsgericht* quashed the judgment of the trial court and remanded.

The opinion of private law scholars was divided and ranged from accord to criticism. One even went so far as to speak of a 'methodological(!) *coup d'Etat*'.[38] Otherwise the *Lüth* judgment was celebrated as a 'victory' of freedom of speech over the vested economic interests of enterprises. In the centre however stands the relationship between the freedom of speech and the limits of its exercise. 'General Acts' are recognised as one such limit according to Art. 5 (2) *GG*. Such general statutes include, for example, the Civil Code and its Tort Law, or Penal Code. This led to the so-called 'theory of mutual effect'. On that point, the Bundesverfassungsgericht elaborated:

> 'Given this fundamental importance of freedom of speech for the free democratic state, it would be illogical for a constitution to make its actual scope contingent on mere statutes. What was said earlier about the relationship between basic rights and private law applies here also: general acts which have the effect of limiting a basic right must be read in the light of its significance and always be construed so as to preserve the special value of this right, with, in a free democracy, a presumption in favour of freedom of speech in all areas, and especially in public life. We must not see the relationship between this basic right and general acts as one in which general acts by their terms set limits to the basic right; but rather that relationship must be construed in the light of the special significance of this basic right in a free democratic society, so that the limiting effect of general acts on the basic right is itself limited.'[39]

Six years later the US Supreme Court reached a comparable ground-breaking decision – but for a conflict of personal reputation against freedom of speech: *New York Times* v. *Sullivan*.[40]

38 Diederichsen, *AcP* 198 (1998), 171, 226.
39 BVerfGE 7, 198 (emphasis added).
40 376 U.S. 254 (1964).

The U.S. Supreme Court decision has the same structure as the judgment of the *Bundesverfassungsgericht*: (1) a clear definition of the relationship of fundamental rights and statutory law; (2) ambivalence as to the question of 'direct effect'/'state action': Is only the state court bound by the fundamental rights or are the legal positions of plaintiff and defendant touched by the national constitution? The *Sullivan Rule* leans more closely to the latter ('the Constitution prohibits a person ...').

Returning to *Lüth*, the treatment of horizontal effect is the weaker part of the much vaunted decision. The intricate problem of constitutional claims against civil law judgments led to misunderstandings or opacity as to:

(1) Who, in the concrete case, interferes with the fundamental right of *Lüth*? The court of first instance in Hamburg (*Landgericht*) through its injunction? The *Bundesverfassungsgericht* in the *Lüth* decision and the US Supreme Court in *Sullivan* appear to use that as the starting point. But from this point of view the problem of *horizontal* effect is not presented at all! Rather it is a traditional case of the relationship between *state and citizen*. The civil court judge is doubtlessly also a part of the judiciary and thus a bearer of public authority bound by fundamental rights according to Art. 1 (3) *GG*.

(2) But how does the civil court judge infringe the fundamental rights of the citizen? A judge can in fact personally intervene in the fundamental rights of the parties to the trial in that s/he for example violates procedural fundamental rights (Art. 103 (1) *GG*: right to a fair hearing; Art. 6 ECHR: right to a fair trial, etc.).[41] The claims would then not only be *enforced via* the state's court, they would also be *directed against* the state as the violator!

That is not however the case here. According to the *Bundesverfassungsgericht*, the judge infringes on the fundamental rights of the citizen by his/her judgment because s/he misconceptualizes the constitution's modification of the private legal relations of the parties (!) and disregards the constitution's influence on private law.[42] Thus the problem of horizontal effect in a specific variant is once again on the table – *this time from the specific perspective of constitutional procedure*. The *BVerfG* presented itself with the question of how fundamental rights affect the (codified) private law. Fundamental rights are regarded as 'an objective order of values', which influences all areas of the law without exception. The sections of the *BGB* must be interpreted in the spirit of the fundamental rights. However that is not sufficient. The *BVerfG* goes one

41 Cf. thereto Schumann, *Verfassungs- and Menschenrechtsbeschwerde gegen richterliche Entscheidungen*, 1963.

42 BVerfGE 7, 198 (c); 30, 173, 195 et seq.; 42, 143, 148; 54, 129, 135 et seq.

step further: The influence of fundamental rights is greatest where it concerns mandatory law, which to a certain extent enshrines the *ordre public* of a national legal order. Insofar, the general clauses of the *BGB* such as good faith and fair dealing (§ 242 *BGB*), or contravention of good morals in § 138 and § 826 *BGB* could be used. The general clauses are the 'breaches through which civil law opens into fundamental rights'.[43] This argument has been prominently represented in legal literature through the work of a leading commentator on the German Constitution, professor *Dürig*.[44] The *BVerfG* could in its judgements refer to him and, and as to him, he praised the court for its decision in the highest tones.[45] Although the court expressly did not want to take a position as to direct or indirect horizontal effect,[46] the *BVerfG* reached nevertheless with this decision an unequivocal position: *against* direct horizontal effect. In its affirmative terms, the *Lüth* judgment contains two further aspects:

(1) Interference with fundamental rights happens *via* the civil court judgement.

(2) The horizontal effect is reduced to a problem of the influence of fundamental rights on the norms of private law.

It is exactly here where the argumentation becomes inconsistent. The influence of fundamental rights does not change the general clauses of private law. Instead, the general clauses of the civil code simply serve as 'breaches' *for the recasting of private law relations* – through fundamental rights! It is this omission of the horizontal relation[47] of citizens *inter se* which is so unconvincing in the *Lüth-Dürig* doctrine. It is the linkage of the vertical relation (Constitution – State (Legislator/Judge) – Citizen) with the horizontal relations between citizens, regulated by private law, that constitutes the problem of horizontal effect.

This *Lüth/Dürig* position of *mittelbare Drittwirkung* or indirect application was for a long time nearly synonymous with the German concept of horizontal effect of fundamental rights. At the same time it also signified a peace-treaty between the competing camps in legal science as to primacy: 'old' civil law on the one side, 'new' constitutional law on the other. The compromise form

43 BVerfGE 7, 198; *NJW* 1958, 257.

44 Dürig, in *Festschrift Nawiasky*, 1956, p. 157; id., in Neumann/Nipperdey/Scheuner, *Die Grundrechte*, vol. 2, 1954, p. 525; id., in Maunz-Dürig, *Kommentar zum Grundgesetz*, Art. 1(1) para. 15 et seq., 1958.

45 Dürig, *DÖV* 1958, 194.

46 BVerfGE 7, 198; *NJW* 1958, 257.

47 One of the few constitutional lawyers who insists on this relation, is Alexy. Cf. id., *Theorie der Grundrechte*, 3rd. edn. 1996, p. 475 et seq.

on which the 'combatants' agreed, was known as 'emanating effects' (*Ausstrahlungswirkung*): The influence of constitutional law on private law does not come to an end with the political 'making' of private law, but extends into the very process of its interpretation. So the independent status of civil law thereby remained in principle assured; and the right of supremacy of constitutional law *vis-à-vis* private law was recognised, – but channelled, and mediated.[48]

The *Lüth doctrine* of reduced horizontal effect was largely indebted to German particularities, notably a legal tradition which was marked by (1) the domination of scientific civil law and its method; (2) by the strict separation of private and public law. Substantively, the rights and freedoms of the constitution, with the uncertainty of their procedures of balancing, did not cohere with the black letter doctrines of civil law with its fixed star, private autonomy expressed as freedom of contract, and freedom to dispose of things and economic rights. The 'new' civil rights, deduced from the constitution, were felt to be irritants and limitations on private autonomy.[49] Exactly to that extent the doctrinal description of the relation of fundamental rights and private law with the doctrine of indirect third party effect appears to be an illusory victory for civil law. The principle grounded therein, compartmentalisation of rights and freedoms, did not however hold through time. Instead of separating them, civil law increasingly opened itself into the constitution – with increasing ambiguity; instead of a nostalgic transfiguration of putative civil law rationality and attendant certainty, it became a matter of methodologically conscious grappling with uncertainty. The alternatives were not civil law or constitutional law[50] – rather it was a 'different' contextual civil law.

2.3 Restraints to freedom of contract (BVerfGE 89, 214)

In a much discussed judgment of 1993 the *Bundesverfassungsgericht* behaved as a 'Super Court of Appeal' and intervened in the classic prerogative of civil

48 Cf. thereto Diederichsen, Die Selbstbehauptung des Privatrechts gegenüber dem Verfassungsrecht, in *Jahrbuch des Italienischen.Rechts*, vol. 10, 1997, p. 3 et seq.; id., *Jura* 1997, 57; from a public law-perspective: Ruffert, *Vorrang der Verfassung und Eigenständigkeit des Privatrechts*, 2001.

49 Cf. as an early position Laufke, Vertragsfreiheit and Grundgesetz, in *Festschrift Lehmann*, 1956, p. 145 et seq.; also Dürig, in *Festschrift Nawiasky*, 1956, p. 157 et seq. focusses primarily on contractual relations.

50 See however Canaris, *Grundrechte and Privatrecht*, 1999, p. 34.

courts – the interpretation of contracts.[51] In the concrete case before the courts the task was to achieve an equitable result. A 21-year-old woman without any skilled education and without any assets of her own worked as a blue-collar worker in a fish factory, earning DM 1.150 net per month. Influenced by her father and his bank she signed an absolute bank guarantee for her father's business debts for an amount of DM 100.000 plus collateral debts. Finally the bank called in all the credits to her father and sued the daughter for payment of DM 100.00. The court of first instance allowed the claim. The court of appeal dismissed it. The bank's appeal succeeded and the Bundesgerichtshof restored the judgment of the first instance.[52] The daughter filed a constitutional complaint to the *Bundesverfassungsgericht*. The Constitutional Court quashed the decision and referred the case back to the *Bundesgerichtshof*.[53] The *BVerfG* argued:

> 'At least for the sake of legal certainty, a contract may not be put in question or corrected in every instance of disturbance of the equality of bargaining power. It is however a matter of the specific interests involved in a case. When it shows a structural inferiority of one contractual party, and the consequences of the contract for the inferior party are unusually burdensome, then the civil law must react thereto and enable corrective measures. That follows from the fundamental guarantee of private autonomy (Art. 2 (1) GG) and the principle of the social state (Arts. 20 (1), 28 (1) GG). (…) For the civil courts follows there from the duty to interpret and apply the general clauses so to ensure that contracts shall not serve as a means to heteronomy.'[54]

It becomes evident that it is here less the case of applying fundamental rights in private law than evoking the principle of social responsibility and solidarity in contract law. This can – in Germany – be done by redress to the constitution, but it can also be achieved without it. The Court of Appeal has seen the bank as having a pre-contractual duty to inform the daughter fairly about the risks embedded in this deal. For breach of this duty they granted the right to withdraw the guarantee. English law comes in similar cases to the same result by applying

51 BVerfGE 89, 214; *NJW* 1994, 36; *JZ* 1994, 408 with notes by Wiedemann; see also BVerfGE 81, 242; *JZ* 1990, 1469 with notes by Wiedemann – Commercial agents.

52 BGH, *NJW* 1989, 1605.

53 BGH, *NJW* 1994, 1341; in English available: http://www.ucl.ac.uk/laws/global-law/german-cases.

54 BVerfG, *NJW* 1994, 36, 38.

the doctrine of undue influence.[55] Lord Denning went even one step further and tried to subsume this kind of cases under the broader heading of *inequality of bargaining power*. This general principle was repudiated later by the House of Lords[56] – but English and Scottish law stick to the defence of undue influence in hard cases.

The *Lüth* formula has not, ultimately, had the pacifying effect which the protagonists of it had hoped for. The strife over horizontal effect of fundamental rights today is even more controversial and confused than ever. The complexity grows further through the fact that it is now placed on the level of European law and even international law as well.[57]

2.4 Doing away with *Drittwirkung: Canaris*

Meanwhile, the discussion has once again reached civil law.[58] First and foremost, the recent developments in contract law have called forth a flood of reactions in civil law, which cover a very broad spectrum of opinions. A great part of the academic scholarship subjects the decision to heavy criticism. Some even speak of 'an end to private autonomy'.

A noteworthy line has been drawn by *Canaris*[59] who intends to rescue the independence of the civil law and defends it against threatening horizontal effects. He again bolsters the basic thesis that only the state is the addressee of fundamental rights. State authorities are not permitted to intervene beyond certain limits into the fundamental rights of the citizens (prohibition of excessive powers – *Übermaßverbot*); the state's authorities also must not leave citizens disproportionately defenceless against threats to fundamental rights (prohibition of non-action – *Untermaßverbot*). The duty to enforce fundamental rights in

55 *Lloyds Bank Ltd* v *Bundy* [1975] QB 326, [1974] All ER 757 (CA).

56 *National Westminster Bank plc* v *Morgan* [1985] AC 686, [1985] 1 All ER 821 (HL).

57 Cf. Alpa, The Meaning of 'Natural Person' and the Impact of the Constitution for Europe on the Development of European Private Law (2004) 10 *ELJ* 734, 743 et seq.; Gerstenberg, Private Law and the New European Constitutional Settlement (2004) 10 *ELJ* 766; see as a recent German stock-taking: Ruffert, *Vorrang der Verfassung and Eigenständigkeit des Privatrechts*, 2001 with further references.

58 Cf., inter alia, Medicus, Der Grundsatz der Verhältnismäßigkeit im Privatrecht, *AcP* 192 (1992), 35; Zöllner, Regelungsspielräume im Schuldvertragsrecht, *AcP* 196 (1996), 1; Diederichsen, Das Bundesverfassungsgericht als oberstes Zivilgericht, *AcP* 198 (1998), 171; Fezer, *JZ* 1998, 265, 267: 'Jahrhundertproblematik'.

59 Canaris, *Grundrechte and Privatrecht – Eine Zwischenbilanz*, 1999.

the horizontal relations between citizens results from this binding of all state powers to the fundamental rights. This is the task of the private law legislator and of civil courts which apply and further develop private law. In contrast to the norms of private law, the citizens and their horizontal legal relations are not in principle directly touched by fundamental rights. It is through their function as a protective command that fundamental rights affect the subjects of private law. How is one to imagine this? The addressee of this *protective duty with horizontal effect* is the civil law legislator, and particularly the civil law judge. The law-maker's statutory Act corresponds to the *ratio decidendi*, which is the core element of the judge's decision. (Here the case-norm theory of *Fikentscher*,[60] which otherwise finds no consideration in the methodological scholarship of *Larenz & Canaris*,[61] comes up, to meet surprising honours). These legislative Acts and court decisions regulate private parties' activities. This is the fulfilment of the state's duty to protect the citizens's fundamental rights. The constitutionality of the results is judicially reviewable. By this enlarged concept of civil law making it is possible to reduce the influence of constitutional law on private law again to the conventional pattern of the political (and judicial) making of private law – and nothing beyond.

In the *Lüth* case the head of the *Hamburg* press office interfered with the freedom of operations of the film producer and distributor through his call for a boycott. The film company, for its part, interfered with the freedom of expression of *Lüth* through its demand for an injunction. Both sides took competing basic freedoms as their right. That is how it appears, at first glance. And that is exactly what is false, according to *Canaris*! It is exclusively the *court* which, as the actor bound by fundamental rights, and its decision in a given case interferes in a fundamental right of the losing party at trial. There, if the application for injunction of the complaining film producer is granted, then it is a matter of judicial interference in *Lüth's* freedom of speech. But if the court rejects the case, then it omits to protect the constitutionally guaranteed freedom of enterprise of the film company.

Is reality here not in fact turned upside down? In the famous *Böll/Walden* case, *Heinrich Böll*, through the television commentary by *Walden*, which described him as a sympathizer of the Red Army Faction, believed his personality right to have been injured.[62] The *BGH* rejected the claim of *Böll* as the

60 Fikentscher, *Methoden des Rechts in vergleichender Darstellung*, vol. 4: Dogmatic Part, 1977, pp. 202-267.

61 Larenz/Canaris, *Juristische Methodenlehre*, 3rd edn. 1995.

62 BGH, *NJW* 1978, 1797.

civil court of last instance. However for *Böll's* constitutional claim the *Bundesverfassungsgericht* overturned the judgment.[63] Did the *BGH* with its judgement infringe the personality right of *Böll* by – viewed *ex post* – failing to provide the constitutionally demanded protection? That may be the case from the constitutional procedural point of view. However, is it also true from the point of view of the substantive civil law?

The weakness of this position is apparent: First, the virtually manic imputation of the violation of fundamental rights in private legal relations to a state offender, (here the civil judgment of a state court), seems unreal and leads to unrealistic outcomes. For example, consider the case of private arbitration: According to Art. 1 (3) *GG* arbitration would not be bound by fundamental rights. Thus, any argument for fundamental rights influencing the parties' private law relationship due to the state's duty of protection collapses. Yet the private law to be applied, whether before an arbitration panel or state court would be the same! There is, by no means, one private law influenced by fundamental rights – and another private law free from fundamental rights. All in all the inconsistencies are evident.

The other weakness is the failure to consider the horizontal relations *between* citizens. In this concept there is no way out of the hierarchical structure (state's duty of protection, statute or *ratio decidendi* of the civil judgment, affected citizen) to the exterior world of private law relations. The relation of citizen-to-citizen remains virtually captured in the judicial *ratio decidendi*. In other words: the entire hyperconstruction of *Canaris* rests on a misunderstanding, that is, cause and effect are confounded. State *or* non-state courts have to consider fundamental rights in their decision on a civil case as far as they *de facto* influence the legal relationships of the respective parties. However, fundamental rights do not claim relevance for private law relations just *because* a state court makes a decision.[64]

This much is true: it is the film producer and distributor, with their claim for an injunction, that primarily interferes with *Lüth*'s freedom of speech; only secondarily[65] might the court hearing and deciding the case interfere with

63 BVerfG, *NJW* 1980, 2072.

64 So goes the oft cited formula of Doehring, *Staatsrecht*, 3rd. edn. 1984, p. 209: It is preposterous 'wenn der Effekt einer Drittwirkung der Grundrechte dadurch herbeigeführt wird, dass das über private Rechtsbeziehungen entscheidende Gericht als die Grundrechte missachtende Staatsgewalt angesehen wird.' Cf. among others Erichsen, *Jura* 1996, 526 (529).

65 For procedural reasons with respect to the constitutional claim under Art. 93 (1) N° 4a GG.

Lüth's fundamental rights. The civil courts clarify the reciprocal rights and duties of the contending private parties. They may misconceive the influence of fundamental rights on the case pending. But the decisive constitutional wrong remains the act of the invading private party: the film producer's interference in the *Lüth* case; *Walden's* tv commentary in the *Böll* case.

2.5 European irritants: Caroline Grimaldi (von Hannover) v. Germany (ECtHR)

Since mid 2005, after the referenda in France and in the Netherlands, the Draft Treaty establishing a Constitution for Europe continues to be a Draft and the European Constitution remains a document of 'bits and pieces'. In the founding treaties of the European Communities there were no fundamental rights mentioned. The EC treaty only provides for the 'famous' *four fundamental freedoms* as part of the single economic market of the community: the general freedom of economic relations (free movement of goods and services), freedom of movement of workers, freedom of establishment, and free movement of capital. In their final orientation on the completion of a system of undistorted competition these fundamental freedoms are differentiated from the universal fundamental rights. In all events, the ECJ has, under the designation 'general principles of law', introduced fundamental rights to community law as limits to state action.[66] This case law is, in particular, brought into effect by Art 6 (2) EU. According to this, the respect of the fundamental rights enshrined in the European Convention of Human Rights (ECHR) *and* in the common constitutional traditions of the member states is binding on the EU. But this leads to no clear cut Human Rights applicable by the European Courts.[67]

Of greater importance for the horizontal effect of constitutional rights are the European Convention of Human Rights and the jurisdiction of the Strassbourg Court. A telling example for the problems caused by the judgments of the ECtHR for German law[68] is the *Caroline Grimaldi case*. – This case

66 Compare in particular ECJ, case 11/70, [1970] ECR 1125, Intern. Handelsgesellschaft; case 4/73, [1974] ECR 491, Nold; case 44/79, [1979] ECR, 3727, Heuer.

67 Cf. on this more generally Jarass, *EU-Grundrechte*, 2005.

68 Another, less spectacular but more dramatic, case is ECtHR, 26.4.2004, case 74969/01, Görgülü v. Germany, *NJW* 2004, 3397. It needed three (!) decisions of the BVerfG to enforce this ECtHR judgment in German Family Law: BVerfG, *NJW* 2004, 3407; *JZ* 2004, 1171 with notes by Klein; BVerfG, *NJW* 2005, 1105; BVerfG, *NJW* 2005, 2685. – Right of a biological father to see his son, who has been given to foster parents for

concerned a series of photographs of *Caroline Grimaldi*, which were published in the German tabloids and showed the Princess in various situations on holidays in southern France. With regard to the legal situation in Germany: the right to one's own image is one of the few 'Personality Rights' ('*Persönlichkeitsrechte'*) laid down in statute – in the *Kunsturhebergesetz* of 1907.[69] Thereafter so-called 'absolute persons of contemporary society (*absolute Personen der Zeitgeschichte*) enjoyed no privacy protection whatsoever outside their home. The publication of their photos is forbidden only if legitimate interests ('*berechtigte Interessen'*) of the prominent person stand in the way. This was long established and certain case law and its constitutional basis was also not questioned. *Caroline von Monaco/von Hannover's* claim for an injunction and compensation for non-pecuniary damage was therefore rejected by the lower courts.[70] In contrast the *Bundesgerichtshof* widened, for the first time, the narrow area of the image protection of celebrities: absolute persons of contemporary history also have a legitimate interest in respect to their privacy outside their own home, if the place is secluded from the wider public and this demarcation is objectively discernable to a third person.[71] With this a relatively vague sphere of privacy for prominent persons outside their own home was defined. The *Bundesgerichtshof* accepted these requisites for one of the photos (Garden Restaurant). *Caroline Grimaldi* followed with a constitutional complaint to the Federal Consitutional Court for the other photos. The Court affirmed the decision of the *BGH* and extended the protection with regard to the photos that showed her with her children.[72] *Caroline Grimaldi* filed an individual complaint to the European Court of Human Rights against the decision of the Federal Constitutional Court and reproved the violation of Art. 8 ECHR. To the surprise of many the ECtHR decided unanimously in favour of *Caroline Grimaldi*. The limited image protection offered to celebrities in Germany infringed Art. 8 ECHR.[73] At any rate, photos published, without consent, of persons who exercise no official function on behalf of a state and with the purpose of fulfilling the voyeuristic coverage of the tabloids, have priority in privacy protection.

adoption.

69 Cf. to this in greater detail Brüggemeier, Haftungsrecht. Struktur, Prinzipien, Schutzbereich, 2006, pp. 297.

70 OLG Hamburg, NJW-RR 1995, 790

71 BGHZ 131, 332; *NJW* 1996, 1128 – Caroline von Monaco III.

72 BVerfGE 101, 361; *NJW* 2000, 1021.

73 ECtHR, 14.6.2004, application no. 59320/00, *NJW* 2004, 2647. At the end Germany had to pay a compensation of € 119 000,-.

Still more important than the result of the new definition of the relationship between media freedom and the protection of the personality rights of celebrities in light of Art. 8 ECHR is the question of what impact this decision will have on the private law systems of the Council of Europe's member states. For Germany this is somewhat complex. The ECHR has been transformed in German law as a statute. It has the status of ordinary legislation, which finds itself below the constitution in the hierarchy of norms. So according to constant jurisprudence of the Consitutional Court the state authorities and the judiciary in Germany are bound by law, and therefore also by the Human Rights Convention in the interpretation which they have experienced from the European Court Human Rights.[74] What applies here though, if this Convention Right conflicts with the more highly ranked German constitutional law (here: the interpretation of the conflict of media freedom and personality rights protection through the Federal Constitutional Court)? As already applied in the famous Maastricht Case,[75] the issue is ultimately subject to the national constitutional court. In a practical case of image right's protection of celebrities the German civil court has to decide the case. The civil courts' judgment will then be brought to the Federal Constitutional Court, to answer the question what horizontal effect of which fundamental right (Artt. 1, 2 GG / Art. 8 ECHR) affects the applicable private law in Germany; in other words, whether the Grimaldi judgment of the ECtHR is constitutional. But before we get lost in problems of multi-level horizontality we will try to summarise the German discussion on Drittwirkung.

3 Drittwirkung revisited

The German legal discourse on horizontal effect is suffering from a trauma: fundamental rights of the constitution can influence relations among private parties. The source of this trauma can, in my opinion, be seen in the historical development of the relationship of civil and public law in Germany. German private law had and has difficulties in responding to the new challenges through constitutional law. Three of the presented positions (*BGH*/*Schacht*, *BVerfG*/*Lüth*, and *Canaris*) are too dogmatic: they render as absolute *one* aspect of a multi-dimensional problem. The scholarship inspired by *Nipperdey* as to direct horizontal effect of the early *Bundesgerichtshof* and *Bundesarbeitsgericht* case

74 Cf. BVerfG, *NJW* 2004, 3407; *JZ* 2004, 1171 with notes by Klein; cf. also Mann, *NJW* 2004, 3220.

75 BVerfGE 89, 155; *JZ* 1993, 1100 with notes by Götz.

law transferred without reflection the Citizen-State relation to the Citizen-Citizen relation. The complications arising from reciprocal fundamental rights are perceived, but the necessary mediations of private law are neglected. The doctrine of indirect horizontal effect in the form of the *Lüth doctrine* fails to consider the relation of citizen to citizen, and limits horizontal effect to private law norms, particularly the general clauses. But the general clauses only mediate the influence of the fundamental rights on the relations between the citizens. This abbreviation of the problem of horizontal effect will only become understandable from the procedural perspective of the *Bundesverfassungsgericht*. The anti-horizontal effect concept of *Canaris* alienates and diminishes the influence of fundamental rights on private law relations, reducing them to a diffuse reflection of a court decision which fulfils only a state protective-duty function. Thus there is no transfer of the vertical citizen-state relation to the horizontal world of citizens *inter se*.

Instead, we must retain the starting point of the *Bundesverfassungsgericht* in the *Lüth* decision: A conflict between private parties over the existing rights and duties between them remains a civil law conflict. Those reciprocal rights and duties are nevertheless influenced by fundamental rights and constitutional values. This influence can however take various forms: the constitution can itself determine the horizontal effect as to private persons (e.g., Art. 9 (3) (ii) *GG*; Art. 119 EC: prohibition of unfair discrimination). The legislator can create statutory law by taking up its constitutional duty of protection of citizens (*Schutzgebot*). Case law can interpret and develop civil law in conformity with the constitution. Through each of these legislative or judicial acts private rights are conceptualised and the freedom of dealing of private parties *inter se* is differentiated and delimited. That leads to the core of the problem which has been often addressed: horizontal effect is a two dimensional process.[76] (1) Fundamental rights find their vertical entry into the world of civil law through the legislator and case law: norms, rules, general principles, scholarship/*doctrine*. (2) Thereby the private law relations of citizens among themselves become directly conceptualised – their rights, freedoms of action, and duties: Arts. 1 and 2 of the German Constitution lead to private rights for one's own image, for one's own word, for the right to privacy, for informational self determina-

76 Cf. thereto Alexy, *Theorie der Grundrechte*, 3rd edn. 1996, p. 475. He develops a slightly different three-level model of third party effect. (p. 484 et seq.). In the vertical dimension he differentiates in addition the justification of fundamental rights of citizens (Who enjoys the right?) and the duty of the state to observe the fundamental right (Against whom may the right be enforced?) as independent levels.

tion, for formation of contracts free from undue influence, etc. – *with respect to other private parties*. Art. 5 *GG* opens up new freedoms in private law relations for some and limits the freedoms of others. That these private rights – more often than not, but not necessarily – must be *enforced* through state power does not differentiate them from, for example, private property rights. Fundamental rights enter into the meshwork of the private law system (as shaped by scholarship and case law) only in the form of private law rights and duties and private law concepts, rules and theories. This is the secret core of the truth to indirect horizontal effect doctrines.[77] But the ways and forms of this process of constitutionalisation of civil law and the civilianisation of fundamental rights cannot be enumerated because that can differ from legal field to legal field and from context to context.

For example, Mr. *Breuer* as the CEO of the *Deutsche Bank AG*, being a creditor of the *Kirch* Media Group, cannot appeal to the freedom of speech when he utters scepticism as to the credit-worthiness of the *Kirch* group at a meeting of the World Economic Forum in New York.[78] Internationally, freedom of commercial speech, within and outside of competition law, is only recognized with restrictions.[79] In contrast, it is well known that there is a general right to free expression and freedom of the press as regards criticism of products and services. Again however, this freedom of expression is limited when it is a matter of injury to personality interests. Striking the balance of competing fundamental rights of equal value has to take place in civil litigation. The aim is to come up with 'a practical concordance' of these rights.

Two recent High Court decisions are impressive examples of this kind of legal reasoning: the above mentioned judgment of the ECtHR – *Caroline von Hannover* v. *Germany* of 24 June 2004[80] and the judgment of the House of Lords, *Campbell* v. *MGN Ltd.* of 6 May 2004.[81] Both cases demonstrate how embittered and conflicting, in private law relations (!), the delimitation of areas

77 Early the BGH ruled on the possibilities of application of the principle of equal rights between the genders (Art. 3 (2) GG) regarding relevant family and marriage law: BGHZ 11 Supp. B, p. 34 et seq (68 et seq.).

78 LG München, *NJW* 2003, 1046; OLG München, *NJW* 2004, 224; BGH, NJW 2006, 830.

79 Cf. *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

80 ECtHR, 24.6.2004, case 59320/00, C. von Hannover v. Germany; www.echr.coe.int.

81 *N. Campbell v MGN Limited* [2004] 2 WLR 1232.

of privacy protection of celebrities is against the freedom of Paparazzi and tabloid press activities – right down to the last inch.[82]

Civil law, even German Civil law, can offer itself the luxury of openness to fundamental rights without losing its independence. Each horizontal effect of fundamental rights necessarily implies the direct shaping of private law relationships: the right is directed against the infringing private party. That is the real core of any doctrine of direct horizontal effect.[83] On that point the wisdom of the authors of the Portuguese constitution merits praise.[84] Art. 18 (1) of the Portuguese Constitution of 1976 proclaims that: 'The constitutional provisions relating to rights, freedoms and guarantees shall be directly applicable to, and binding on, both public and private bodies.'[85] Not one word more or less! The rest is the task of discursive constitutional and civil law scholarship and of judicial law making.

82 BGHZ 131, 332; *NJW* 1996, 1128; BVerfGE 101, 332; ECtHR, judgment of 24.6.2004, case 59320/00, C. von Hannover v. Germany; www.echr.coe.int.

83 Cf. Leisner, *Grundrechte und Privatrecht*, 1962, p. 378; (agreeing) Alexy, *Theorie der Grundrechte*, 1996, p. 491; denying, inter alia, Diederichsen, *AcP* 198 (1998), 171.

84 The English Lord Judges as well: 'The values embodied in articles 8 and 10 [ECHR] are as much applicable in disputes between individuals or between an individual and a non-governmental body such as a newspaper as they are in disputes between individuals and a public authority.' Lord Nicholls of Birkenhead in *Campbell v MGN Ltd* [2004] 2 WLR 1232.

85 'Os preceitos constitucionais respeitantes aos direitos, liberdades e garantias sao directamente aplicáveis e vinculum as entidades públicas e privadas.' Similarly – following the Portuguese model – see, Art. 8 (2) South African Constitution of 1996.

7

THE CONSTITUTIONALISATION OF PRIVATE LAW IN THE UK: IS THERE AN EMPEROR INSIDE THE NEW CLOTHES?

Stathis Banakas[1]

1 FUNDAMENTAL RIGHTS IN PRIVATE LAW: BACKGROUND

In its Roman law origins, Private law already encompassed the protection of certain aspects of human dignity. Examples are the principles of iniuria and lesio enormis in the jus civile. Several rules of the public jus gentium emerged later, offering minimum humanitarian protection to non-Roman citizens against abuses by the Roman authorities, and becoming the ancient predecessor to modern International Humanitarian Law. Historically and systematically the jus civile (Private law) took precedence over the jus gentium (Public law) and so did the protection of basic human rights by Private law (with the public display in the Forum of the first principles of Private law in the XII Tables). Even slaves had basic rights in Roman law, reminiscent of rights modern animal welfare activists want to see extended to animals in our time. In Continental Europe, as is well known, the jus civile had a lasting influence and its protection of certain freedoms and rights of a human person (even one not yet born or even conceived) became the nucleus of a much greater protection of human dignity embedded in the Law of Persons or Family law of all modern European Civil Codes. Several of these recognize a general right to one's personality, the content of which defines the Private law's residual notion of human dignity (i.e. right to one's freedom, bodily and psychological integrity, reputation,

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Tom Barkhuysen and Siewert Lindenbergh (Eds), *Constitutionalisation of Private Law.*

image, name and so on).[2] However, the Roman law's influence on the protection of human dignity in modern Private law is not the only historical influence; a second very important influence has been the theory of human rights that emerged with the rise of the Law of Reason in Germany, with Immanuel Kant being the first major thinker in modern times to develop a full theory of human dignity, based on the primary principle of individual freedom or self-determination, which is necessarily coupled with personal responsibility (the two must be interchangeable in causal order). Several others followed in the same vein as Kant, firmly founded in the liberal-individualistic Kantian model, right down to our contemporaries Rawls, Habermas and Alexy, the latter proposing a theory of fundamental rights based on basic notions of morality, underpinning not just Private, but also Constitutional law (see also the German Grundgesetz that can be said to exemplify this approach).[3] But in post-modern times, this one-dimensional view of fundamental rights based on classic western liberal ideologies has given way to theories of fundamental rights that define human freedom and responsibility in the light of the collective entity in which humans exist, i.e. communitarian or even cosmopolitan theories of fundamental rights. And in an interesting aversion to far eastern Confucianism, one can also approach fundamental rights in the context of freedom and responsibility within groups other than states or other public entities, of a more private nature, such as churches or religious associations, sport associations, private clubs and, as shown in the emergence of contemporary principles of Child Law, in the family itself, with rights and duties of parents and children toward each other.

Against this background, what exactly is meant by Constitutionalisation of Private law? Is it the fertilization of traditional private law, styled in Continental Europe by the jus civile, with Constitutional rights born of political-moral ideas of fundamental rights, in the way that this has clearly occurred, for example, with civil law in Germany, after the introduction of the Grundgesetz in the second half of the last century? Or could it be the elevation of Private law principles to constitutional status, as one saw recently in France with the recognition by the Constitutional Council in France of the quasi-

2 I. Shimazu, 'The individual and collective decisions: Concept of law and social change' in A. de la Catedra and F. Suarez, Contemporary Law and justice in a global society (IVR, Granada 2005) 470.

3 *See*, for instance, R. Reiner, 'Justice' in: J. Penner, D. Schiff and R. Nobles (eds), Jurisprudence and Legal Theory. Commentary and Materials (LexisNexis Butterworths, London 2002) 742; or A. Barron, '(Legal) Reason and its 'Others': Some Recent Developments in Legal Theory' in ibid 1073.

constitutional status of the fault principle in the French Civil Code?[4] Or perhaps a third alternative, a continuous counter-influence of Constitutional and Private law in the protection of human dignity? It is submitted that the third view of Constitutionalisation of Private law reflects more accurately reality in European legal systems today.

It is important to note that Private law, for both historical (pre-existed long before any notion of Constitutional order or Constitution) and social (being the law that determines the basic status and personal rights of individual private human beings) reasons, has been the one first to influence the other, Constitutional law, in the area of protection of human dignity. The rights to life, freedom, bodily integrity, property and reputation were, of course, protected in the jus civile long before they appeared in any list of basic Constitutional rights. Also, Criminal law and Criminal Procedure developed independently from any Constitutional influence over the centuries to provide an effective protection to the most important aspects of human dignity as shown in the evolution of these branches of the law in Common law (see below under III), and Binding's theory of basic protected interests, on which positive criminal law is founded, a theory that was first advanced many years before the Grundgesetz was introduced in Germany. Private law primarily protects basic individual rights against invasion by other private persons (with exception of public authority tort liability in some legal systems, and the traditional public authority liability as 'fiscus'). Constitutional rights primarily protect individuals against invasions of such rights by the state or other public bodies, modern theories of direct or indirect horizontal effect notwithstanding. It can, therefore, be claimed that in the evolution of the legal protection of basic human rights the emergence of fundamental Constitutional rights is a much later phenomenon, extending the protection afforded by private law to private individuals against the aggression of other private individuals, to a protection of private individuals against actions of public authorities and the State itself. The importance of Private law in the case of the latter remains considerable: an example may be given from the UK, where the fundamental right to life, enforced against the State and public authorities, is now officially recognized by the Human Rights Act 1998 (see below under III). Yet, the authorities in the UK have repeatedly refused the prosecution for murder, or even manslaughter, of policemen on duty who shoot and kill an innocent man by mistake, on the basis of an interpretation of a

4 *See* the excellent reflections and all relevant references in Philippe Brun 'La Constitutionalisation de la Responsabilité pour Faute', in Responsabilité civile et Assurance, 2003, 37-42.

criminal law principle that is not applied in the case of a mistaken killing by a private individual. No Constitutional list of fundamental rights can offer effective protection without proper Criminal Procedure rules that prevent the abuse of authority at the point of delivery.

2 Vertical/ horizontal effect of constitutional rights: a comment

Fundamental Rights can be written or unwritten, settled or emerging, global or culturally variable, National or Transnational or International.[5] This paper is limited to a discussion of the effect on Private law of Constitutional Rights of the lato sensu Constitution (i.e. not confined to any specific text that may or may not exist). In that sense they:

First, control the State's normative and executive power to physically compel and restrict a person's freedom of choice, i.e. the State's violence.

Second, they may also oblige the State to take positive action to protect essential interests of individuals or

Third, even to create conditions in which individuals may fulfil basic needs and aspirations.

The first function of Constitutional Rights is only vertical, whereas the second and the third can also be indirectly horizontal, as with legislation on Competition or Discrimination and the like. Such indirect horizontal interpretation is not part of our discussion here, and should be distinguished from what is also called indirect horizontal effect, i.e. the use of Constitutional Rights in the process of judicial reasoning in a judicial decision on a dispute between two private persons. But if they are used as part of the rationale for a judicial decision they have a direct horizontal effect.

When they have a direct horizontal effect, Constitutional Rights interfere with the residual principle of equality of rights and duties of all persons in private law. Acting, as Ronald Dworkin first said, as 'trumps' they can have a decisive impact on who wins in a case where the positive Private law is clearly set.[6] See in connection with this the introduction in the German Civil

5 For the question of the horizontal effect of fundamental rights in the transnational sphere: G. Teubner, 'Globalized society, fragmented justice: Human rights violations by „private" transnational actors' in A. de la Catedra and F. Suarez (eds), (n 1) 547.

6 J. Penner, 'Law and Adjudication: Dworkin's Critique of Positivism' in J. Penner, D. Schiff and R. Nobles (eds), (n 1) 350.

law of the Allgemeines Persoenlichkeitsrecht by the Courts in the famous Herrereiterfall in the 1950s.[7] The problem does not exist if they have been already integrated in positive Private law, as in the case, for example, of Greek Civil law where the Right to one's Personality is protected under article 57 of the (amended) Greek Civil Code. The direct horizontal effect of Constitutional Rights affects the essentially relational function of Private law in an unpredictable way as Constitutional Rights, equally shared by all, may be conflicting in a case (e.g. Right to Private Life and Right of Freedom of Speech: a well-known footballer is having an extra-marital affair, can he stop the newspaper from publishing details to protect his private and family life?), and it will have to be on extra-legal grounds that the judge will resolve this conflict. This can be seen as retroactive and arbitrary, especially if Constitutional Rights are used in Private disputes as swords rather than shields, i.e. to seek a remedy of damages or an injunction or even a specific performance. The judge may, of course, seek cover behind well-established Private law clausulae such as Good Faith, Abuse of Rights or, the ultimate chimera, Legal Policy or Public Interest, but this is, of course, illusory, as there can be no legal grounds on which a judge can base a decision to find it, for example, in the public interest that the newspaper's right to freedom of speech prevails over the footballer's right to private life.[8]

Of course, precedent may set, in effect, new law and the legislator may change the legislative texts to incorporate such case law developments (as in the case of the Greek Civil Code). The horizontal effect is, thus, dressed in formal Private law clothes. Should the power of the judge to effect a horizontal application of Constitutional Rights be unlimited? Let us recall that Constitutional Rights protect all persons against the State's unique right of compulsion and violence in enforcing its power to impose duties without consent, and force the State to protect Constitutionally defined interests or grant Constitutionally defined benefits. Private persons do not have rights to impose duties on other private persons without consent, nor can they be obliged by other private persons to protect their defined interests or grant them benefits, except when such rights or duties are clearly recognized by positive private law in its relational function (or in well defined cases of emergency or self-defence that are of no relevance here). Should Constitutional Rights always be allowed to rule a private law dispute despite, or in the absence of, positive Private law rights or duties? Having originally been granted to offer protection against the

7 BGHZ 26, 349.

8 B and C v A [2002] EWCA Civ 337 (Court of Appeal).

State, how far should they be allowed to interfere with the freedom of choice of private persons in the frame of the rights and duties recognized in Private law? It must be remembered that Private law rights are 'front line' rights that need to comply with Rights of a higher order, i.e. Constitutional Rights. When they do, there is obviously no need for any horizontal application of Constitutional Rights. Private Law Rights should be allowed to solely decide the dispute. If they don't, then the lawmakers should change them, and after they are changed there should again be no need for horizontally applying Constitutional Rights. If there is a lacuna in the Private Law that allows the violation of the Constitutional Rights of an individual, new Private Law rights should be introduced, either reflecting directly the Constitutional Rights concerned (as was the case in Germany with the so-called Allgemeines Persoenlichkeitsrecht), or offering similar protection in different clothes (as English judges have done in offering the old remedy of breach of confidence for the protection of Privacy at common law).[9] When should, therefore, the judge need to properly enforce horizontally Constitutional Rights?

As shown by the German experience after the introduction of the Grundgesetz, and now also by the English experience after the introduction of the Human Rights Act 1998, lawmakers often show a great deal of inertia in creating front-line Private Law Rights to extend the protection of new Constitutional Rights to all aspects of Private life. This may be due to political reasons. Front-line Private Law Rights affect individuals directly and can meet higher public or lobby resistance, as happened in the UK with the resistance by the Press to the creation of a front-line right of Privacy after the Human Rights Act. Or the political aims of the lawmakers are now different than they were when the Constitutional Rights were introduced and they intentionally procrastinate. Cultural reasons can also be a cause for inertia in creating front-line Private Law Rights, as is the case in France, Germany and other countries with great Private Law traditions encoded in major Private Law codifications, especially with Fundamental Rights imposed by International Treaty, such as the EU Treaty or the Council of Europe Treaty or, indeed, by the legal culture of a foreign conqueror, or the culture of the Private Law lawmakers that can be different to that of the Fundamental Rights lawmakers. It is noteworthy that the Japanese Constitution, imposed by the victorious allies after the war, expressly provides that Constitutional Fundamental Rights have a direct binding effect on the courts in all cases, effectively introducing a horizontal effect that

9 Douglas and others v Hello! Ltd and others (No 2), [2005] EWCA Civ 595, [2005] 2 FCR 487 (CA).

was felt necessary to counteract the anticipated hostility of the local legal culture to those 'foreign' rights.[10]

It is evident that judges should not only be allowed, but obliged, by the Constitution (as is the case in Japan) to apply Constitutional Rights horizontally, in cases of inertia by the Private law lawmakers, as, indeed, happened in the German Federal Republic in the early and mid-1950s. The UK is a special case, because there judges are also lawmakers who can create Private law Rights in developing the common law to protect basic freedoms, and, in this sense, they do not need to apply Human Rights horizontally in a Private law dispute: they can develop the common law in the light of the content of such rights, something they have being doing with a certain degree of caution since 1998 (see infra under III).

A different question is whether judges should also apply Constitutional Rights horizontally to correct an individual injustice or unfairness super casum, due to an abuse of front-line Rights, or, simply, a conflict between one person's Private Law Rights and another's Constitutional Rights. The answer to this question must be clearly yes. Private law rights are abused in the present sense when not exercised to pursue the purpose, political, social or economic, for which they have been granted, and this violates the Constitutional Rights of another person. A real conflict exists when Private law rights, although properly acquired and exercised, seriously affect the Constitutional Rights of another. The latter should not prevail merely because they are rights of a higher order, as they were primarily granted for protection against public authority and the State. They should not automatically have a direct horizontal effect against private law rights of other private individuals. They should perhaps only have such an effect and prevail when the other's private law rights are acquired or exercised unreasonably in circumstances in which the other has a de facto power of coercion in imposing duties on another (e.g. a landlord, employer, enterprise or a private Church or club, imposing duties on a tenant, employee, consumer or church or club member). In such cases, the original function of Constitutional rights (to protect against coercion by the State or public authority) can explain the horizontal effect.

10 'It was as if we had to speak a foreign language to deal with formal and public matters': I. Shimazu (n 2) 475.

3 THE UK EXPERIENCE

At first sight, it is hard to contemplate Constitutionalisation of Private law in a country like the UK, which appears to have neither a Constitution nor Private law! However, certain basic civil rights have been recognized over the centuries in Royal Charters and Acts of Parliament that are considered to have Constitutional status. And in 1998 the UK enacted the Human Rights Act that finally incorporated the European Convention of Human Rights into domestic UK Law.[11] The lack of major Codifications and the largely unsystematic and casuistic development of the different areas of common law also make it impossible to speak of any reverse Constitutionalisation, i.e. common law principles that have acquired Constitutional importance. But one clearly sees in UK law today certain, primarily equitable, principles playing a central role in judicial thinking and appearing almost indispensable and which, like Constitutional principles, are impossible to think of UK law living without: such as liability arising from fiduciary relationships, trusts and the Duty of Care in the law of Negligence, based on considerations of what is "Just, fair and reasonable".

Whether or not the Human Rights Act was intended to have a horizontal effect,[12] it is clearly applicable to the actions of public authorities and the courts are expressly described as public authorities in the Act itself. So the courts are obliged to apply directly the Act in relation to public authority actions, i.e. when there is a dispute between a public authority and a private citizen. However, the common law (unlike, for example, French law) has a common regime of civil liability for public authorities and private persons. Any

11 The very absence of an autonomous public law system in England [may have] led to some of the general confusion over the applicability of the Convention in the private sphere. A. Clapham, Human Rights in the Private Sphere (Clarendon Press, Oxford 1993) 6.

12 For the early scholarly discussion on vertical and horizontal effect of the HRA see among others: M. Hunt, "The Horizontal Effect of the HRA" [1998] Public Law 423; G. Phillipson, "The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper?" [1999] MLR 824; I. Leigh, "Horizontal Rights, The Human Rights Act and Privacy: Lessons from the Commonwealth" (1999) 48 ICLQ 55; H.W.R. Wade, "Horizons of Horizontality" (2000) 116 LQR 220; R Buxton, "The Human Rights Act and Private Law" LQR 51; David Feldman, Civil Liberties and Human Rights in England and Wales 2nd ed, 2002, Oxford UP. As for the case law: Douglas v Hello, supra note 8; Mendoza v Ghaidan [2002] 4 All ER 1162; Venables and Thompson v. Newsgroup Newspapers and Associated Newspapers Ltd, [2001] W.L.R. 1038; or PW v Milton Gate Investment Ltd [2004] 2 WLR 443.

developments, therefore, in public authority liability influenced by the Act apply equally in disputes between private citizens, allowing a direct horizontal effect of the Human Rights Act.

In the light of all this there has been considerable pressure on the judiciary to give due attention to the Act in developing common law. The judges are sensitive to this need, but they have consistently tried to avoid the creation of new Private Law remedies directly founded on the Act. Instead, they have adopted or developed existing common law remedies, such as breach of confidence[13] or, even, nuisance,[14] to increase the protection of privacy and private and family life. This is partly due to the fact that judges are very cautious in applying statutes (and the Human Rights Act is only a statute, not a Constitution!), which they have always interpreted strictly, as they see them as an unavoidable intrusion into the common law. But they feel free to be creative with the common law itself, as it is entirely judge-made. Additionally, there is a strong culture in English law that whatever is not clearly prohibited by the law is permitted:[15] statutory human rights cannot, therefore, be used in England as Fundamental rights carrying an unspecified measure of power of exclusion of other persons' freedom to act.[16]

It would, nevertheless, be wrong to say that the human rights discourse has not influenced the development of common law after the introduction of the Act. On the contrary, judges have often based their reasoning in granting traditional Private law remedies on Human Rights, such as self-determination, privacy, human dignity and several others. They are helped in this by the historical fact that the English law of Contract, Tort, Equity and Trusts is rich in remedies precisely intended to protect Human Rights such as these; the following is only an indicative list.[17]

13 *See* Douglas v Hello! Supra note 8.

14 *See* Pemberton v Southwark LBC [2000]3 All ER 924 (CA), extending the protection of the law of nuisance to a tolerated trespasser when basic dignity in private life is at risk.

15 A-G v Guardian Newspaper Ltd (No.2) [1988] 3 All ER 545 (CA) 596 (Sir John Donaldson MR: "The starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law or by statute.").

16 D. Feldman, Civil Liberties and Human Rights in England and Wales (2nd edn OUP, Oxford 2002) 70.

17 *See* also H. Rogers, "Tort Law and Human Rights: A New Experience." A lecture given at the 2nd Annual Conference on European Tort Law (Vienna 25 April 2003); D. Friedman and D. Barak-Erez (eds), Human Rights and Private Law (Hart, Oxford 2001) 3; or Derbyshire CC v Times Newspapers Ltd [1992] QB 770.

Equitable relief has been historically the gateway to considerations on morality and good faith in English law, as illustrated by the basic rule that one must come to Equity with clean hands. The protection of all aspects of one's personality is evident in several equitable exceptions to the harshness of common law.

In Contract law, remedies such as Duress and Undue Influence, control of unreasonable exception clauses, the doctrine of Frustration of Contracts, promissory estoppel, illegality for restraint of trade, clearly vindicate important Human rights such as self-determination and freedom to develop one's personality and potential. It must be remembered in this connection that English Contract law is essentially commercial in nature (no distinction exists in principle between commercial and other contracts) and yet judges have always been conscious of the need to take basic human rights into account, even in a commercial environment.

Tort Law is also rich with remedies protecting individual human rights, having a long history of such protections unparalleled in modern times (only classical Roman law equalled this).

The tort of Trespass to the person guaranteed personal bodily autonomy, physical safety and freedom of movement. Trespass on land provided an immediate protection of proprietary interests in land, regardless of any actual damage to property. Defamation protected the right to one's reputation. Several economic torts, such as intimidation, conspiracy or using unlawful or impermissible means guaranteed an individual's freedom of economic self-determination. The rule in Wilkinson v Downton protected an individual's emotional integrity.[18] The tort of nuisance extended protection of proprietary interests to the enjoyment of one's property and personal and family life. Pragmatic considerations such as the 'just, fair and reasonable' test were introduced to make liability in Negligence proportional to the severity of injury.[19] Recently, in Spring v Guardian Assurance,[20] a remedy was granted to protect an individual's professional reputation from negligent misinformation. Last year, in Rees v Darlington Memorial Hospital[21] the right of a woman to self-determination

18 Wilkinson v Downton [1897] 2 QB 57.

19 *See* e.g. recently the important cases of compensation in negligence for asbestosis: Fairchild v Glenhaven Funeral Services Ltd and others, Fox v Spousal (Midlands) Ltd,Matthews v Associated Portland Cement Manufacturers (1978) Ltd and another [2002] UKHL 22, [2003] 1 AC 32 (House of Lords).

20 Spring v Guardian Assurance Plc [1995] 2 AC 296.

21 Rees v Darlington Memorial Hospital NHS Trust [2004] 1 AC 309.

in procreation was affirmed. At the same time, in Chester v Afshar,[22] the House of Lords decided by a majority that the doctor's duty to inform the patient properly about risks inherent in a necessary treatment was aimed at protecting the patient's right to make an informed choice, a right that was violated even when the patient could not prove that, had she been properly informed, she would have refused the treatment. As Lord Steyn put it:

> '…A rule requiring a doctor to abstain from performing an operation without the informed consent of a patient serves two purposes. It tends to avoid the occurrence of the particular physical injury the risk of which a patient is not prepared to accept. It also ensures that due respect is given to the autonomy and dignity of each patient'.[23]

The second judge in this case, one of the majority, Lord Hope, agreed:

> 'I start with the proposition that the law which imposed the duty to warn on the doctor has at its heart the right of the patient to make an informed choice as to whether, and if so when and by whom, to be operated on.'

22 [2004] UKHL 41.

23 Quoting with approval Ronald Dworkin, Life's Dominion: An Argument about Abortion and Euthanasia (1993) p. 224:
'The most plausible [account] emphasizes the integrity rather than the welfare of the choosing agent; the value of autonomy, on this view, derives from the capacity it protects: the capacity to express one's own character-values, commitments, convictions, and critical as well as experiential interests-in the life one leads. Recognizing an individual right of autonomy makes self-creation possible. It allows each of us to be responsible for shaping our lives according to our own coherent or incoherent-but, in any case, distinctive-personality. It allows us to lead our own lives rather than be led along them, so that each of us can be, to the extent a scheme of rights can make this possible, what we have made of ourselves. We allow someone to choose death over radical amputation or a blood transfusion, if that is his informed wish, because we acknowledge his right to a life structured by his own values.'

And the third, Lord Walker, said:

> 'In Sidaway v Bethlem Royal Hospital Governors,[24] Lord Scarman described the patient's right to make his own decision as a *basic human right.*[25] Lord Scarman was delivering a dissenting speech, but the whole House recognised this right'.[26]

Other important examples of well established Tort rules protecting Fundamental rights are:

> The judicially developed principles of assessment of damages for pain and suffering[27] and loss of amenities,[28] the recognition of exemplary (punitive) damages for unconstitutional acts of public authorities,[29] and aggravated damages for violation of personality rights such as personal dignity.[30]

Finally, let us not forget that, not only in the UK, but in all legal systems Human Rights are protected par excellence by Criminal law and the law of criminal Procedure that not only limits the power of the State to intrude into such rights but also, of course, protects citizens horizontally, against actions of other private citizens. Criminal law applies in the UK equally to private citizens and state officials and is in the hands of the courts of common jurisdiction. In the UK there is a long historical tradition of protection of private citizens in Criminal law against arbitrary and unconstitutional actions by state officials, including judges, as encapsulated in the centuries-old right to be judged by a jury of one's peers, a right that has proved extremely hard to curtail up until now despite all the criticism against jury trials. In this respect the UK differs from virtually the whole of the rest of Europe, where the use of juries

24 [1985] 1 All ER 643 at 649, [1985] AC 871 at 882: the majority of the House of Lords rejected in this case the introduction of an American-style doctrine of informed consent into English law.

25 Emphasis added by this author.

26 *See* Lord Diplock ([1985] 1 All ER 643 at 659, [1985] AC 871 at 895), Lord Bridge of Harwich ([1985] 1 All ER 643 at 660, 662-663, [1985] AC 871 at 897, 900) and Lord Templeman ([1985] 1 All ER 643 at 666, [1985] AC 871 at 9.

27 *See* e.g. Lim Poh Choo v Camden and Islington AHA [1980] (House of Lords).

28 H. West v Shephard [1964] AC 326: even when the victim is unconscious, the loss of amenity is compensated to recognize the violation of one's personal right to enjoy all of one's faculties.

29 *See* e.g. Kuddus v Chief Constable of Leicestershire Constabulary [2001] 2 WLR 1789 (House of Lords).

30 E.g. John v MGN Ltd [1997] QB 586.

in Criminal trials has been replaced by mixed courts in which professional judges normally form the majority. Criminal Law and Procedure are, in fact, the best front-line defence of human rights in Private law, extended now to cases of discrimination, harassment and unequal treatment.

4 CONCLUSION

Jeremy Bentham, that great believer in statutory law reform and social welfare of the 19th century, famously called human rights 'nonsense on stilts'.[31] We have come a long way since then by recognizing, in the UK, the importance of formally accepting Human Rights as the pillar of statutory law. Although the courts have responded to the introduction of the Human Rights Act with caution, their excellent record in defending Constitutional rights with specific common law remedies guarantees that the Act is in good hands. Recent judicial opposition to alarming Government measures to restrict basic rights, such as those of fair trial, liberty and equality, in order to combat the terrorist threat, has shown the courts ready to resort directly to the Convention to defend fundamental rights, in a most rigorous way, even against Acts of Parliament. In the very important recent cases of A and others v Secretary of State for the Home Department, and X and another v Secretary of State for the Home Department, a panel of nine Law Lords[32] held an Act of Parliament from 2001, restricting the liberty of only foreign Nationals, to be contrary to articles 5 and 14 of the Convention, virtually using the Convention as a text of national UK Constitutional Authority. And they declared void an administrative order authorised by that Act, giving the Home Secretary powers to detain only suspect terrorists that were non-UK nationals.[33] This very significant case illustrates the extent to which the British legal landscape is changing under the influence of the European Convention of Human Rights, after the Human Rights Act propelled it to the centre of legal argument. The House of Lords Judicial Committee, for the first time in UK history, refused to give effect to a properly promulgated Act of Parliament as contrary to Fundamental Rights, showing these rights to be embedded in a higher, Constitutional order. This is an unprecedented challenge to the principle of Parliamentary sovereignty, the Grund-

31 *See* J. Waldron (ed.), Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man, p.73 (London, Methuen 1987).

32 They usually sit in a panel of five except in cases of major importance.

33 [2004] UKHL 56.

norm of UK Constitutional law. And it vindicates those who argue that our era is the era of Fundamental Rights, the age of non-positivism, in which judges must fulfil the law's claim to moral correctness rather than always aim at a legally perfect decision. For, as acknowledged even by the founder himself of legal positivism, Gustav Radbruch, 'extreme injustice is not law'.[34]

34 Quoted by Alexy, The Argument from Injustice, Oxford 2002, at p. 4.

8

THE CONSTITUTIONALISATION OF PRIVATE LAW IN THE NETHERLANDS

Siewert Lindenbergh[1]

1 INTRODUCTION

The issue and significance of fundamental rights (basic rights and human rights) in private law relationships has started to attract more and more attention in the Netherlands, as it has in other European countries. How can these rights be embedded in private law relationships, what is their significance and how can the balancing of interests, which is necessary for the most part, take shape? In the Netherlands, too, this issue is known as the constitutionalisation of private law.[2] The essential question involved is the extent to which private law 'is in line' with the Constitution and the fundamental rights laid down in treaties. The underlying idea is that although it is true that fundamental rights have not been defined in the first place with an eye to private law relationships, they

1 Siewert Lindenbergh was senior university lecturer and fellow at the E.M. Meijers Institute of Legal Studies at Leiden University until December 1, 2005. Since that date he holds tenure in private law at the Erasmus University of Rotterdam.

2 Refer to J.M. Smits, Constitutionalisering van het vermogensrecht ('Constitutionalisation of Patrimonial Law'), NVVR Preliminary Report, Deventer 2003. By now, 'constitutionalisation of private law' has also taken on another meaning, namely the impact of EC law on private law. See Olha Cherednychenko, 'Report on the Conference "European Constitutionalisation of Private Law"', ERPL 2004, p. 708 ff.

Tom Barkhuysen and Siewert Lindenbergh (Eds), *Constitutionalisation of Private Law.*

are so fundamental in nature that their significance to private law relationships cannot be disregarded.[3]

For the Netherlands, too, the topic of the effect of basic and human rights on private law is anything but new.[4] The new family law and law of persons, which was introduced in 1970, has frequently been tested against the European Convention on Human Rights (ECHR), with very far-reaching consequences. Testing against fundamental rights has become essentially important in the area of wrongful acts, and now also the effect of fundamental rights on contractual relationships is also attracting more and more attention. Finally, in the law of property as well, there is an ever-growing awareness of the human rights aspects to the ownership right (as laid down in Art. 1 of the First Protocol to the ECHR).[5]

Below, the state of affairs relating to the constitutionalisation of private law in the Netherlands will be described. For this purpose, the sources and nature of the fundamental rights relevant to Dutch law will be addressed first. Subsequently, attention will be focussed on the ways in which fundamental rights may affect private law in the Netherlands. Next, the practical significance of fundamental rights for two branches of civil law will be dealt with: contract law and extra-contractual liability law. I will close with an evaluating conclusion.

3 Refer to J.H. Nieuwenhuis, De constitutie van het burgerlijk recht (The Constitution of Civil Law), RM Themis 2001, p. 203 ('The basic rights constitute a "Wertsystem" comprising the entire field of the law – hence including civil law.') and Asser/Hartkamp 4-II (2001), no. 45a ('The basic assumption is the awareness that the basic rights are positivizations of principles that are so important in our society that they should play a role not only in the legal relationships for which they were traditionally intended, namely the relations between citizens (and their organizations governed by private law) and the government, but that they should have an effect in the mutual relations between the citizens (and their organizations)'.)

4 *See* already H. Drion, 'Civielrechtelijke werking van grondrechten' ('Civil-Law Effect of Fundamental Rights'), NJB 1969, pp. 585-594.

5 *See*, for example, 'The Right to Property, The Influence of Article 1 Protocol No 1 ECHR on Several Fields of Domestic Law' (Jan-Peter Loof, Hendrik Ploeger & Arine van der Steur), Maastricht 2000; H.D. Ploeger, Eigendom in het licht van het EVRM ('Ownership in the Light of the ECHR'), WPNR 6419 (2000), pp. 687-695; T. Barkhuysen, M. van Emmerik and H.D. Ploeger, De eigendomsbescherming van artikel 1 van het Eerste Protocol bij het EVRM en het Nederlandse burgerlijk recht (The Ownership Protection of Article 1 of the First Protocol to the ECHR and Dutch Civil Law), Preliminary Reports 2005, issued for the Dutch Association for Civil Law, Deventer: Kluwer 2005.

2 Sources and types of fundamental rights

Usually the term 'fundamental rights' is used to denote the basic rights laid down in the Constitution and the human rights enshrined in the Constitution and treaties.[6] In view of the prohibition against testing legislation against the Constitution (Art. 120 of the Dutch Constitution), the fundamental rights enshrined in treaties (in respect of which the prohibition against constitutional review is not applicable) are the most important to the Netherlands for the time being.[7] Relevant examples include the European Convention on Human Rights (ECHR), but also the International Covenant on Civil and Political Rights (ICCPR), the European Social Charter (ESC), the EC Treaty[8] and – by now – the extensive Charter of Fundamental Rights of the European Union.[9] First and foremost, this involves the classical rights, which are designed to protect the core of the human personality, such as the right to life, physical integrity, protection of privacy, freedom of movement, freedom of expression, equal treatment, freedom of religion, respect for family life, the right to marry, the right to a fair trial, et cetera. But it may also involve social fundamental rights, which order the state to do its utmost to achieve certain rights.[10] Both types of rights are originally intended primarily to be applicable between the government and citizens. Indeed, they have been defined in order to define the government's obligations and responsibilities vis-à-vis the citizen. This justifies the question to what extent they are also applicable in private law relationships (private law effect) and between the citizens themselves (horizontal effect).

6 With respect to the scope of fundamental rights, see E.A. Alkema, 'Fundamentele rechten – nationale en internationale dimensies' ('Fundamental Rights – National and International Dimensions'), in: De reikwijdte van fundamentele rechten (The Scope of Fundamental Rights), Preliminary Report of the Netherlands Lawyers' Association, Zwolle 1995.

7 *See* the private member's bill introduced by the member of the Lower House Halsema, Parliamentary Papers II 2001/02, 28 331, nos. 1-3, which advocates the partial lifting of the prohibition against constitutional review.

8 Refer to Articles 6 and 7, which are intended to safeguard fundamental rights.

9 Nice, December 2000. This concerns rights that will be binding only if the EU Constitution takes effect. The principles laid down therein continue to operate as principles.

10 Refer to M.W. Hesselink, 'The Horizontal Effect of Social Rights in European Contract Law', in: Privaatrecht tussen autonomie and solidariteit (Private Law between Autonomy and Solidarity) (M.W. Hesselink, C.E. du Perron & A.F. Salomons, ed.), The Hague 2003, pp. 119-131. Please note, however, that an ever increasing number of classical fundamental rights, such as the right to life, also enjoy positive protection in that they also require the government to achieve something.

Fundamental rights can also be defined, however, in much broader terms, as rights that are so elementary that they ought to be applicable as a matter of principle, irrespective of whether they have found expression in basic rights or in human rights. A concept sometimes used in this sense is known as the 'right to human dignity', from which more specific rights can be derived and on which party autonomy and the related principle of freedom of contract,[11] for example, are said to be based.[12] In fact, this involves fundamental rights as legal principles as such and not so much the question of the branch of law (public law or private law) in which they are rooted. This latter perspective has the disadvantage that it does not give us much to go on in concrete terms, but it could also prove an advantage, because it may transcend pigeonholed thinking.

3 Ways in which fundamental rights have an effect

Much has been written, in particular in the public law context, about the effect of fundamental rights, but we also no longer find ourselves in uncharted territory in the private law context. In my view, this issue may be briefly summed up by the conclusion that the private law effect (the acceptance of the significance of fundamental rights in private law relationships) as such has been accepted both in the literature and in case law. It has also been accepted – in any case in relation to specific fundamental rights – that their effect is not limited to relations between the government and the citizen (vertical), but that they also have an effect on the relations between the citizens themselves (horizontal).[13]

11 On the freedom of contract as a fundamental right, see also Asser/Hartkamp II, no. 45 and E.A. Alkema, 'Contractvrijheid als grondrecht; de vrijheid om over grond- en mensenrechten te contracteren of er afstand van te doen' ('Freedom of Contract as a Basic Right; the Freedom to Contract about Basic and Human Rights and to Waive Them'), in: Contractvrijheid (Freedom of Contract), C.J.J.M. Stolker & T. Hartlief (ed.), Deventer 1999, p. 33 ff.

12 On contract law, a similar point was made by Brigitta Lurger, Grundfragen des Vertragsrecht in der Europäischen Union, Wien, New York 2002, p. 242, who advocates a 'Grundrecht auf einigermaszen faire Vertragsbeziehungen' aimed at preventing serious infringements of the interests of one of the parties.

13 Refer to the extensive treatment thereof in L.F.M. Verhey, Horizontale werking van grondrechten, in het bijzonder het recht op privacy (Horizontal Effect of Fundamental Rights, Particularly the Right to Privacy), diss. Utrecht, Zwolle 1992, p. 69 ff. During the debate on the constitutional revision in 1983, the legislator left the issue of the horizontal effect of fundamental rights to the courts (TK 1975-1976, no. 3, p. 10 ff).

The debate, however, centres on the question of *how* fundamental rights are allowed to affect private law relationships and *to what extent* this should be allowed. In this context, a distinction can be drawn between 'direct' effect – meaning that a basic or human right can be invoked immediately without this right having been translated into a civil-law provision – and 'indirect effect', meaning that the fundamental right, or any aspect of this right, has been embodied in a formal statutory provision, hence an effect *through* private law.[14] As a matter of fact, this kind of indirect effect may well concern a more specific statutory provision, such as the ban on discrimination laid down in Art. 429quater of the Dutch Penal Code, in the Equal Treatment Act (*Algemene Wet Gelijke Behandelin*g) and in, for example, Art. 646 Book 7 of the Dutch Civil Code, which provides that discriminatory contracts and clauses in the context of an employment relationship are null and void. It may, however, also concern the review of one or more fundamental rights in the context of an open standard, such as the standard of due care to be observed in society (Article 162 of Book 6 of the Dutch Civil Code), good morals (Article 40 of Book 3 of the Dutch Civil Code) or reasonableness and fairness (Articles 2, 233 and 248 of Book 6 of the Dutch Civil Code).

In my opinion, the controversy about direct or indirect effect is for the most part political in nature and it does not have great practical significance. Advocates of direct effect claim that it has the advantage that the effect is more outspoken.[15] Advocates of indirect effect are frequently proponents of a more modest impact of fundamental rights as well.[16] When considered from a technical perspective, neither view needs to result in a 'greater effect' than the other in practice: direct effect may be interpreted in a very restricted way, whereas

14 German law has in principle opted for the indirect effect. Refer to Claus-Wilhelm Canaris, Grundrechte und Privatrecht, Berlin, New York 1999 and BverfG 15 January 1958, 7, 198.

15 *See*, for example, M.W. Hesselink, 'The horizontal effect of social rights in European contract law', in Privaatrecht tussen autonomie en solidariteit (Private Law between Autonomy and Solidarity) (M.W. Hesselink, C.E. du Perron & A.F. Salomons, ed.), p. 130, footnote 47, who prefers direct horizontal effect, because he expects the effect to be stronger in that case.

16 Refer, for example, to J.M. Smits op. cit. 2003, p. 13: '… basic rights are a factor only as a source of knowledge for the fundamental values that are to be respected in private law.'

indirect effect may well be quite substantial.[17] By now, Dutch law has many examples of indirect effect in a wide variety of shapes and gradations.

Since, at this juncture, Dutch patrimonial law has many open standards, it offers useful reference points for balancing fundamental rights in private law relationships. The textbook example of the foregoing is, of course, the decision by the Dutch Supreme Court in which it held in the context of Art. 162 of Book 6 of the Dutch Civil Code that the right to the protection of privacy and the freedom of expression, or other basic rights, should be balanced.[18] The open due care standard is explicitly designated as a source for a restriction provided for by law, as required by the ECHR.[19] By now, the Dutch Supreme Court has made it clear that not only the open standard of Art.162 of Book 6 of the Dutch Civil Code may serve as an appropriate framework for review of fundamental rights invoked in a lawsuit governed by private law but that open standards in the law of contract are also suitable for that purpose.[20] Accordingly, these standards, too, may be designated as restrictions on basic rights sufficiently defined by law. What weight should be given in a concrete case to the fundamental nature of the right invoked and on what does the outcome of the balancing process in a concrete case depend – naturally – on the weight of the other facts and circumstances that are relevant to this balancing. However this may be, the scope offered by open standards and the flexible approach adopted by the Dutch Supreme Court in being prepared to use this scope as a framework for reviewing fundamental rights tends to push the importance of the issue whether fundamental rights have direct effect or 'merely' indirect effect into the background. As a matter of fact, the courts always have the possibility of attaching significance to fundamental rights and of doing justice to their weighing up in a concrete case.

17 Refer, for a critical point of view in this respect, to B.J. de Vos, Constitutionalisering: een overschat vraagstuk? (Constitutionalisation, an overestimated issue?), in Eenheid en vermogensrecht (Unity and patrimonial law), E.M. Hoogervorst, I.S.J. Houben, P. Memelink, J.H. Nieuwenhuis, L. Reurich, G.J.M. Verburg (ed), Deventer 2005, p. 287-304.

18 Supreme Court decision dated 5 June 1987, NJ 1988, 702 with a note by EAA (Goeree I), Supreme Court decision dated 2 February 1990, NJ 1991, 289 with a note by EAA (Goeree II), Supreme Court decision dated 18 June 1993, NJ 1994, 347, with a note by EAA and CJHB (HIV test) and Supreme Court decision dated 2 May 2003, NJ 2004, 80, with a note by EJD (Storms/Niessen).

19 Refer to the recent Supreme Court decision dated 2 May 2003, NJ 2004, 80, with a note by EJD (Storms/Niessen).

20 *See* the Supreme Court decision dated 12 December 2003, NJ 2004, 117 (HIV test).

There is another reason why this technical effect is of lesser importance: the Dutch Supreme Court has proved to be willing to recognise fundamental rights with its own merits in a private law context, which means that the entire effect issue is in fact circumvented. In the context of wrongful acts, the Dutch Supreme Court has spoken about the 'general personality right' underlying basic rights, such as the right to privacy, right of freedom of thought, conscience and religion and the freedom of expression'.[21] In this judgment, the Dutch Supreme Court recognises the existence of values so fundamental that they precede, as it were, the expression of these values in more concrete human rights. The Supreme Court pursued this line of reasoning to derive concrete rights (in this case, the right to know the identity of a begetter), which had not been defined in such terms before from the general personality right. In this way, it chooses a higher level of abstraction as it were (general personality right from which basic rights have been derived) and it next descends directly to a lower level by distilling from that personality right a private-law right with direct effect (the right to know the identity of a begetter) without dealing with the technical aspects of the effect of the fundamental rights issue.[22] This shows that fundamental rights may constitute a source for conclusions of law in a private-law context even if they have not been articulated in detail in basic or human rights and without the need to address formal effect issues.[23]

Accordingly, one may opt for the more specific perspective of the question of how concrete basic and human rights affect private law. In this context, the

21 Supreme Court decision dated 15 April 1994, NJ 1994, 608 with a note by WH-S (Valkenhorst).

22 Something similar is to be found in the Supreme Court decision dated 8 April 1994, NJ 1994, 704 (Agfa/Schoolderman), in which the Supreme Court rejected the assertion that Art. 1 of the Dutch Constitution (equal treatment) does not have horizontal effect by taking the ground that the district court 'had only taken account of the generally recognised legal principle that equal work should be paid equally in equal circumstances (…)' and that it was under an obligation to do so under Art. 3:12 of the Dutch Civil Code in the context of the application of Art. 1638z as well.

23 On the concept of personality rights, their relationship with fundamental rights and their relationship with subjective rights, see S.D. Lindenbergh, 'De positie en de handhaving van persoonlijkheids- rechten in het Nederlandse privaatrecht' ('The Position and Enforcement of Personality Rights in Dutch Private Law'), Preliminary Report, Tijdschrift voor Privaatrecht 1999, pp. 1665-1707; R. Nehmelman, Het algemeen persoonlijkheidsrecht (The General Personality Right), diss. Utrecht, Deventer: W.E.J. Tjeenk Willink 2001, as well as A.J. Verheij, Vergoeding van immateriële schade wegens aantasting in de persoon (Reparation of Non-Economic Damage as a result of the Victim's Person being Afflicted), diss. Amsterdam (VU), Nijmegen: Ars Aequi 2002.

codified basic and human rights may be an inspiration and reference point. They may help articulate and give substance to fundamental personal interests in law. One may also opt for the more general perspective of the question of how to give sufficient justice to fundamental interests or principles, such as human dignity and party autonomy in a private law context. Besides, there may be fundamental rights other than those laid down in the Constitution and treaties that define or affect the private law relationship more specifically. As a matter of fact, these are not perspectives that rule each other out: ideally, they meet at an intersection: good private law allows room for basic and human rights and does sufficient justice to fundamental interests and rights. Below, a variety of examples of the effect of fundamental rights will be addressed. I will make a distinction between legal relationships governed by contract law and legal relationships based on extra-contractual liability.

4 Contract law

As indicated above, fundamental rights may affect contractual relationships in a variety of ways. I will give a number of examples of each type of effect. On this issue, there is a steadily increasing amount of literature in the Netherlands,[24] while the issue has also been addressed in legal proceedings. This may involve an effect through more or less general legislation affecting contract law (4.1), an effect though legislation relating to specific contracts (4.2), or an effect through general contract law tenets (4.3).

4.1 Effect through Legislation Affecting Contract Law

As indicated above, various fundamental rights are enshrined in legislation, which, for its part, may affect contract law. The prime example in this context is the Dutch Equal Treatment Act, which in Section 5 includes a prohibition

24 For the Netherlands, see J.M. Smits, Constitutionalisering van het vermogensrecht (Constitutionalisation of Patrimonial Law), Preliminary Report of the Netherlands Comparative Law Association, Deventer 2003, pp. 1-163, discussed by C. Mak, NTBR 2004, p. 124 ff; O. Cherednychenko, 'Constitutionalisation of contract law: Something new under the sun?', EJCL 2004, Vol. 8.1; S.D. Lindenbergh, 'Constitutionalisering van contractenrecht, Over de werking van fundamentele rechten in contractuele verhoudingen' ('Constitutionalisation of Contract Law; on Fundamental Rights in Contractual Relationships'), WPNR 6602 (2004), pp. 977-986.

against discrimination with regard to employment, and in Section 7 it provides that it shall be unlawful to discriminate on the ground of religion, beliefs, political opinion, race, sex, nationality, heterosexual or homosexual orientation or marital status in offering goods or services and in concluding, performing or terminating contracts relating thereto.[25] Section 9 of the Equal Treatment Act provides that clauses conflicting with the Act are null and void.

In addition to the Equal Treatment Act, the Personal Data Protection Act (*Wet bescherming persoonsgegevens* or *WBP*) is worth mentioning. This act contains further rules with regard to the due care to be observed in relation to personal data as well as provisions governing the processing of special personal data relating to a person's religion, beliefs, race, political opinion, health, sexual life, membership of a trade union, personal data in the context of criminal law and in the context of wrongful conduct ('*i.e.* torts'). These rules are applicable, for example, when it comes to the requirements a good employer has to live up to in a contract of employment concerning the collection of data on employee Internet use.

4.2 Effect through Legislation relating to Specific Contracts

Various contractual relationships have been defined to a considerable degree by the legislator. These often relate to contracts concerning 'primary necessities of life', such as health, home and work. These statutory regulations have been principally inspired by fundamental rights and they often give further substance to these rights in terms of the contractual relationship to which they relate.

Reference may be made to the equal treatment provisions (Art. 646 *et seq.* of Book 7 of the Dutch Civil Code) and the personal safety provisions (Art. 658 of Book 7 of the Dutch Civil Code) as far as employment contracts are concerned.[26] But the provisions relating to the non-competition clause (Art. 653 of Book 7 of the Dutch Civil Code) may also be considered an *ex ante* assessment by the legislator of the individual rights and freedoms enjoyed by

25 The third subsection of Section 7 makes an exception for requirements that cannot reasonably be set in view of the private nature of the circumstances to which the legal relationship relates.

26 On the issue of age discrimination, see the recent Supreme Court decision dated 8 October 2004, NJ 2005, 117 with a note by GHvV (compulsory retirement of pilots at the age of 56 is not inconsistent with Art. 1 of the Dutch Constitution and Art. 26 of the ICCPR).

employee and employer alike, which has resulted in a further demarcation of the freedom of contract.[27] In more general terms, it may be said that labour law is suffused with the spirit of protection for the human person and the employee's freedoms.[28] Finally, Article 611 of Book 7 of the Dutch Civil Code, which relates to good employeeship and employership (reasonableness and fairness in the employment relationship), offers plenty of possibilities for fundamental rights applying to concrete cases not specifically governed by law.[29] Besides, the principle of equal pay for equal work, for example, has contributed to a significant extent towards the emancipation of the employee working under a flexible employment contract,[30] which by now has given rise to significant statutory amendments.

Fundamental rights have also had a significant impact on the statutory regulation of the lease agreement, especially the residential lease agreement. These concern mainly provisions aimed at giving the lessee the opportunity to rent residential property at a reasonable price and at safeguarding his enjoyment of the property in other ways as well, including his privacy.[31]

Further, the regulation governing medical treatment contracts contains various provisions affecting the fundamental rights of the person treated. Examples include provisions concerning the supply of information to the patient and the patient's right to self-determination (Articles 448, 449, 450, 454 and 456 of Book 7 of the Dutch Civil Code) and provisions relating to information about the patient or his private life (Articles 457, 459 and 464 (2) of Book 7

27 *See* J.B. Floor, 'Discussie omtrent verenigbaarheid van wetsvoorstel 28 167 met het grondrecht op arbeidsvrijheid' ('Discussion on the Incompatibility of Bill 28 167 with the Basic Right to Freedom of Employment'), Rechtshulp 2004, no. 5, pp. 11-21.

28 Refer, for example, to the Supreme Court decision dated 14 November 2003, NJ 2004, 138: 'The protection idea underlying labour law, which finds expression, inter alia, in Articles 7:613, 7:678 (3), 7:681 (4) and 7:686, last sentence, of the Dutch Civil Code, means that (…) it must be assumed that a clause under which the employer or any organ thereof is empowered to impose sanctions under employment law against an employee by way of a binding party decision is void.'

29 *See*, for example, the judgment of the Court of Appeal of 's-Hertogenbosch dated 2 July 1986, NJ 1987, 451 (Prohibition against placing video cameras to record employee conduct) See also the Supreme Court decision dated 30 January 2004, JAR 2004, 68 (Bb 2004, no. 9, M.S.A. Vegter), in which the Dutch Supreme Court distils the principle of equal pay from Art. 7:611 of the Dutch Civil Code. See also below.

30 Refer to the Supreme Court decision dated 8 April 1994, NJ 1994, 704 (Agfa/Schoolderman).

31 For an example of a case in which it was attempted in vain to fend off an eviction claim on the ground of nuisance by invoking the Convention on the Rights of the Child, see the judgment by the Court of Appeal of The Hague dated 11 March 2005, LJN AT5461.

of the Dutch Civil Code). But also more general provisions, such as the prohibition against the exclusion or limitation of liability (Article 463 of Book 7 of the Dutch Civil Code) may be regarded as an elaboration on the fundamental right to the protection of physical integrity and health promotion. Finally, the provision regarding good-quality care (Art. 653 of Book 7 of the Dutch Civil Code) allows fundamental rights to be applied in concrete cases not specifically governed by law.

Apart from these contracts that are governed by a statutory regulation that is to a great extent based on people's fundamental rights, there are, of course, other contracts that are governed by statutory regulations that include specifications of or references to fundamental rights.[32] Further, reference may be made to the matrimonial property regulation relating to the protection of 'hearth and home' (Art. 88 of Book 1 of the Dutch Civil Code), which could be regarded as a manifestation of the right to respect for family life.

4.3 General Reference Points in Contract Law

Fundamental rights may also have an impact where there are no detailed statutory regulations based thereon, indeed perhaps even more so in that case. It seems natural to assume that it is mainly the various open standards that offer a suitable framework for review for the foregoing, as is the case in the law of extra-contractual liability. Telling examples of the foregoing include Art. 40 of Book 3 of the Dutch Civil Code (inconsistency with public order and good morals), Articles 2 and 248 of Book 6 of the Dutch Civil Code (reasonableness and fairness) and Article 233 of Book 6 of the Dutch Civil Code (general terms and conditions), but illustrations of the relevance of fundamental rights can also be found in the context of other doctrines, such as the vitiating factors (known as 'defects of the will' in Dutch law). Below, this will be illustrated on the basis of examples taken from relevant case law.

4.3.1 Legislation, public order and good morals

The most profound impact of fundamental rights on contractual relationships may be related to Article 40 of Book 3 of the Dutch Civil Code, under which

32 *See*, for example, Art. 1020 ff of the Dutch Code of Civil Procedure regarding the arbitration contract, which affects the right to access to the courts as laid down in Art. 17 of the Dutch Constitution.

fundamental rights may be one of the factors defining the content of public order and/or good morals and which may in this way set limits to the freedom of contract.[33] This involves not only the fundamental rights that may have an impact on contractual relationships through the concepts of public order and good morals but also the fundamental value of the freedom of contract as such. After all, in these cases the relevant question is how this freedom of contract relates to the fundamental rights protected by public order and good morals in a concrete case.[34] In the past, the Dutch Supreme Court recognised on several occasions that fundamental rights may have an impact through the testing of the content of the contract against public order and good morals.[35]

Even if the contents of a contract are permissible, fundamental rights may carry weight when it comes to a court's conclusion about the extent to which it may order the performance of a contract.

An example of the latter can be found in a recent decision concerning a contract between the Dutch Public Prosecution Service and a gangland informer.[36] The contract included a clause to the effect that information pro-

33 On this issue, see in particular V. van den Brink, De rechtshandeling in strijd met de goede zeden (The Juridical Act that Conflicts with Good Morals), diss. Amsterdam (UvA), The Hague 2002, pp. 38-49.

34 Incidentally, the good morals as such may also serve as a restriction with respect to human rights, according to European Court of Human Rights. Refer to the ECHR decision dated 7 December 1976, NJ 1978, 236 (Handyside), ECHR 25 March 1985, NJ 1987, 900, with a note by EAA (Barthold), ECHR 24 May 1988, NJ 1991, 685, with a note by EAA (Müller et al.), ECHR 29 October 1992, NJ 1993, 544, with a note by EJD (Dublin Well Women).

35 Refer to the Supreme Court decision dated 20 May 1938, NJ 1939, 331, with a note by PS (a divorce settlement clause under which a woman is obligated to send a child to a Roman-Catholic school under pain of forfeiture of the right to maintenance conflicts with good morals), Supreme Court decision dated 31 October 1969, NJ 1970, 57, with a note by GJS (Mensendieck I) (a clause under which a participant in a course is under an obligation to refrain from practising Mensendieck therapy if she fails to complete her course is not incompatible with public order and good morals on the mere ground that it would be impossible to practise the Mensendieck therapy for the whole of her life), Supreme Court decision dated 6 March 1987, NJ 1987, 1016, with a note by WLH (on the issue of whether a medical doctor has to give information to the court under a medical treatment contract) and the Supreme Court decision dated 20 March 1992, NJ 1992, 495, with a note by PAS (on the question whether the discriminatory dismissal of sailors was void because of incompatibility with public order and good morals). See also the judgment by the Arnhem Court of Appeal dated 25 October 1948, NJ 1949, 331 (obligation in a lease agreement relating to membership of a Protestant congregation is void because it conflicts with the freedom of religion).

36 Dutch Supreme Court decision dated 28 March 2003, NJ 2004, 71, with a note by Sch.

vided by the informer would not in any way be made available to 'third parties, including police officers, the Fiscal Intelligence and Investigation Service, etc.' The lawsuit concerned the question of how 'third parties' had to be interpreted, whether this clause was valid and what its consequences were. The State was of the opinion that a reasonable interpretation meant that 'third parties' did not also include the Lower House of the Dutch Parliament and the National Security Service, and that, to the extent that the parties had wanted this to be so, this would not result in the Public Prosecution Service's constitutional obligation of providing information being overridden (Art. 68 of the Dutch Constitution). According to the Court of Appeal, it was undeniably the case that the parties had intended to guarantee that the information to be provided by the informer would not be passed on to any persons or entities other than the Public Prosecution Service for reasons of the informer's safety. The Court of Appeal deemed the clause void, however, insofar as it related to an overall and unconditional prohibition imposed on the relevant Minister to give information to the States General. Even so, the Court of Appeal did not reverse the order issued by the President of the District Court to the effect that no information may be given to third parties, because in its opinion, the legal duty to protect the informer's safety as much as possible in passing on the information remains unaffected, as this safety can be sufficiently protected by passing the information to the States General in strict confidence. According to the Court of Appeal, the contract was void to the extent that it prohibits the provision of information to the National Security Service, because the Intelligence and Security Services Act requires the Public Prosecution Service to do just that, and because the risk of further dissemination had been sufficiently contained as a result of the special position of the National Security Service and the obligation of secrecy to be observed by its officials.

The Supreme Court took a different view and it implicitly attached greater weight to the right of privacy and the importance of the informer's personal safety. The Supreme Court emphasized the broad interpretation of 'third parties', which means that it also includes the Lower House of the Dutch Parliament and the National Security Service, and it considers that the parties were duly empowered to enter into the contract, that the promise included therein is binding on the State and its organs and that the person to whom the promise was made is, in principle, entitled to the fulfilment of this promise. In addition, the Supreme Court did not consider making this kind of promise to be incompatible under all circumstances with the obligation of informing Parliament as laid down in Art. 68 of the Dutch Constitution, because there is an exception to this obligation (conflict with 'the interest of the State'), which includes the

protection of privacy. Nevertheless, the Supreme Court concluded that there can be a situation in which the Minister may have to disclose the information given to him to Parliament in confidence. Against this background, the Supreme Court considers it relevant that under Articles 296 of Book 3 and 168 of Book 6 of the Dutch Civil Code, an unconditional prohibition imposed on the State against giving information to Parliament in connection with weighty social interests may be rejected. Accordingly, the Court of Appeal to which the case is remitted will have to define the court order to be issued such that no information may be given to Parliament unless the informer's written permission has been obtained or after the informer has been given the opportunity to ask for additional legal protection. Further, the Supreme Court does not agree with the Court of Appeal's conclusion that the agreement on absolute secrecy is void because it conflicts with the obligation to inform the National Security Service laid down in the Intelligence and Security Services Act, because this obligation depends on the Public Prosecution Service's balancing of interests, perhaps in advance.

The judgment shows that the protection of privacy and an informer's safety being embedded in a contract means that great importance must be attached to that. The informer may invoke not only these fundamental rights but also the principle of the freedom of contract and the related binding force of the contract. The importance of these interests is also manifest in the context of the performance. Where the court – as in this case – may not order the unconditional fulfilment of the obligation of secrecy in connection with the constitutional obligation of informing Parliament, the order to be imposed by it must nevertheless be defined such that the informer's fundamental interests are sufficiently guaranteed.

4.3.2 Reasonableness and fairness

Fundamental rights may have an impact not only through public order and good morals, but also through the supplementary as well as the restrictive effect of reasonableness and fairness, as laid down in Articles 2 and 248 of Book 6 of the Dutch Civil Code (and in connection with general terms and conditions, as laid down in Article 233 of Book 6 of the Dutch Civil Code). In this context, the relevance of fundamental rights may simply find expression through the generally recognised legal principles, the juridical views held in the Netherlands and the societal and personal interests relevant to the given case, all of which have to be taken into consideration in the determination of the requirements

of reasonableness and fairness, according to Article 12 of Book 3 of the Dutch Civil Code.[37]

4.3.2.1 Additional effect, an example

A clear example of the supplementary effect of reasonableness and fairness as a result of the balancing of fundamental rights can be found in the judgment concerning an assistant doctor specialising in oral/dental surgery who cut his finger while removing a wisdom tooth, as a result of which his blood contacted that of the patient.[38] The doctor, who feared that he had been infected with the HIV virus because the patient had used drugs and had served a prison sentence in the past and as such belonged to a risk group, demanded in preliminary relief proceedings that the patient should give his blood for purposes of a HIV test in order to determine the chances of infection. The question facing the court was whether the patient was under an obligation by virtue of the legal relationship between him and his doctor to undergo this kind of infringement of his right to physical integrity, and, when viewed from the doctor's perspective, whether the latter had a legitimate claim towards the patient in respect of this kind of operation. In other words, this action focussed on the definition of the mutual rights and obligations arising under the legal relationship, which in this case was governed by the rules of the medical treatment contract. It is in particular the decision rendered by the Court of Appeal that merits attention, because the Dutch Supreme Court fully endorsed this decision.

The Court of Appeal starts by embedding the patient's invocation of his right to privacy and the right to respect for his physical integrity into the contractual relationship. For this purpose, it considers that in answering the question of whether the doctor is entitled to the patient's cooperation in the form of a blood test to be undergone by the latter, the Court must assume that the basic right to privacy and his physical integrity, which is derived from Articles 10 and 11 of the Dutch Constitution, is subject to any restrictions imposed thereon by or pursuant to law. According to the Court of Appeal, this kind of restriction to be applicable between citizens mutually may, in principle, be based on Article 162 of Book 6 of the Dutch Civil Code, partly on the basis of the proper social conduct standards that are implicit in that article. Where, as in this case, a contract has been concluded between these citizens which has a relevant bearing on the reason underlying the request for cooperation, this

37 *See* also Dommering, Mon. A-7, no. 9, who claims that social fundamental rights can also be applicable through this article.

38 Supreme Court decision dated 12 December 2003, NJ 2004, 117 (HIV test).

restriction may arise from the contents of the contract already, according to the Court of Appeal. The contents are also determined by means of the requirements of reasonableness and fairness in the light of the nature of the contract. The mutual relationship between the patient and the doctor as a result of the conclusion of the medical treatment contract means, according to the Court of Appeal, that in circumstances arising from or relating to the execution of this contract, they have to observe a degree of care vis-à-vis each other that is not applicable vis-à-vis an arbitrary third party. Further, the Court of Appeal takes the stand that a patient may be required to do everything necessary to restrict the damage or loss sustained by the doctor during the treatment within reasonable limits even after the termination of the medical treatment contract. With respect to the interests to be balanced against each other in this concrete case, the Court of Appeal considers that there has been an infringement of a basic right within the meaning of Article 11of the Dutch Constitution in this case, but that it involves a relatively minor infringement of this basic right. He only had to tolerate the taking of his blood, whilst the blood test results needed to be disclosed only to the doctor. Only if the patient himself did not object to this was the result disclosed to him and/or his lawyer. Besides, the test did not involve any risks for the patient's health, according to the Court of Appeal. The minor infringement of the patient's basic right is counterbalanced by the doctor's weighty interest in finding out with certainty whether or not he has been infected with the HIV virus and whether or not it is necessary for him to use prophylactic medicines with heavy side-effects in connection with the foregoing. The balancing of these interests justifies the conclusion, according to the Court of Appeal, that the patient may be required to undergo a blood test. By refusing to do so, he has failed to meet his obligation towards the doctor arising under the medical treatment contract, or, alternatively, has acted unlawfully towards the doctor.

Accordingly, the Court of Appeal 'translates' the possibility of a restriction on a basic right offered by Art. 162 of Book 6 of the Dutch Civil Code, according to the Dutch Supreme Court, to the contractual relationship by placing it in the context of reasonableness and fairness. This position deserves support, in my view: if this kind of restriction on a basic right is possible in a relationship between more or less arbitrary third parties by relying on an open standard, the same should apply to parties having a contractual relationship.[39] Here the concept of reasonableness and fairness offers an adequate framework for judicial

39 A similar point was made by Procurator General Hartkamp in his Opinion in this case (under 9).

review. Arguably, the case described above concerned a post-contractual relationship, but this does not detract anything from the foregoing, in my view. This relationship, too, is definitely governed by reasonableness and fairness. Incidentally, the Court of Appeal makes it clear that it would not have arrived at a different conclusion on the ground of a wrongful act, but this does not mean that it makes no difference whether the test is carried out on the basis of Articles 162 or 248 of Book 6 of the Dutch Civil Code, for the existence of a contractual relationship may result in a different assessment in terms of contents, for the very reason that the parties have a special relationship with each other.

Another advantage of basing an invocation of a fundamental right on the concept of reasonableness and fairness is that this is a tested framework for balancing interests, which is almost inevitable in such cases. A further interesting aspect of this case is that it shows that where the statutory regulation of the contractual relationship between doctor and patient is focussed mainly on guaranteeing the fundamental rights of the patient (physical integrity, privacy, information), this case reveals the possibility of giving weight to the doctor's relevant personal interests as a result of balancing the interests. As a matter of fact, the judgment also shows that fundamental rights (in this case, those of the patient) are not absolute rights. In the very relationship in respect of which the law aims to offer a broad range of protection to the patient's fundamental rights, these rights may in the concrete case yield to the equally fundamental rights of the doctor. In this context it is worth mentioning that in one of the objections in the cassation ground, it was argued that the mere fact that the patient had interests recognised in the Constitution necessitates the exercise of restraint in permitting any infringements of these interests. It was claimed that the Court of Appeal failed to attach any or sufficient weight with a clear significance of its own to the fact that basic rights had been infringed. This objection was in vain: in the Court of Appeal's balancing of interests, it had taken this aspect into consideration. Where interests are balanced, a litigant putting forward a basic right will not always be victorious.

4.3.2.2 Freedom of contract and derogatory effect, an example

An example of the balancing of fundamental interests in the context of freedom of contract and the derogatory effect of reasonableness and fairness can be found in the judgment on the passing of employment seniority rights.[40] This case concerned a claim brought by an interest group (Parallel Entry) representing

40 Supreme Court decision dated 30 January 2004, NJ 2005, 117, with a note by GHvV (Parallel Entry/KLM)

pilots of KLM Cityhopper B.V. (KLC pilots) against KLM, for the purpose of securing the same terms and conditions of employment for these KLC pilots as those of the other pilots employed by KLM (KLM pilots) in the case of a transfer to KLM. This case centred on the fact that KLC pilots making a transfer to KLM could bring only a part of the seniority built up at KLC with them, which had consequences for applications to heavier and better paid jobs, for example. Parallel Entry regarded this as unequal pay for equal work and argued that KLM failed in the performance of the contracts of employment of KLC employees by failing to behave as a good employer towards these employees (Article 611 of Book 7 of the Dutch Civil Code), or, alternatively, by acting in violation to the requirements of reasonableness and fairness. Both the subdistrict court and the district court ruled against Parallel Entry.

In the cassation proceedings, the Dutch Supreme Court focussed on the question whether the KLC pilots were entitled to the same conditions of employment in terms of salary and seniority rights as those of the KLM pilots on the ground of the 'Agfa criterion'.[41] In answering this question, the Supreme Court emphasized that this case was not about a distinction prohibited by a treaty provision with direct effect (such as distinctions based on religion, race, sex and the like) or the distinction based on a difference in the working period or on the temporary or permanent nature of the contract of employment as prohibited under Articles 648 and 649 of Book 7 of the Dutch Civil Code. According to the Supreme Court, this means that the question whether this case involves a permissible distinction can be answered only on the basis of the requirements of good employership in accordance with Art. 611 of Book 7 of the Dutch Civil Code, in which provision the general requirements of reasonableness and fairness, as laid down in Articles 2 and 248 of Book 6 of the Dutch Civil Code in respect of labour law, find expression. The Supreme Court continues as follows:

> 'In determining the requirements of good employership in respect of a case like the present one, the Court must therefore (…) "take account of" the principle of equal pay for equal work in equal circumstances, unless an objective justification permits unequal pay.'

41 According to the Supreme Court: the 'generally recognised legal principle of equal pay for equal work in equal circumstances, unless an objective justification permits unequal pay'. Refer to the Supreme Court decision dated 8 April 1994, NJ 1994, 704.

Accordingly, this is a factor that must be included in the assessment and that carries some weight:

> 'The foregoing means that this principle – to which (…) great weight should be attached – is not decisive, but that it has to be included, in addition to other circumstances of the case, in the assessment of whether the employer has acted in violation of the requirements of good employership in the given circumstances. In other words: even if it must be assumed in itself that employees perform equal work in equal circumstances without there being any objective justification for that difference in pay, this does not necessarily lead to the conclusion that they ought to be paid equally.'

In determining the extent of the employer's freedom to contract according to its own wishes, the Supreme Court draws a parallel with the derogatory effect of reasonableness and fairness:

> 'It also follows from the foregoing that the Court should exercise restraint in assessing the question of whether an agreed inequality in pay on the ground of this principle is to be regarded as impermissible and is to be set aside for this reason, because this concerns a test similar to the one to be applied in respect of the application of Article 248(2) of Book 6 of the Dutch Civil Code and that consequently, this question can be answered in the affirmative only if the inequality in pay is unacceptable according to the criteria of reasonableness and fairness. The same is all the more true if the unequal pay is based on a collective agreement, because in that case, the weighty principle of the freedom of negotiation on conditions of employment, which arises under several treaty provisions, is also a relevant factor.'

It is remarkable that even though the Dutch Supreme Court emphasizes the importance of the principle of equal pay in this case and attaches 'great weight' to it, it tones down this conclusion to a significant extent by emphasizing that this case does not centre on a specific prohibited violation and furthermore, that it is about the assessment of the freedom of contract, in which case the Court should exercise restraint. The foregoing seems to be inconsistent, because the definition of the principle 'no unequal pay unless there is an objective justification' suggests that in the case of factual inequality, the employer has a duty to state reasons, whereas the 'unacceptable inequality clause', by contrast, presupposes a duty to state reasons on the part of the employee. In my opinion, two distinct aspects are relevant in this context. First, the principle of equal pay carries less weight in situations not relating to specific prohibited dis-

tinctions.[42] Second, this 'dilution' means that this principle gives way sooner in the context of an assessment against the freedom of contract (and the corresponding binding force of the contract), which is after all also at issue when it comes to the derogatory effect of reasonableness and fairness. In this context, it is less fortunate, in my opinion, to use the phrase 'restrained assessment', because the *assessment* is not restrained (it still concerns the balancing of interests), but in this assessment the principle of the freedom of contract naturally carries great weight. Apparently, this is what the Supreme Court has in mind when it closes by establishing a link with the freedom of contract (in this case referred to as 'the weighty principle of the freedom of negotiation on conditions of employment').

4.3.2.3 Derogatory effect, another example

Another example of a case where constitutional aspects affect the assessment to be made in the context of the derogative effect of reasonableness and fairness concerns a judgment relating to the applicability of an arbitration clause restricting the right of access to the regular court system, as laid down in Article 17 of the Dutch Constitution.[43]

The case concerned a dispute between a firm of architects and a law firm in connection with an unpaid bill. In the opinion of Supervisory Board of the Royal Institute of Dutch Architects, the 1997 Standard Conditions Legal Relationship Client-Architect, which included an arbitration clause, had been declared inapplicable to the agreement between the parties, which was contrary to the architects' rules of conduct. The Court of Appeal ruled that these standard conditions did not govern the legal relationship, but that nevertheless, the ordinary court was not competent to take cognisance of the architects' claim, because their plea that the conditions were not applicable had to be considered unacceptable in the given circumstances in accordance with the standards of reasonableness and fairness.

The Supreme Court opts for a rather technical line of reasoning and holds that Article 248 (2) of Book 6 of the Dutch Civil Code (derogative effect of reasonableness and fairness) can mean only that a rule applicable between the parties as a result of a contract is not applicable to the extent that, in the given

42 On the limited applicability and scope of the principle of equal pay, also see the extensive discussion thereof in the Opinion filed by Advocate General Keus in this case, under 2.9

43 Supreme Court Decision dated 6 February 2004, NJ 2004, 349 (Van der Linden/Heutink Advocaten).

circumstances, it would be unacceptable according to the standards of reasonableness and fairness. Consequently, this rule cannot mean that the standard conditions that were not applicable according to the Court of Appeal are in fact applicable.

In his Opinion in this case, however, Procurator General Hartkamp points to the importance of the basic right aspect in the assessment in respect of the implications of reasonableness and fairness. The very fact that the basic right of access to the court system is at issue may be significant in this context:

> 'I emphasize that the words "unacceptable according to the standards of reasonableness and fairness" in Article 248 (2) of Book 6 of the Dutch Civil Code (and in Article 2 (2) of Book 6 of the Dutch Civil Code) mean that the court should exercise restraint in applying these provisions. (…) As observed (…), the constitutional argument is also in favour of this restraint. Dogmatically, this may, for example, be interpreted to mean that the horizontal effect of the basic right may in this way be effectuated by an extra restrictive application of reasonableness and fairness.'

Accordingly, the fact that a basic right, such as the right of access to a regular court, as laid down in Article 17 of the Dutch Constitution, is at issue is a relevant factor for the assessment to be made in the context of a general doctrine of contract law.[44]

4.3.3 Obligation to disclose in the case of vitiating factors

In addition, fundamental rights may play a part in the context of error and fraud.[45] In particular, the right to privacy may mean that a contracting party is entitled to withhold specific information. This applies, in particular, where other fundamental rights, such as the right to equal treatment, are involved as well.

A telling example of the latter can be found in a recent judgment of the European Court of Justice.[46] It concerned a German nurse who had taken

44 Also refer to the Supreme Court Decision dated 17 January 2003, NJ 2004, 280, with a note by HJS (ABN AMRO/Teisman), where the Supreme Court holds that Art. 17 of the Dutch Constitution is not in conflict with the possibility of tacit acceptance of arbitration proceedings in a collective agreement.

45 *See* also A.G. Castermans, De mededelingsplicht in de onderhandelingsfase (The Obligation to Disclose at the Negotiation Stage), diss. Leiden, Deventer 1992, p. 113 ff.

46 ECJ 27 February 2003, NJ 2003, 654 (Wiebke Busch/Klinikum Neustadt); also refer to Jac. Hijma, 'Privaatrecht Actueel', WPNR 6597 (2004), pp. 873-874.

parental leave for a period of three years, but had expressed the wish within this three-year period to return to work fully. Immediately after her employer had consented to her return to work, the woman informed her employer of her seven-month pregnancy, and she announced that she would take and was entitled to maternity leave on full pay. The employer wondered whether its agreement to the return to work could be reversed on the basis of error or fraud. The Court of Justice holds that the protection of the pregnant woman laid down in EU directives and enshrined in domestic legislation means that the woman was not obliged to notify her employer of her pregnancy. Further, the Court holds that the directive does not permit an employer to revoke its consent to a female employee's return to work before the end of the parental leave period on the ground of error as to the pregnancy of the relevant employee under domestic law.

For Dutch law, this means that when a female employee fails to disclose the existence of pregnancy, this failure may not be qualified as a violation of a duty to provide information within the meaning of Article 228 (1), under (b), of Book 6 of the Dutch Civil Code (error), and neither can it be qualified as 'a fact that a person was obliged to communicate' within the meaning of Article 44 (3) of Book 3 of the Dutch Civil Code (fraud), because, according to the Court, she was not obliged to give information about her pregnancy.

5 Extra-contractual liability

Fundamental rights also have an impact in the area of extra-contractual liability. In this area, too, various types of effect may be involved at different 'stages' of the legal debate: at the time liability is created, in the context of safeguarding and shaping the right to damages and in the context of the claim settlement process.

5.1 Violation as grounds for liability

First, acts in violation of fundamental rights as such may be a basis for liability along different lines. Certainly where the government acts contrary to a citizen's fundamental right laid down in a treaty or in the Constitution, this, in itself, may already be unlawful towards the citizen within the meaning of Article 162 of Book 6 of the Dutch Civil Code, because this can be said to be an infringement of a subjective right (which also includes personality rights), or conduct

contrary to a statutory duty (which includes obligations under the Constitution or treaties[47]), or acts or omissions violating rules of unwritten law relating to proper social conduct.[48]

A striking example of a case in which it was attempted to base the government's liability partly on the violation of a fundamental right relates to the Enschede firework disaster.[49] In this action, attempts were (and are being[50]) made to show that the government did not exert itself sufficiently to safeguard the right to life enshrined in Article 2 of the ECHR and the right to peaceful enjoyment of one's possessions, as laid down in Article 1 of the First Protocol to the ECHR. In this context, the Öneryildiz/Turkey case was also an inspiration, in which the Court ruled that the Turkish state was liable for the damage suffered by slum inhabitants who had fallen victim to a methane explosion.[51] This case shows that the government's obligations of safeguarding the safety of its citizens are far-reaching and that non-performance of these obligations may constitute independent grounds for damages.[52]

Another area where fundamental rights have been found relevant to wrongful acts relates to the determination of liability for press publications. It always concerns a clash between two fundamental rights: the right to freedom of speech on the one hand and the protection of privacy on the other hand. In this context, previous decisions of the Dutch Supreme Court have shown that Article 162 of Book 6 of the Dutch Civil Code, which relates to wrongful acts in general, provides for a sufficiently specific restriction on the freedom of speech and may be used by the courts as a framework for balancing interests.[53]

47 On this subject, see Michiel L. van Emmerik, Schadevergoeding bij schending van mensenrechten [Damages in case of Violation of Human Rights], diss. Leiden 1997, p. 15.

48 Refer to Art. 6:162 (2) of the Dutch Civil Code.

49 District Court of The Hague, 24 December 2003, NJ 2004, 230.

50 An appeal has been filed against the judgment rendered by the District Court of The Hague.

51 ECHR 18 June 2002, RJD 2002, NJB 2002, p. 1615 ff, no. 38. ECHR 2002, 64, with a note by H. Janssen, M & R 2002, 139, with a note by Kamminga, NJCM Bulletin 2003, p. 54 ff with a note by Kuijer.

52 An extensive discussion of this issue can be found in T. Barkhuysen & M.L. van Emmerik, ECHR judgment in the case Öneryildiz v. Turkey: European limits to tolerating dangerous situations and limits to government liability in case of accidents and disasters, O&A 2003, pp. 109-121.

53 Supreme Court Decision dated 24 June 1983, NJ 1984, 801 (Municipal Councillor); Supreme Court Decision dated 4 March 1988, NJ 1989, 361, with a note by CJHB (De Bourbon Parma children)l Supreme Court Decision dated 12 June 1992, NJ 1992, 554

Furthermore, claims other than claims for damages may be based on a fundamental right as well. A striking example in this context is the Valkenhorst case, where a child born in a home for 'fallen mothers' successfully started an action against the foundation managing this home demanding that it should provide information about the father's identity.[54] In this judgment the Supreme Court held that it concerned:

> 'the general personality right on which the right of privacy, the right of freedom of thought, conscience and religion are based.'

Although, in this case, Tort Law does not necessarily have to provide the framework for review and a claim for the disclosure of the father's identity could also be based directly on Article 296 of Book 3 of the Dutch Civil Code, because it concerns compliance with a legal duty directly based on a personality right in this case, the clash between fundamental rights is preferably reviewed on the basis of the tried assessment model of the wrongful act (Article 162 of Book 6 of the Dutch Civil Code).

Therefore, the basic function of fundamental rights is to provide a basis for liability, both that of the government and, in specific circumstances, that of private individuals.

5.2 Fundamental rights and full compensation

Second, fundamental rights may serve as further support for civil-law principles, such as the right to full compensation. Civil law-liability means that the victim is, in principle, entitled to full restoration.[55] This concerns a deeply rooted principle that is adhered to in nearly all Western European countries.[56] The

(mr Y); Supreme Court Decision dated 21 January 1994, NJ 1994, 473, with a note by DWFV (Ferdi E.); Supreme Court Decision dated 6 January 1995, NJ 1995, 422, with a note by EJD (Parool/Van Gasteren); Supreme Court Decision dated 2 May 2003, NJ 2004, 80, with a note by EJD (Storms/Niessen).

54 Supreme Court Decision dated 15 April 1994, NJ 1994, 608, with a note by WH-S (Valkenhorst).

55 For this principle, see Mon. Nieuw BW B-34 (Monograph on the New Civil Code B-34) (Bloembergen/Lindenbergh), nos. 6, 7 and 10.

56 Refer to U. Magnus (ed.), Unification of Tort Law: Damages, The Hague 2001, p. 188. For personal damage, see, in particular, a comparative summary of M. Bona in: Personal Injury Damages in Europe (Marco Bona & Philip Mead, red.), Deventer 2003, p. 556 ff

roots of this principle can actually be found in the system of liability law: if a contractual or extra-contractual legal obligation is violated and this has harmful consequences, this disruption of the legal order will have to be restored. In this context, Bloembergen refers to an elementary principle of the state under the rule of law.[57] This reparation can be done only by fully removing or compensating these harmful effects.[58]

The ECHR's interpretation of Article 6 of the ECHR (right to a fair trial) and Article 1 of the First Protocol to the ECHR (right to the peaceful enjoyment of one's possessions) shows that the right to full compensation enjoys protection from a human law perspective as well.[59] In this context, it should be borne in mind that the human rights background of these provisions means that the legal terms used have their own meanings and these may differ substantially from those of the terms used in national legal systems. For example, Article 1 of the First Protocol to the ECHR uses a concept of 'ownership' that is much broader than the concept of ownership used in Article 1 of Book 5 of the Dutch Civil Code. According to the case law of the European Court of Human Rights, this includes, for example, a claim arising from a wrongful act, as this arises from the loss-causing occurrence by operation of law and, therefore, constitutes an asset to the victim.[60] Restrictions on this right may, therefore, in specific circumstances, be qualified as violations of Article 1 of this First Protocol. A victim may invoke this kind of violation direct vis-à-vis the government, but this treaty provision is also significant in 'private relationships'.

A recent example of a successful claim on the basis of Article 1 of the First Protocol to the ECHR is the opinion of the Amsterdam Court of Appeal, which held that a claim by NS travellers based on the statutory limitation of liability mentioned in Article 110 (1) of Book 8 of the Dutch Civil Code (a maximum

57 In this respect, the principle of full damages may be considered an effect of 'the rule of law', according to A.R. Bloembergen in: Schadevergoeding: een eeuw later (Damages: a Century Later), Deventer 2003, p. 14. Also refer to J.H. Nieuwenhuis, De constitutie van het burgerlijk recht (The Constitution of Civil Law), RMth 2000, p. 206 ff, who states that disruptions in the division according to distributing justice must be adjusted on the ground of retaliatory justice.

58 On the problems and consequences of this principle for the area of personal injury, see Lindenbergh 2004, p. 2 ff.

59 For an extensive discussion of Art. 1 EP, see T. Barkhuysen, M. van Emmerik and H.D. Ploeger, Preliminary reports VBR 2005.

60 ECHR 20 November 1995, NJ 1996, 593, with a note by EJD (Pressos Compania Naviera S.A. et al. /Belgium), where it concerned a Belgian act which excluded all government liability for wrongful acts committed by pilotage organisations in the past, which the Court found to be a 'disturbance in the enjoyment of ownership'.

of NLG 300,000 in case of death or injury) had to be set aside, as this claim was considered unacceptable according to the standards of reasonableness and fairness.[61] The Court was of the opinion that the fact that limitation may serve a legitimate purpose (controllability of the entrepreneurial risk and insurability) did not alter the fact that this case lacked a fair balance between the general interest on the one hand and the protection of individual rights on the other hand. In this context, the Court also considered it relevant that a rather old limit up to a modest sum, non-indexed for inflation purposes, had been used (which the Court thought was even 'quite low'), whereas, the tendency in international treaties showed an increase in limits, according to the Court of Appeal.

As far as Dutch law is concerned, the legislative proposal concerning mass damage is also relevant in respect of Article 1 of the First Protocol,[62] which is based on the assumption that all victims are bound by a collective contract of settlement with the parties liable, unless the parties concerned state that they do not wish to be bound thereby (opting out). According to the explanatory notes, this regulation is in full agreement with the ECHR,[63] but the Council of State and the Netherlands Association for the Judiciary have their doubts about that.[64] In particular the persons who are not aware of their damage at the time of the conclusion of the collective contract of settlement with the parties liable, which may be the case if there is hidden damage, or the persons who miss the announcement of the regulation through no fault of their own, could in that case be bound by an agreement approved by the court, whereas they have never had access to a court.[65]

Furthermore, Article 6 of the ECHR and Article 1 of the First Protocol were mentioned in respect of the prescription of the right of action in respect of unknown damage, such as that suffered by mesothelioma victims.[66] The right of access to a court safeguarded by Article 6 of the ECHR presumably was

61 Judgment of the Amsterdam Court of Appeal dated 12 August 2004, NJF 2004, 543 LJN AR23333.

62 Parliamentary Papers II 2003/04, 29 414.

63 Parliamentary Papers II, 2003/04, 29 414, no. 7, pp. 14 and 19.

64 Parliamentary Papers II 2003/04, 29 414, no. 4, pp. 3-4.

65 For suggestions to overcome these difficulties, see F.B. Falkena & M.F.J. Haak, De nieuwe wettelijke regeling afwikkeling massaschade (The New Statutory Regulation for the Settlement of Mass Damage), AV&S 2004, p. 202.

66 *See* especially the opinion of Advocate General Spier (under 9) for the Supreme Court Decision dated 28 April 2000, NJ 2000, 430, with a note by ARB under no. 431 (Van Hese/De Schelde).

a weighty[67] argument for accepting the possibility that a claim based on prescription may be unacceptable in specific circumstances by reason of inconsistency with reasonableness and fairness.

The cases described reveal the safeguarding function of fundamental rights. They may be invoked if the national law fails to provide sufficient means for enforcement or denies the victim fundamental rights.

5.3 Violation as a basis for compensation of specific damage

A third category of cases where fundamental rights may play a part in liability law concerns cases where a fundamental right may be put forward to base a specific loss of an item on. In this context, it concerns mainly cases where there is no physical injury, but where fundamental personal values are, nevertheless, impaired, while there is often hardly any significant mental damage either. In particular, German law has accepted, in this context, a right to non-pecuniary damages on the basis of the *allgemeines Persönlich-keitsrecht* laid down in the *Grundgesetz*, in addition to the bases for a right to emotional damages provided for in civil law. Dutch law is beginning to show a similar development.

An example of the foregoing can be found in a recent Supreme Court judgment in which the municipality of Groningen was held liable because of a serious violation of privacy, because the police failed to intervene in a timely fashion when vandals attacked a dwelling during New Year riots.[68] In this action, the Supreme Court explicitly accepted a right to emotional damages, even in the absence of any physical or mental damage.[69] This may be explained only by the high status of the right violated in this case (respect for privacy) and the seriousness of the violation of this right (attack of a dwelling for a considerable number of hours whilst, despite repeated requests for assistance, the police failed to appear[70]).[71] Although the persons attacked clearly

67 Refer to ground 3.3.2. in NJ 2000, 430, where the Supreme Court refers to ECHR 22 October 1996, NJ 1997, 449 (Stubbings et al. /United Kingdom).

68 Supreme Court decision dated 9 July 2004, RvdW 2004, 98 (Groningen/Lammerts).

69 For cases where, under the old law, a right to emotional damages was accepted because of violation of privacy without any injury, see the Supreme Court Decision dated 30 October 1987, NJ 1988, 277 (Naturistengids) and the Supreme Court decision dated 1 November 1991, NJ 1992, 58 (Staat/K).

70 The claim brought by the son, who was not at home during the attack, was denied because the infringement of his privacy was not considered sufficiently serious.

suffered emotional damage, the right to damages in such a case is also justified by the idea of law enforcement.[72]

The Supreme Court faced a similar matter in a recent wrongful life action, where the legal question was raised[73] whether the mother and the father are entitled to non pecuniary damages solely based on a violation of their right to decide (in an informed manner) about their own reproduction (an element of self-determination). In this action, the Supreme Court accepted a right to damages for both parents solely on the basis of the violation of their fundamental rights to decide about their reproduction themselves, in other words, even in the absence of any mental injury, which was usually required.[74]

The Baby Joost case and the Kindertaxi case are other examples. In these cases, the right to a family life as laid down in Article 8 of the ECHR was used to substantiate the right of relatives to emotional damages. The Supreme Court considered it insufficient grounds for awarding emotional damages, because, according to the Supreme Court, Article 8 of the ECHR does not seek to protect the asserted interest,[75] nor does it impose an obligation on the legislator to provide for damages in such cases.[76] Nevertheless, I consider it quite valid to argue that the exclusion of the compensation of damage arisen as a result of the loss of a relative in cases where the mental damage of a third person does qualify for compensation, is contrary to Article 8 of the ECHR.[77] It is

71 *See* S.D. Lindenbergh, Smartengeld (Non pecuniary loss), diss. Leiden, Deventer 1998, p. 155 ff

72 In this context, also refer to A.J. Verheij, Vergoeding van immateriële schade wegens aantasting in de persoon, diss. Amsterdam (VU), Nijmegen 2002, p. 445 ff.

73 In the literature, the issue was raised before by S.D. Lindenbergh, Smartengeld (Emotional Damages), diss. Leiden 1998, p. 161, Brunner in his footnote to Supreme Court decision dated 27 February 1997, NJ 1999, 145 (wrongful birth I), A.J. Verheij, Vergoeding van immateriële schade wegens aantasting in de persoon, diss. Amsterdam (VU) 2002, pp. 507-509 and by Buijssen, AV&S 2003, pp. 63-69. See also on this issue – restrained – Advocate General Spier in his opinion for the Supreme Court decision dated 9 August 2002, RvdW 2002, 132 (wrongful birth II).

74 Supreme Court decision dated 18 March 2005, RvdW 2005, 42 (wrongful life).

75 Supreme Court decision dated 8 September 2000, NJ 2000, 734, with a note by ARB (Baby Joost), ground 3.7.

76 Supreme Court decision dated 22 February 2002, NJ 2004, 240, with a note by JBMV (Kindertaxi), ground 6.3.

77 In this context, it concerns the distinction that the Supreme Court believes must be made between 'confrontation damage' and 'loss damage' (refer to NJ 2002, 240, ground 5.4, closing statements). In this context, contrary to what the Supreme Court suggests in ground 6.3, closing statements, this does amount to a restriction on the right to full damages. For more details, see S.D. Lindenbergh, Trema 2002, p. 340 ff.

interesting that in English law, it is expected on the basis of the implementation of the Human Rights Act 1998 that the Court will challenge the rigid system of the Fatal Accidents Act concerning 'damages for bereavement'.[78]

The cases described above show that fundamental rights may contribute to the articulation of highly appreciated personal interests and that they may furnish arguments for a right to damages in cases where the traditional loss categories are found to be insufficient.

5.4 Fundamental rights may foster the development of damages law

In a wide variety of other issues relating to damages law, fundamental rights may set the course and offer useful reference points for making important decisions. In a way, they may exercise an indirect influence in this context by offering a catalogue of values.

For example, with respect to the assessment of the loss of labour potential, it is not permitted to make use of statistical data on the labour participation of women in the past, first because it presumably fails to give an adequate picture of the future staff turnover, and second, because these sorts of data are mostly intrinsically discriminatory for women.[79]

In addition, fundamental rights may be useful tools in determining the reasonableness of choices to be made by the victim after he has sustained the injury.[80] Should the victim use outdoor care financed out of the social security system because of his duty to limit damage as much as possible or is he entitled to a more expensive type of care at home as a result of his right to family life? And should a woman with an unwanted pregnancy as a result of a medical

78 Refer to McGregor, On damages 2003, p. 1561.

79 For an extensive discussion of equal treatment in personal injury cases, see S.D. Lindenbergh, Schade aan het lichaam als bron van inkomsten. Onderscheid naar geslacht bij schadebegroting? Injury to the Body as a Source of Income, Distinction based on Gender in case of Damage Assessment?), Nemesis 2001, pp. 178-185. See also the recent decision by the Haarlem District Court dated 10 March 2004, case no./cause list no. 90157 / HA ZA 03-238, Nieuwsbrief Personenschade 2004, no. 11, p. 1 ff and Cie Gelijke Behandeling 1 april 2004, no. 2004-37, Nieuwsbrief Personenschade 2004, no. 11, p. 5 ff.

80 On the general duty to limit damage as much as possible, see A.L.M. Keirs, Schadebeperkingsplicht (Duty to Limit Damage or Loss), diss. Groningen, Deventer 2003. On the element of freedom of choice, see more specifically T. Hartlief, 'Keuzevrijheid in het personenschaderecht'('Freedom of Choice in Personal Injury Law'), NJB 2004, pp. 1832-1839.

mistake be permitted to stop working and subsequently submit a claim for lost income to the party liable? It seems to be perfectly reasonable to attach considerable weight to the protection of privacy and family life in answering these questions, and the nature of these rights is such that the victim has great freedom of choice.

As far as this somewhat more diffused group of cases is concerned, fundamental rights may be regarded as rich sources for the arguments to be put forward, for they reflect deeply-rooted values that should not be disregarded in the context of damage actions.

5.5 Fundamental rights as the setting of the claim settlement process

A final category of cases where fundamental rights may be put forward at various stages relate to the process of the recovery and settlement of damage claims. During this procedure, in which both parties, as between themselves, have to act in accordance with the requirements of reasonableness and fairness, under Article 2 of Book 6 of the Dutch Civil Code, fundamental rights form the setting against which the parties fight their battle.

When viewed from this perspective, the current issue concerning the passing of the victim's medical data to the party liable may simply be reduced to a conflict between the right of privacy on the one hand and the right to a fair trial, which, after all, implies a right to the exchange of relevant data, on the other. One of the stages at which this issue comes to the fore is when the potential pre-existing complaints are listed and when the question arises to what extent the victim is required in this context to furnish more or less general information about his medical history to the party liable or his medical adviser.[81] Many lawsuits are currently being filed in connection with this issue and fundamental rights are being invoked on both sides of the argument.[82] There is the same tension where the victim invokes his 'blocking right' as laid

81 On this subject, see R.M.J.T. of Dort, 'De tien geboden voor het medisch traject bij personenschade' ('The Ten Commandments for the Medical Procedure in the case of Personal Injury'), TvP 2001, p. 29 ff.

82 Refer to the recent decision by the Amsterdam District Court dated 1 November 2004, cause list no. 284668 / HA RK 04-126 (NM) and the decision by the Amsterdam District Court dated 2 November 2004, cause list no. H 04.0238 / 287582, in which the District Court compels the victim to furnish copies concerning the medical information relating to him from the period preceding the accident to the expert and the medical adviser of the party liable.

down in Article 446 (2) of Book 7 of the Dutch Civil Code in the context of a medical expert's examination.[83]

A comparable conflict between fundamental rights may arise where the party liable who feels that he has been insufficiently or inaccurately informed engages a detective agency to watch the victim's movements. The limits of what is appropriate are defined on the basis of the victim's right to privacy.[84]

In these issues, fundamental rights offer a possibility above all for articulating the interests relevant to the dispute, as a result of which these can be balanced against each other adequately.

5 Conclusions

Constitutionalisation is a strong word, certainly in a country such as the Netherlands, in which there is a prohibition against testing legislation against the Constitution. If the issue is considered from a broader perspective, in terms of the impact of fundamental rights, as laid down in or arising from the Constitution and from treaties, on civil law, this impact is certainly manifest in the Netherlands as well.

Fundamental rights may have an impact on civil law along a variety of very different lines. Sometimes the direct invocation of a fundamental right may constitute the basis for a legal action, even in the private-law relationship between the citizens themselves. In other cases, invoking a fundamental right may contribute towards the foundation of or elaboration on a legal action in a case governed by private law. In still other cases fundamental rights offer useful manifestations that can be used to articulate interests relevant to the dispute.

With its many open standards, Dutch civil law offers plenty of possibilities to incorporate claims based on fundamental rights into the legal framework and to do justice to their value. This applies both to the law of contract and to Tort Law.

83 Refer to the Dutch Supreme Court decision dated 26 March 2004, RvdW 2004, 54 (Levob). On this issue, see also M.H. Elferink, 'Onduidelijkheden rondom uitoefening "blokkeringsrecht" bij medische expertises' ('Lack of Clarity with respect to the Exercise of the Blocking Right in Medical Expert's Examinations'), TvP 2004, p. 51 ff.

84 Refer to Dutch Supreme Court decision dated 31 May 2002, NJ 2003, 589, with a note by JBMV (K/Aegon).

Naturally, fundamental rights are not a panacea in private-law disputes either. Those who invoke these rights do not by definition emerge victorious for this reason alone, if only because the opposing party often puts forward a fundamental right as well. In this context, it should be borne in mind that by their very nature fundamental rights carry great weight, but that their invocation should not and cannot be regarded as an absolute finisher. Usually, in any concrete balancing of interests, fundamental rights will carry weight on both sides of the argument.

The significance of fundamental rights in private law relationships is mainly that they may contribute towards the articulation of party interests for the purpose of fostering the necessary balancing of interests. I therefore tend to consider the impact of fundamental rights on civil law to be an improvement rather than a threat to the national system of civil law. They are an important source of inspiration for the development of the law and may make a significant contribution to its quality.

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