Ius Comparatum – Global Studies in Comparative Law

Verica Trstenjak
Petra Weingerl *Editors*

The Influence of Human Rights and Basic Rights in Private Law

Springer

Ius Comparatum – Global Studies in Comparative Law

Volume 15

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Académie Internationale de Droit Comparé
International Academy of Comparative Law

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The Influence of Human Rights and Basic Rights in Private Law

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ISSN 2214-6881 ISSN 2214-689X (electronic)
Ius Comparatum – Global Studies in Comparative Law
ISBN 978-3-319-25335-0 ISBN 978-3-319-25337-4 (eBook)
DOI 10.1007/978-3-319-25337-4

Library of Congress Control Number: 2015959487

Springer Cham Heidelberg New York Dordrecht London

Printed on acid-free paper

Springer International Publishing AG Switzerland is part of Springer Science+Business Media (www.springer.com)

Foreword

Human rights and basic or fundamental rights are fruits from the same tree. Their emergence is rooted in the political philosophy of the eighteenth century's Enlightenment, in the ideas of John Locke, Jean-Jacques Rousseau, Immanuel Kant and others. The state of innate freedom and equality of every human being posited by them was initially conceived of as an ideal, an alternative to positive law. It was soon split up into several more specific rights and appropriated by practical politics. The Déclaration des droits de l'homme et du citoyen of 1789 and the Bill of Rights adopted in the USA in 1791 revaluated the philosophical ideas, conferring particular significance to them in political discourse and finally in legal disputes.

The ideas focusing on the central position of the individual in society were gradually disseminated across the globe until they received, for the first time, worldwide recognition in the Universal Declaration of Human Rights of 1948. Although non-binding, this instrument gave rise to the incorporation of binding lists of fundamental rights in national constitutions and to the adoption of obligatory human rights in regional treaties. It is in particular the European Convention on Human Rights with its own enforcement mechanism, i.e. the individual complaint to the European Court of Human Rights in Strasbourg, which has become the spearhead of the development of human rights law.

Over the last two and a half centuries, the development of human rights and basic rights has been driven by the need for the defence of the individual against authoritarian princes, dictators and, more generally, the power of government. They were meant to protect individual freedom against state intervention, thus a part of what in continental jurisdictions is considered as public law. In more recent years, however, a growing impact of human rights and basic rights on private law can be observed.

It follows from different theoretical approaches. First, the difference in power in some private relations such as employment contracts is similar to that between the individual and the state; in certain sectors of private life, states have even delegated regulatory powers to private institutions. As a consequence, the need for protection of the individual against powerful private actors is considered as equivalent to that existing in public law. A second approach interprets human rights not only as defences against superior state power, but as indicators of the basic values of human

society which have to guide its organization in both vertical and horizontal relations. A third approach does not focus on the relation between the private parties, but looks at the regulation of private relations by the state. Thus, the private relation merely reflects the vertical relation between the private parties and the ordering state. Regardless of the theoretical background, the application of human and basic rights to private law thus entails, to a varying degree and with a varying scope, a constitutionalization of private law.

This phenomenon can be ascertained in a number of jurisdictions. In a comparative perspective, the intertwinement of private law and public law appears to make progress. A growing number of decisions of the European Court of Human Rights address issues of private law. And in the European Union, the conferral of a binding character to the Charter of Fundamental Rights by the Treaty of Lisbon of 2007, which entered into force in 2009, may herald another step in this development. In light of the absence of a clear distinction between private and public law in the European Union, an overspill of public law ideas into private law is not unlikely. On the other hand, the growing dominance of public law reasoning in matters of private law bears considerable risks for individual freedom and a society built on private autonomy. Each jurisdiction is confronted with the resulting tension and has to find its own balance between individual freedom and state intervention flowing from the enforcement of human or basic rights.

The International Academy of Comparative Law therefore considered this topic as particularly well suited for a comparative investigation and selected it for the 19th International Congress of Comparative Law held in Vienna, Austria, in July 2014. It appointed Professor Verica Trstenjak, former Advocate General of the Court of Justice of the European Union, as General Reporter to the respective section of the congress. The book resulting from this section is composed of her general report and a large number of national reports which highlight the relevance of the subject for the modern development of private law.

The book benefits from the experience Professor Trstenjak gained in her former office in the Court of Justice which often shows an inclination to translate as it were issues of private law into public law. The careful analysis of case law demonstrates that human rights and basic rights may exercise a certain influence in all areas of private law, starting from contract and tort law across property law to the law of succession and family law. Thus, the book points to a future development of private law which constantly has to take account, beyond the application of traditional private law rules, of a second normative layer, the human rights and fundamental rights.

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Bristol, UK

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Abbreviations

ABGB	Allgemeines Bürgerliches Gesetzbuch (the Austrian Civil Code)
AC	Appeal Cases
ADI	Ação Direta de Inconstitucionalidade (Direct Unconstitutionality Action)
ADPF	Ação de Descumprimento de Preceito Fundamental (Action for Nonfulfillment of Fundamental Precept)
Ag.	Agravo (a kind of appeal)
Ag. Instr.	Agravo Instrumental (a kind of appeal)
Ag. Rg.	Agravo Regimental (a kind of appeal)
All ER	All England Reports
Ap. Cív.	Apelação Cível (a kind of appeal)
Art.	Artigo (article)
B-VG	Bundesverfassungsgesetz (Austrian Federal Constitutional Code)
BE	Banque Express
BGB	Bürgerliches Gesetzbuch (the German Civil Code)
BVerfG	Bundesverfassungsgerichtshof (German Constitutional Court)
CA	Cour d'appel du Québec
CC	Câmara Cível (administrative division of state courts)
CHRR	Canadian Human Rights Reporter
CPLM	Codification permanente des lois du Manitoba
CS	Cour supérieure du Québec
CA	Court of Appeal
CESL	Common European Sales Law
Cf.	Conferir (see)
CJEU	Court of Justice of the European Union
Comm	Commercial
CSC	Cour suprême du Canada
DTE	Droit du travail Express
e.g.	Example given
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights

EHRR	European Human Rights Reports
EMLR	Entertainment and Media Law Reports
EMRK	Europäische Menschenrechtskonvention (European Convention on Human Rights)
Env LR	Environmental Law Reports
Et seq	Et sequentes
EU	European Union
EWCA Civ	England and Wales Court of Appeal Civil Division
EWCA Crim	England and Wales Court of Appeal Criminal Division
EWHC	England and Wales High Court
FLR	Family Law Reports
GG	Grundgesetz (German Basic Law)
GCC	Greek Civil Code
HL	House of Lords
HRA	Human Rights Act 1998
ICR	Industrial Cases Reports
Ibid	Ibidem
Id	Idem
IP	Intellectual property
JE	Jurisprudence Express
JLE	Jurisprudence Logement Express
julg.	Data de julgamento (date in which a decision has been issued)
KB	King's Bench
Keisyû	Recueil officiel des arrêts de la Cour suprême dans le domaine pénal
LC	Lois du Canada
LM	Statuts du Manitoba
LQ	Lois du Québec
LRC	Lois refondues du Canada
LRN-B	Lois refondues du Nouveau-Brunswick
LRO	Lois refondues d'Ontario
LRQ	Lois refondues du Québec
LRY	Lois refondues du Yukon
LTN-O	Lois des territoires du Nord-Ouest
LR	Law Reports
Min.	Ministro (Justice in a Superior Court)
Minsyû	Recueil officiel des arrêts de la Cour suprême dans le domaine civil
MS	Mandado de Segurança (petition for writ of mandamus)
New Civil Code	Act V of 2013 on the Civil Code of Hungary
OGH	Oberster Gerichtshof (Austrian Supreme Court)
Old Civil Code	Act IV of 1959 on the Civil Code of Hungary
ONCA	Ontario Court of Appeal
P & C R	Property and Compensation Reports
p.	Page

Para	Paragraph
PC	Privy Council
pp.	Pages
QB	Queen's Bench
QCCA	Cour d'appel du Québec
QCCQ	Cour du Québec
QCCS	Cour supérieure du Québec
QCTDP	Tribunal des droits de la personne du Québec
RCS	Recueils de la Cour suprême du Canada
RDL	Régie du logement
RJQ	Recueils de jurisprudence du Québec
RRA	Recueil en responsabilité et assurance
RSA	Revised statuts of Alberta
RSBC	Revised Status of British Columbia
RSNL	Revised status of Newfoundland and Labrador
RSNS	Revised Statutes of Nova Scotia
RSPEI	Revised Statuts of Prince Edward Island
RE	Recurso Extraordinário (a kind of appeal exclusive to the Superior Court of Justice)
REJB	Répertoire électronique de jurisprudence du Barreau
Rel.	Relator (reporter, a judge responsible for reporting facts to others in a court decision)
REsp	Recurso Especial (a kind of appeal exclusive to the STJ Court)
Rn	Randnummer (recital)
Rt.	Norsk Retstidende (report of Norwegian Supreme Court cases)
Rz	Randziffer (recital)
S.	Seção (administrative division of a Superior Court)
SQ	Statuts du Québec
SR	Statuts du Canada
SS	Statuts de la Saskatchewan
STF	Superior Tribunal Federal (Superior Court of Justice)
STJ	Superior Tribunal de Justiça (a Superior Court)
T.	Turma (administrative division of a Superior Court)
TA	Tribunal d'arbitrage
TEU	Treaty on the European Union
TDPQ	Tribunal des droits de la personne du Québec
TFEU	Treaty on the Functioning of the European Union
TJDFT	Tribunal de Justiça do Distrito Federal e Territórios (Court of Appeal of the Federal District)
TJMG	Tribunal de Justiça do Estado de Minas Gerais (Court of Appeal of the Minas Gerais State)
TJRJ	Tribunal de Justiça do Estado do Rio de Janeiro (Court of Appeal of the Rio de Janeiro State)
TJRS	Tribunal de Justiça do Estado do Rio Grande do Sul (Court of Appeal of the Rio Grande do Sul State)

TRF-2	Tribunal Regional Federal da 2ª Região (a Federal Court of Appeal)
UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
V.	Ver (see)
VfGH	Verfassungsgerichtshof (Austrian Constitutional Court)
WLR	Weekly Law Reports

Part I
General Report

Chapter 1
General Report: The Influence of Human Rights and Basic Rights in Private Law

Verica Trstenjak

1.1 Introduction

1.1.1 General Matters and Terminology Issues

Objectives and Methodology The aim of this general report[1] is to identify the role and the influence of human rights and basic rights in private law across different jurisdictions. It was prepared on the basis of the session 'The influence of human rights and basic rights in private law' at the XIXth International Congress of Comparative Law, organized by the IACL – International Association of Comparative Law, which took place between 20 and 26 July 2014 in Vienna, Austria. Nineteen national reports on countries from all over the world contributed to this end. The general report's structure follows a particular pattern. It focuses on the influence of human rights and basic rights in the selected fields of private law, *i.e.* in contract, tort, property and family law. Separately, it deals with issues of significant importance for this topic – the right to privacy and personality rights, which are examined at the end of the report. Concerning the structure of different parts, this report will always start by mapping the general principles of the particular field of private law and continue by looking into different jurisdictions, to look into the potential influence of human rights and basic rights in private law. This will be followed by an outline of the influence of human rights and basic rights in the European Union (EU).

[1] I would like to thank Petra Weingerl for her help and assistance in drafting this general report.

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V. Trstenjak, P. Weingerl (eds.), *The Influence of Human Rights and Basic Rights in Private Law*, Ius Comparatum – Global Studies in Comparative Law 15, DOI 10.1007/978-3-319-25337-4_1

Terminology The concept of human rights and basic rights is rarely legally defined across the participating States. Ostensibly, the notion of fundamental rights is less frequently used in the legislation and jurisprudence of different jurisdictions. However, it is a notion that is employed in legal discourse of the EU. In this report, notions of 'human rights and basic rights' and 'fundamental rights' are used interchangeably, unless stated otherwise. In doing so, the notion of 'fundamental rights' is predominantly used.

This report does not focus on the different definitions and legal concepts that are associated with fundamental rights and their influence in private law discourse. Rather, it tries to demonstrate their factual influence in the case law of courts and the potential changes in legislation that they generate. With this, this report tries to identify and map out the common underpinning rationales and thematic similarities in jurisprudence, which are perplexed by the influence of fundamental rights.

1.1.2 Some Historical Highlights

Magna Carta and Bill of Rights When thinking about fundamental rights in general, the first significant statutes are found in English law – the *Magna Carta* from 1215 and the *Bill of Rights* from 1689 (Youngs 2014, 1), respectively. The *Magna Carta* was the first document that was imposed upon a King of England by his feudal barons, with the aim to limit the King's powers by law and protect their rights. The *Bill of Rights* was enacted by Parliament. It has asserted the supremacy of Parliament over the monarch and contains a number of fundamental rights and liberties.

Other Highlights Another significant document that represents a key milestone in the history of fundamental rights is the *French Declaration of the Rights of Man and of the Citizen* (*Déclaration des Droits de l'Homme et du Citoyen*), which was enacted by French Parliament in 1789 (Helleringer and Garcia 2014, 3–4). Generally, with the exception of *England*, the first early approaches towards regulating the protection of fundamental rights in legislation can be identified at the end of the eighteenth century and the beginning of the nineteenth century, although they were mainly declaratory and with no binding force. With regard to the first appearance of the binding concept of fundamental rights in different legal systems, there are several common denominators – the development of the modern constitutional systems of States, the end of the Second World War, as well as the fall of the Iron Curtain and other related events at the end of the 1980s and beginning of the 1990s.

The *Netherlands* has a long-standing experience with the protection of fundamental rights. Major sources of fundamental rights in the Dutch legal order are, on the one hand, the *Dutch Constitution*, and on the other hand, international and supranational treaties to which the *Netherlands* is party (Cherednychenko 2014, 3). This pattern can be found across all of the jurisdictions. In *Portugal*, the first *Portuguese Constitution* of 1822 introduced the concept of fundamental rights

through the provision of governing the protection of freedom of opinion (Monteiro et al. 2014, 2). After a period of 150 years, it reappeared in the *Constitution* of 1976. In *Germany*, the German *Grundgesetz* (GG) of 1949 put the catalogue of basic rights at its very beginning. The latter emphasizes human dignity (Article 1 I GG) and human rights (Article 1 II GG) (Looschelders and Makowsky 2014, 1). Similarly, in *Japan* the *Constitution* that ensured the respect of fundamental rights was enacted in 1946 (Hatano 2014, 1). In *Argentina*, the Supreme Court referred to this notion for the first time in its case law in 1958 (Belluscio 2014, 2). In *Greece*, the notion of fundamental rights was introduced with the *Constitution* of 1975, in which the principle of human dignity is acknowledged and, for the first time, it refers to both citizens and humans (Deliyanni-Dimitrakou and Akrivopoulou 2014, 5–6). Only a few years later, in 1982, *Canada* embraced the constitutional protection of the *Canadian Charter of Rights and Freedoms*, which was founded on the respect of human dignity and protects the fundamental rights of citizens in relation to the State (Samson and Langevin 2014, 3). Similarly, in *Brazil*, it was only with the *Constitution* of 1988 that the constitutional laws were endowed with normative force (previously, they were simply considered political-philosophical dispositions) (Tepedino 2014, 2).

In *England*, formally, fundamental rights were only introduced in October 2000, when the *Human Rights Act* 1998 (HRA) took effect and incorporated the *European Convention on Human Rights and Fundamental Freedoms* into English law (Youngs 2014, 1).

In socialist countries, which were formed after the Second World War, many fundamental rights protection standards were merely declaratory. This was due to the lack of will to implement them. For example, as seen in the *Hungarian* and the *Polish report*, the shortage of institutional background made it impossible for these rights to take full effect, as well as a lack of instruments and procedures to enable a specific human being to use them in his or her defence (Gárdos-Orosz 2014, 2; Łętowska 2014, 2). As it is noted in the *Polish report*, they only had a 'façade-like character'. The first court rulings that invoked fundamental rights acts in *Poland* came in the 1990s.[2]

It was only after the 'velvet revolution' that the *Czech Republic*, as a post-communist country, returned to the democratic system and started searching for a fundamental conception of fundamental rights and inquired into the role of fundamental rights in the system of law (Hurdík and Selucká 2014, 1). Likewise, *Croatia* and *Slovenia*, which gained independence in 1991, first introduced the modern concept of fundamental rights in the *Constitutions* in the early 1990s (Josipović 2014, 1; Weingerl 2014, 1).

The position of the *United States of America* (the US) is somewhat exceptional in the development of the influence of fundamental rights in private law. The US Supreme Court has developed State Action Doctrine, under which the constitutional rights will only be deemed violated when the wrongful conduct is that of the government or of a private entity with such a close connection to the government that,

[2] Decision SC (Supreme Court) 9.9.1993, III ARN 45/93; SC 11.2.1993, III AZP 28/93.

in practice, the government is deemed to have acted.[3] The identified exceptions to the extremely limited influence of the fundamental rights in private law are non-discrimination and freedom of expression (Miller 2014, 7).

1.1.3 Sources of Fundamental Rights

International Level Fundamental rights are typically enshrined in international human rights treaties and national constitutions. They are found in various sources at an international, regional and national level. At an international level, the most renowned human rights instrument is the *United Nations*' *Universal Declaration of Human Rights*, which was adopted in 1948 as a result of the Second World War. It is a non-binding instrument and there is no court to protect the rights that are enshrined in it.

Regional Level At a regional level, the most influential fundamental rights document proves to be the *European Convention on Human Rights and Fundamental Freedoms* (*ECHR*), adopted by the Council of Europe in 1950 and effective since 1953. Parties to the *ECHR* are 47 countries, all of which are Council of Europe Member States. With the adoption of the Lisbon Treaty, the EU has taken steps to accede to the *ECHR*. The accession procedure is currently in progress.

The *ECHR* established the European Court of Human Rights (ECtHR) with the seat in Strasbourg, France. In contrast to the *Universal Declaration of Human Rights*, the rights granted by the *ECHR* enjoy protection by the ECtHR. Any person who thinks that a State party has violated his or her rights under the *ECHR* can take a case to the ECtHR.

In the *European Union*, the important sources are the *Treaty on the European Union* (TEU) and the *Treaty on the Functioning of the European Union* (TFEU). An important EU primary law source is also the *EU Charter of Fundamental Rights* (*EU Charter*),[4] which was enacted in 2000 but only became legally binding in 2009 with the Lisbon Treaty's entry into force. Furthermore, the general principles of the EU, some of them enshrined in Treaties and some of them established by the *Court of Justice of the European Union* (CJEU), also play an important role in this discourse. Some of these principles are *pacta sunt servanda*, *clausula rebus sic stantibus* and legal certainty (Trstenjak and Brkan 2012, 173).[5] Relevant provisions can also be found in the EU secondary legislation, in regulations and directives.

National Level At a national level, the most important legal instruments are *national constitutions*. In some countries, the same constitutional character is also

[3] Brentwood Academy v. Tennessee Secondary School Athletic Assn., 531 U.S. 288, 296 (2001), in Miller (2014, 7–8).

[4] Charter of Fundamental Rights of the European Union, OJ C 83/389, 30.3.2010.

[5] For discussion on the CJEU, private law and general principles, see also Basedow (2010).

ascribed to *constitutional laws*. Alongside national constitutions and constitutional laws, the important sources for the purpose of identifying the influence of fundamental rights in private law are also the provisions that are found in the *laws* of different countries. Moreover, and especially relevant for this report, important sources are also the *judgments of the courts* and, in some countries, the *judgments of Constitutional Courts*.

1.1.4 'Constitutionalization' of Private Law

The Traditional Role of Defensive Rights in Public Law Traditionally, the function of fundamental rights was limited to vertical relationships, and thus confined to public law. Principally, their role is one of defensive rights, protecting individuals' freedoms and privacy against State interference or illegitimate discrimination. Furthermore, some of them create positive obligations of the State. However, today, there is an ongoing discourse on the growing influence of fundamental rights in private law, especially contract, tort and property law.[6]

Growing Influence of Fundamental Rights in Private Law The process of the growing influence of fundamental rights on horizontal relationships is sometimes referred to as the 'constitutionalization of private law' (Smits 2006, 9; Cherednychenko 2007a, 1, at n. 1 and references therein).[7] This 'constitutionalization' is defined as "the increasing influence of fundamental rights in relationships between private parties, fundamental rights being those rights that were originally developed to govern the relationship between the State and its citizens" (Smits 2006, 9). The question of whether this influence is normatively desired does not engender a univocal answer. Although it is sometimes viewed as highly beneficial to allow fundamental rights to play a role in relationships between private parties (Smits 2006, 9), it also opens up doors to several issues and concerns.

Often, fundamental rights play an important role in private law in case law, through the interpretation of private law rules in the light of fundamental rights. However, the impact on the legislation seems to be rather limited. This impact is normally seen through the legislative changes, following the newly established line of case law, which is influenced by fundamental rights. These influences can be described as a transplant of fundamental rights discourse of the public law sphere into the private law sphere (Collins 2014, 62). Some legal academics argue that such transplantation and translation generates problems (Collins 2014, 1).

[6] For the detailed discussion on the influence of fundamental rights in contract law, see, for instance, Cherednychenko (2007a); Bruggemeier et al. (2010); see also, Busch and Schulte-Nölke (2010); Mak (2008).

[7] For the collected essays on the constitutionalization of different aspects of private law, see Micklitz (2014).

1.1.5 Horizontal Effect of Fundamental Rights

Vertical and Horizontal Effect The effect of fundamental rights can be vertical or horizontal. Fundamental rights have a 'vertical' effect in a vertical relationship between a private party and a State. Here, fundamental rights are applicable to a State to protect an individual against a State (Engle 2009, 5). The effect of fundamental rights on relations between private parties, *i.e.* among individuals or individuals and companies or other legal entities of private law, is 'horizontal' (Ciacchi 2014, 104).

Direct and Indirect Horizontal Effect A horizontal effect can be direct or indirect. Some academics are cautious to differentiate it in this way. *Direct horizontal effect* is the application of fundamental rights directly to legal relations between private parties (Engle 2009, 165). Thus, certain fundamental rights are not only directly binding upon public authorities but also, to some extent, between private individuals (Ciacchi 2014, 104).

Indirect horizontal effect entails the applicability of a fundamental right through the influence on the interpretation of private law rules (Leczykiewicz 2013, 490). Hence, the private law rule, such as general clauses of 'good morals' or 'good faith', is interpreted and applied in the light of a fundamental right (Mak 2008, xxix).

Importance The importance of the effect of fundamental rights on private law is reflected in the fact that fundamental rights, which have been traditionally created for protection against a State, operate in a private law sphere and influence underpinning concepts and principles of private law. The typical fundamental right provision is vague and incomplete, therefore accepting the use of fundamental rights in this context leads to the huge empowerment of judges to determine *ad hoc* what conduct is 'legal' and 'illegal' (Leczykiewicz 2013).

(Un)mittelbare Drittwirkung One of the most prominent theories on the influence of fundamental rights in private law are the German theories of *unmittelbare* and *mittelbare Drittwirkung*. These are theories on direct and indirect effects on third parties. The theory, which has been adopted in practice and widely used, is the idea of an indirect horizontal effect of constitutional rights. This was developed in the German case, *Lüth*,[8] pursuant to which the private law provision is not overridden by constitutional rights but only interpreted in the light thereof (Cherednychenko 2007b, 5). In this case, the court proclaimed the concept of constitutional rights as an over-arching system of values for the whole legal order. The influence of this theory is also identified in other countries, for instance, in *Greece* and *Austria*. Therefore, the judiciary must take fundamental rights into account when interpreting and applying the law, most notably when dealing with open texture norms or general clauses (Perner and Zoppel 2014, 8). Surprisingly, it is submitted in the *Italian report* that Italian courts take it a step further and sometimes 'pretend' to

[8] BverfG 15 January 1958, BverfGE7, p. 198.

apply fundamental rights directly to the contract (*unmittelbare Drittwirkung*) if it is found to be in conflict with them (see Navarretta and Bargelli 2014).

Limited Influence So far, fundamental rights have only had a limited influence on private law relationships, mainly through an indirect horizontal effect. They influence courts' interpretation of the private law rules and principles (Smits 2006, 12; Collins 2014, 6), relating their application with the interpretation of norms and principles of private law. Thus, their role in influencing private law is seen especially through a 'radiating effect' (Deliyanni-Dimitrakou and Akrivopoulou 2014, 11). Consequently, private law can sometimes be interpreted in the light of fundamental rights but private law rules still have priority over them. This process can be characterized as subsidiarity in reasoning (Smits 2006, 12).

In *Slovenia*, Article 15 of the *Slovenian Constitution*, which governs the exercise and limitations of fundamental rights, provides that fundamental rights shall be exercised directly on the basis of the *Constitution* and, as the Supreme Court has held, this is also true for private relations.[9] The same is true in other countries, for example, in *Brazil* (Tepedino 2014, 12) or *Portugal*, where the *Portuguese Constitution* extends the traditional scope of the defensive function of fundamental rights to private relations (Monteiro et al. 2014, 6).

The EU The issue of the horizontal effect of fundamental rights is also of special importance in the EU, in particular with regard to the horizontal applicability of the *EU Charter*. Although certain rulings of the CJEU contain indications of direct applicability of the general principles of EU law in relationships between individuals, the question of a potential horizontal direct effect of the EU's fundamental rights remains unanswered (Trstenjak and Beysen 2013, 308).

The CJEU dealt with the interpretation of the *EU Charter* for example in the cases of *Åkerberg Fransson*[10] and *Melloni*[11] (see for example Streinz 2014). In *Melloni*, the CJEU ruled that, in principle, Member States are allowed to apply (higher) national fundamental rights standards in matters that fall within the reach of EU law, but only "provided that the level of protection provided for by the EU Charter, as interpreted by the CJEU, and the primacy, unity and effectiveness of EU law are not thereby compromised".[12] Furthermore, in *Åkerberg Fransson*, the CJEU explained the field of application of the *EU Charter*, stating that the "applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter".[13]

The CJEU has further asserted the applicability of the *EU Charter* in the preliminary reference procedure, essentially asking whether the *EU Charter* can be applied in a dispute between private parties, as in the case of *AMS*.[14] This case concerns the

[9] The Decision of the Supreme Court of the Republic of Slovenia, II Ips 737/2005, 3 April 2008.

[10] Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105.

[11] Case C-399/11, *Melloni*, ECLI:EU:C:2013:107.

[12] ibid., para. 60.

[13] Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, para. 21.

[14] Case C-176/12, *AMS*, ECLI:EU:C:2014:2.

question of a potential horizontal effect of workers' right to information and consultation, enshrined in Article 27 of the *EU Charter* and implemented through the *Directive on a Framework for Informing and Consulting Employees in the EU*.[15] The CJEU held again that "the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law", which might also potentially open doors for the *EU Charter*'*s* application in private law relationships.

The ECtHR Another European court (not a court of the EU, but an institution of the Council of Europe), the ECtHR, has also dealt with the question of whether certain fundamental rights can give rise to a duty of the Member States to ensure that those rights are also observed by private individuals. Its case law acknowledges, under certain conditions, an obligation of the State to take measures in order to prevent violations of various fundamental rights by private individuals (Trstenjak and Beysen 2013, 308). For example, it has been ruled that the right to respect for private and family life under Article 8 *ECHR* – which is also guaranteed under Article 7 of the *EU Charter* – may give rise to positive obligations of the State in order to secure effective respect for private or family life. Furthermore, these obligations may involve the adoption of measures that are designed to secure their respect, even in the private sphere, among individuals themselves (Trstenjak and Beysen 2013, 309).[16]

1.2 The Influence of Fundamental Rights in Contract Law

1.2.1 General Principles of Contract Law

Context Contract law forms part of the law of obligations, together with tortious ('delictual' or 'non-contractual') obligations (see Cartwright 2007, 47). Rules on contract usually encompass the law relating to the formation, performance and discharge of contractual obligations (see Twigg-Flesner 2013, 2). There is no universally agreed definition of a contract, however, there are basic principles of the law of contract that can be ascertained (McKendrick 2012, 4). To conclude a contract, parties must reach an agreement and there must be an intention to create legal relations (McKendrick 2012, 4). The legal concept of contract law constantly evolves by expanding and revising its scope, rules and basic principles (Collins 2003, 3). These changes are prompted by the reception of new social policies and political ideas, as well as interactions with other fields of law (Collins 2003, 3).

[15] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ L 80, 23.3.2002.

[16] See *Đorđević v. Croatia*, no. 41526/10, § 151, ECtHR 2012; *Von Hannover v. Germany* (*No. 2*), nos. 40660/08 and 60641/08, § 98, ECtHR 2012.

General Principles The central principles of contract law are private autonomy or freedom of contract, non-mandatory character of contract law norms and the equality of parties to the contract. As highlighted for example in the *Japanese* and *French reports*, freedom of contract is expressed in two sub-principles: the freedom to choose the contracting party and the freedom to determine the content of the contract (Hatano 2014, 5; Helleringer and Garcia 2014, 14).

National reports also mention other legal principles that are important for contract law. Some of these principles are: legal certainty, particularly concerning the protection of legitimate legal expectations of one party; the principle of the contractual equivalent and the ethical power of sanctity of contracts; the principle of no required form of negotiation and the principle of respect for and fulfilment of contracts (*pacta sunt servanda*).[17] Also, the principle of good faith can be identified as a leading principle in contractual relations, in particular in civil law traditions (see Samson and Langevin 2014, 28; Helleringer and Garcia 2014, 14).

The central principle of contract law, the *freedom of contract*, safeguards the *autonomy of private parties* and enables them to arrange their relationships in a way that best suits them (Cherednychenko 2014, 6).[18] However, the freedom of contract is not unlimited. As an immediate observation, rules that would allow for the limitation of the freedom of contracting, with the express objective of protecting fundamental rights, are rare. In principle, the general clauses of good faith, *bonos mores*, and equity in contracts play a crucial and highly important role in limiting the economic freedom of the parties in favour of other rights or general principles (e.g. the protection of the weaker contracting party) (Deliyanni-Dimitrakou and Akrivopoulou 2014, 20; Belluscio 2014, 7). However, as noted in the *Dutch report*, such clauses may also serve as the gateways to the effect of fundamental rights in contractual relationships (Cherednychenko 2014, 6). These private law general clauses are usually open texture norms and judiciary might take fundamental rights into account when interpreting and applying the law. Thus, in many cases, notions of good faith and public morals serve for the introduction of constitutional rights and freedoms in the field of private relations and facilitate the balancing between the conflicting rights and interests of the individuals (Perner and Zoppel 2014, 8; Deliyanni-Dimitrakou and Akrivopoulou 2014, 20). Thus, for instance, fundamental rights must be applied when interpreting the '*gute Sitten*' (Perner and Zoppel 2014, 8).

The meaning of the principle of contractual freedom is changing. The impact of the wide-ranging concern for at least the limited protection of the weaker contracting party can be observed across different jurisdictions, despite the general liberal stance of contract laws. To illustrate, in the *Greek report*, the principle of protecting the *economically weaker party* has been expressly mentioned as a general principle of contract law (Deliyanni-Dimitrakou and Akrivopoulou 2014, 20). A noteworthy example of illiberal values in contract law is the Brazilian principle of the social function of contract, which requires that parties promote, within a contractual scope,

[17] These principles are mentioned, for instance, in the Austrian, Czech, French, Croatian, Greek, Slovenian and Brazilian reports.

[18] For discussion on the freedom of contract in the EU, see Basedow (2008).

not only their own interests but also socially useful interests (Tepedino 2014, 6). It can be said that the principle of the freedom of contract has been adapted in order to permit the real freedom of contract for all parties of the contract (Samson and Langevin 2014, 21). It is not solely for those that are in economically stronger positions and have more manoeuvres to bargain. In order to put weaker contracting parties in a more equal position, the influence of fundamental rights have, at least to a certain extent, redefined the principle of freedom of contract in the stage of formation, as well as in the stage of execution of the contract (Samson and Langevin 2014, 21). As it is put in the *Quebecois report*, following the adoption of the extensive legislation and provisions protecting consumers, the law of obligations has to be revisited to reflect these new concepts and ideas (Samson and Langevin 2014, 20).

The prevention of imbalance and protection of the weaker party in cases of imbalance are often achieved through separate contract law rules. Numerous rules for the elimination of an imbalance among parties can be found in national legislations, especially in countries that are Member States of the EU. This is particularly the case due to the vast secondary legislation and the case law of the CJEU, which aim to protect the weaker party of a contract (see Helleringer and Garcia 2014, 16–19). These decisions have a binding effect in all 28 Member States of the EU. Normally, protection is ensured through traditional mechanisms, *i.e.* classical contract law instruments, such as nullity of contract due to lack of consent (threat, force and fraud) and usurious contracts, *clausula rebus sic stantibus*, *laesio enormis* (see for instance Josipović 2014, 11).

Besides the protection of a weaker contracting party, some participating States' legislations also expressly protect special vulnerable individuals. For example, in *Quebec*, Article 48 of the *Charte Quebecoise* protects elderly people and all handicapped people against any form of exploitation. Another example is *Brazil*, especially in the case of consumer contracts and of the contracts of city real estate lease for residential purposes.

Another principle that limits contractual freedom is the *prohibition of abuse of rights*. Article 7 of the *Slovenian Code of Obligations* provides: 'In exercising their rights, contractual parties must refrain from action by which the performance of the obligations of other parties would be rendered more difficult. Any action by which the holder of a right acts with the sole or clear intention of harming another shall be deemed as the abuse of the right'. The principle of the abuse of rights regulates imbalances and sets limits in the enjoyment of the rights that are acknowledged in all fields of private law, functioning as a principle of proportionality in private sphere relations (Deliyanni-Dimitrakou and Akrivopoulou 2014, 23).

1.2.2 The Freedom of Contract and Contractual Imbalance

Context Through case law, the influence of fundamental rights in contract law is a typical example of the indirect horizontal effect of fundamental rights via general clauses of private law. The judiciary explicitly takes fundamental rights into account when examining the validity of contract clauses. As aforementioned, one of the thematic underpinnings of the impact of fundamental rights in contract law is their influence in the application of blanket clauses and vague legal concepts. In doing so, courts consider fundamental rights as just one of the factors to assess when balancing the competing interests of contractual parties, and fundamental rights provisions are not directly applied (Cherednychenko 2014, 7).

In their application, fundamental rights tend to eliminate an imbalance between contracting parties (Looschelders and Makowsky 2014, 7). Usually, contract laws contain special provisions that deal with the protection of weaker parties and vulnerable parties, thus the influence of fundamental rights in their adjudication is rather limited. However, as underlined in the *Japanese report*, fundamental rights can sometimes give an impression that legal reasoning in judgments is more justifiable and convincing (Hatano 2014, 7).

Surety The influence of fundamental rights on contractual imbalance is notable in the context of a review of a contract of surety. Here, a commercially inexperienced and impecunious person stood surety for a close family member, although the debt greatly exceeded his financial capabilities (Looschelders and Makowsky 2014, 7). In this context, the influence of fundamental rights can be seen, for instance, in *Germany* and *Austria*. The German Federal Constitutional Court, the *Bundesverfassungsgericht*, ruled that civil courts are constitutionally obliged to control the content of such a contract with regard to the basic rights that are at stake.[19] The references of blanket clauses (§§ 138, 242 of the *German Civil Code*, *Bürgerliches Gesetzbuch* (BGB)) to morality, common usage and good faith require courts to concretize with respect to objective values. The latter primarily derive from the basic rights of the constitution.[20] However, only a severe imbalance can justify judicial interference with a contractual agreement.[21]

As it is derived from the *Austrian report*, Austrian courts tend to be inspired by the German courts and thus, also by the case law on surety of close relatives (Perner and Zoppel 2014, 9). In 1995, the Austrian Supreme Court decided on a similar matter and followed the German Court's opinion. The legislator followed up by enacting provisions that are designed to protect consumers in such cases.[22] The treatments of non-professional sureties who guarantee the borrowing of family members – the so-called family sureties – were also decided upon in Dutch courts. An example is

[19] BVerfGE 89, 214, 229 ff.

[20] §§ 138, 242 BGB.

[21] BVerfGE 89, 214, 255.

[22] BGB l I 1997/6; see Perner and Zoppel (2014, 9–10).

the *Van Lanschot* v. *Bink*[23] case, which involved a mother who had acted as a surety for her son's debts. In this case, contrary to German case law, the Dutch Supreme Court in civil matters did not resort to fundamental rights, as it based its decision on the contract law concept of mistake. Such reference to fundamental rights did not prove to be necessary in order to achieve a result comparable to that reached by the German *Bundesverfassungsgericht* on the basis of fundamental rights (Cherednychenko 2014, 6).

It is submitted in the *Austrian report* that, as seen from the case law on surety contracts of close relatives, the Austrian courts, as well as the Austrian legislator, understand private autonomy as a material concept rather than a formal one (Perner and Zoppel 2014, 20). Mere consent does not provide sufficient authority for a binding contract. To the contrary, the parties of a contract must be free in their decision. It is exactly this idea of empowering all contracting parties to restore the balance in a contractual relationship, which underlines the need for weaker party protection.

Tenancy Another example of the limitations of freedom of contract is tenancy. Tenancy serves as a legitimate objective for the limitation of property rights.[24] In the *Netherlands*, in 1948, the Arnhem Court of Appeal dealt with a situation where the parties to a lease contract had agreed that the contract would be terminated if the tenant had not made sufficient efforts to achieve the goals of the Protestant Church. The basis for a termination of the contract was if the tenant changed his religious belief (Cherednychenko 2014, 7). The Court of Appeal found the term in question to be contrary to good morals and public order because it seriously impaired the tenant's freedom of religion.[25]

In tenancy case law, the indirect application of fundamental rights can also be observed in *Italy*. For instance, it is demonstrated in a case concerning a clause of a residential tenancy contract prohibiting a tenant to host people other than family members for a long period of time.[26] This clause was held to be void for being in contrast with the 'mandatory duties of social solidarity imposed by Article 2 of the *Constitution*' (Navarretta and Bargelli 2014, 8). The impact of fundamental rights on tenancy legislation is also revealed for example in *Norway*. Legislation protecting tenant ground leases (thus, protecting the right to housing) was found to violate an owner's property rights under Article 1 of the *First Protocol to the ECHR* (Lilleholt 2014, 3).

Freedom of Education The principle of freedom of contract is also limited in cases when constitutional freedom of education is impaired. As derived from the *Dutch report*, a contractual clause that barred the person concerned from teaching for the rest of her life, if she failed to obtain the required diploma, was found void

[23] R 1 June 1990, *NJ* 1991, 759 (*Van Lanschot Bankiers* v. *Bink*).

[24] Pl. ÚS 42/03; also in the Netherlands, see Cherednychenko (2014, 7).

[25] Hof Arnhem 25 October 1948, *NJ* 1949, 331 (*Protestantse Vereniging* v. *Hoogers*).

[26] Cass. 19 June 2009, no. 14343.

when tested against the compatibility with public order and good morals in restricting the constitutional freedom of education.[27]

Right to Bodily Integrity As far as the direct application of fundamental rights in contract law is concerned, the furthest-reaching effect seems to be in a Dutch case, in which a patient's constitutional right to bodily integrity was invoked as a reason to refuse to undergo AIDS testing.[28] The dispute in this case arose out of the fact that, during medical treatment, the blood of a patient, who belonged to a group of people with a higher risk of being infected with the HIV virus, had come into contact with the blood of a dentist (Cherednychenko 2014, 7). The latter requested a court order for the patient to undergo an AIDS test, as the patient claimed that the demanded blood test constituted a violation of his constitutionals rights to bodily integrity and privacy laid down in Article 11 and Article 10, respectively, of the *Dutch Constitution*. In its decision, the Dutch Supreme Court recognized the patient's constitutional right to bodily integrity, which is limited by restrictions that are laid down by Article 6:162 of the *Dutch Civil Code* on tort (*Onrechtmatige Daad*), as well as from the contract between the parties. As the parties had concluded a medical treatment contract, they owed each other a duty of care. For this reason, after the termination of the contract, the patient could be required to do what is necessary to limit the damage suffered by the dentist at the time of medical treatment. In balancing the competing interests of the parties, *i.e.*, the patient's right to bodily integrity and the dentist's interest in knowing whether or not he had been infected with the HIV virus, the court concluded that the patient had failed to perform his obligations under the contract (Cherednychenko 2014, 7–8).

Nevertheless, such a direct horizontal effect might only seem apparent in view of the fact that limitations upon the exercise of fundamental rights are found in open private law. As a result, ultimately, in order to resolve a conflict between parties, courts resort to balancing competing interests. For this purpose, they translate a fundamental right into a private law interest, which is connected with the exercise of this right. They then weigh it against another purely private law interest or an interest which, being protected by the fundamental right, is also translated into a private law interest (Cherednychenko 2014, 7). Under such circumstances, what can formally be considered as a direct horizontal effect of fundamental rights, in substance, comes down to an indirect horizontal effect of such rights (Cherednychenko 2014, 7).

The Choice of the Contracting Party An issue that also needs to be addressed is whether the protection of fundamental rights also has an impact on the choice of a contracting party, especially in relation to the non-discrimination principle. An interesting case has been provided in the *Japanese report*. Public bathing ('*le bain public*') is very popular in Japan, with the Japanese being familiar with the special rules of how to use it (Hatano 2014, 6). However, as Russian marines also started to

[27] HR 31 October 1969, *NJ* 1970, 57 (*Mensendieck I*). See also HR 18 June 1971, *NJ* 1971, 407 (*Mensendieck II*); HR 22 January 1988, *NJ* 1988, 891 (*Maimonides*).

[28] HR 12 December 2003, NJ 2004, 117 (*Aidstest II*).

use them (who were not familiar with the special rules of usage), some of those *bains* started to be advertised as for 'Japanese only'. Consequently, a German and two American costumers brought an action before a court, seeking non-pecuniary damages (Hatano 2014, 6). The court upheld their claims, qualifying this action as racial discrimination and decided that such racial discrimination was forbidden among private parties (Hatano 2014, 6–7).

The *Italian report* focuses on the possibility of restricting the freedom of choice of a contracting party in the case of public offer. It claims that, according to the most widespread opinion, the principle of non-discrimination is only applicable to proposals that are made in public advertisements (Navarretta and Bargelli 2014, 9). The extent to which the perpetrator of discriminatory acts can be forced into a contract with the victim is uncertain. Moreover, another controversy lies in the question of whether the non-discrimination principle may restrict the freedom of choice of a contracting party, even in the case of an offer being made to one or more specific persons (Navarretta and Bargelli 2014, 9).

1.2.3 Remedies for the Breach of Contract or Failure to Perform

Failure to Fulfil Contractual Obligation Under the principle *pacta sunt servanda*, the primary obligation of parties is the obligation to perform contractual obligations. However, sometimes one party fails to fulfil an obligation under a contract through non-performance or defective performance (in civil law jurisdictions) or commits a breach of contract (in common law jurisdictions) (Cartwright 2007, 247–248).

Although a breach of contract or failure to perform does not in itself discharge the performance obligations of the party in breach, the way in which the remedies operate does, in practice, often translate non-performance or defective performance into damages. Damages for breach of contract have the objective of putting a claimant in the position in which he would have been if the contract had been properly performed – the so-called 'expectation interest' (Cartwright 2007, 262). Such damages usually cover the loss that an applicant has suffered and the gain of which an applicant has been deprived.[29]

Damages In *Portugal*, the consumers' right to the quality of goods and services and the right to damages are enshrined in the *Constitution* in Article 60 (1). Thus, a consumer's right to damages is elevated to a constitutional level (Monteiro et al. 2014, 20).

Concerning non-pecuniary damages in the case of a breach of contract, the *Italian report* stresses that Italian courts are keen to award them as far as a funda-

[29] See for example Article 132 of the Slovenian Code of Obligations. See also Article 160 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final.