The Constitutionalization of European Contract Law: Judicial Convergence and Social Justice

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Abstract: A form of contract law constitutionalization known by most European legal systems is the horizontal effect of fundamental rights and constitutional principles. This paper presents a comparative overview of fundamental rights adjudication in the private law of ten EU Member States. It draws attention to the spontaneous judicial convergences in contract law, which enable us to speak of the common ‘fact patterns’ of horizontal effect. This paper aims to demonstrate two theses: first, this horizontal effect is a pan-European phenomenon, not necessarily linked to a particular national legal culture. Second, horizontal effect in contract law is not politically neutral but inspired, at least in its application by national courts, by policies of social justice.

I. Introduction

Constitutions and contract law are not separate worlds. The classic, most direct ways of constitutionalizing private law, and also contract law, are judicial declarations of unconstitutionality of statutory provisions, and legislative reforms to bring the law in conformity with the Constitution. The latter reforms often, although not always, follow the former declarations. Both ways, however, are only rarely practised. Most of the contract law constitutionalization in Europe has been achieved along a third path: the constitutional interpretation, determination and application of contract law rules by the judiciary. This is the main field of operation of what has been called the ‘horizontal effect’ of fundamental rights.1 The idea behind this expression is

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that fundamental rights and constitutional principles do not only permeate ‘vertical’ citizen-State relationships or mutual relationships between State powers, but also private law relationships between equal citizens.

Written Constitutions are not the sole legal instruments acknowledged to have horizontal effect in private law. The same is true for international Treaties in which fundamental rights and principles are laid down, such as the Human Rights Convention (ECHR). This paper will present a comparative overview of the horizontal effect of constitutional or Convention rights and principles in different European legal systems. It will focus on judicial solutions in contract law and their convergences across the European borders. This paper aims to demonstrate two theses: First, horizontal effect is a pan-European phenomenon, not necessarily linked to a particular national legal culture. Second, the horizontal effect in contract law is not politically neutral but inspired – at least in its application by national courts – by policies of social justice.


2 A comprehensive comparative study on this topic is in preparation by the EC funded Research Training Network ‘Fundamental Rights and Private Law in the European Union’, co-ordinated by G. Brüggemeier / A. Colombi Ciacchi / G. Comandé. This research project involves nine countries: England, France, Germany, Italy, the Netherlands, Poland, Portugal, Spain and Sweden. For further information about this project see http://www.fundamentalrights.uni-bremen.de. I would like to thank all the authors of the draft project reports for having made available to me the materials which are subject to analysis in this paper.

II. Mapping Horizontal Effect in Europe: A Macro-Comparative Overview

In a macro-comparative perspective, from the viewpoint of the institutional framework and the practical relevance of horizontal effect in Europe, a distinction can be made between five models:

1. The Constitutional Court model

In several continental European legal systems with a written Constitution, such as Germany, Italy, Poland, Portugal and Spain, a Constitutional Court is competent not only to control the constitutionality of statutes in the abstract, but also to adjudicate on the correct interpretation and application of the Constitution in concrete private law cases brought before the civil courts. In each of the countries mentioned above, after the fall of a totalitarian regime and the enactment of a new democratic Constitution, both the civil courts and the Constitutional Court soon began to apply the Constitution horizontally in private law cases. Therefore this phenomenon is as old as their new democratic Constitutions: more than fifty years in Italy and Germany, more than twenty years in Portugal and Spain, and less than 10 years in Poland.

Within this group of countries, the horizontal effect of the national Constitutions has a great practical relevance. Major changes in private law adjudication have often been initiated or consecrated by the Constitutional Courts. Sometimes the latter have forced the Supreme Courts to overrule their con-

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6 For a recent comparative overview of the German and Italian discourse on this topic see H. Nießen, Die Wirkung der Grundrechte im deutschen und italienischen Privatrecht (Hamburg: Verlag Dr Kovac, 2005).
solidated precedents in order to provide a better protection of certain fundamental rights or principles in specific private law cases.9

Curiously enough, this paramount role of the Constitutional Courts in the private law development in those countries seems to be widely independent of the allowance of individual complaints of unconstitutionality. For example, the Italian and Portuguese citizens have no direct access to the Constitutional Court, unlike the German, Spanish and Polish ones. However in Italy and Portugal the indirect access to constitutional justice, through a question of constitutionality raised before a civil court and referred by the latter to the Constitutional Court,10 seems to work equally well. As far as first comparative studies have assessed, the influence of the Constitutional Court on the interpretation and application of private law in Italy is as strong as in Germany, and in Portugal as strong as in Spain.11

In those countries, the horizontal effect of international Conventions such as the ECHR plays little role if any. References to the Human Rights Convention in private law judgments are quite rare and mostly redundant: the ECHR articles are quoted together with national constitutional provisions protecting the same rights, just to confirm the values expressed by the latter.12 This is mainly due to the fact that all fundamental rights enshrined in those Conventions find their counterpart in national constitutional provisions. Moreover, in these legal systems the international Conventions are neither

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9 See for instance in Italy Corte Costituzionale (Corte Cost) 14 July 1986 no 184 (1986) Foro italiano I 2053 (personal injury damage); in Germany BVerfGE 89, 214 and Neue Juristische Wochenschrift 1994, 36 (unfair suretyships).


11 This results from a comparison of the draft project reports mentioned in n 3 above.

12 See eg in Italy Cass 11 November 1986 n 6607, (1987) Foro italiano I, 833 (Art 8 ECHR); in Portugal STJ 9 January 1996, (1996) Colectânea de Jurisprudência I, 37 (Art 2 ECHR). For an exception to this rule see the German case Amtsgericht Tauberbischofsheim, Neue Juristische Wochenschrift – Rechtsprechungsreport 1992, 1098, where the reference to Art 10 ECHR was decisive for the recognition of the right of a Turkish tenant to install a satellite dish against the landlord’s will. However, two years later the German Federal Constitutional Court adjudicated the same matter without any reference to the Convention: the Court deduced the right of immigrant tenants to receive information via a satellite dish directly from Art 5 German Constitution (freedom of opinion and information). See BVerfGE 90, 27 and Neue Juristische Wochenschrift 1994, 1147.
considered hierarchically superior to the national Constitutions, nor are generally acknowledged to have constitutional rank.\textsuperscript{13}

2. The French and Dutch model

The French and Dutch legal systems are based on written Constitutions, too. However in the Netherlands neither a Constitutional Court exists, nor have civil courts the competence to put unconstitutional legislation out of force.\textsuperscript{14}

In France the \textit{Conseil constitutionnel} has no competence to adjudicate on the interpretation and application of the Constitution in concrete private law cases, since it is not strictly speaking a court. Questions of constitutionality can only be raised in the abstract,\textsuperscript{15} and about legislation which has not yet come into force. Contesting the constitutionality of legislation is a prerogative belonging to political organs: the President of the Republic, the Prime Minister, the Presidents of the Chambers of Parliament, or a group of members of Parliament (at least 60).\textsuperscript{16} French civil courts have no possibility to bring any claims before the \textit{Conseil constitutionnel}.

Nevertheless, in France and the Netherlands as well, the horizontal effect of constitutional norms is commonly acknowledged\textsuperscript{17} and widely practiced by the judiciary. French and Dutch courts have been referring to fundamental


rights in deciding private law cases for half a century. They have applied horizontally not only provisions of their national Constitutions, but also – and to a great extent – the Human Rights Convention and other international conventions. This phenomenon may be explained bearing in mind that in France and the Netherlands international law instruments such as the ECHR have supremacy on national law and are considered directly effective insofar as self-executing.

The practical relevance of horizontal effect seems greater in the Netherlands than in France. Since the mid 1990s, however, the French courts have also made an increasingly wide use of constitutional and Convention norms in solving private (and contract) law cases.

3. The Swedish model

Sweden has a written Constitution but it differs notably from the other European Constitutions as it consists of four basic laws: the Act of Succession 1810, the Instrument of Government 1974, the Freedom of the Press Act 1949, and the Fundamental Law on Freedom of Expression 1991. There is no such thing as a Constitutional Court in Sweden. The competence of constitu-

18 For an early case of horizontal effect in France see Tribunal de la Seine, 22 January 1947, Dalloz 1947, 126: a testamentary clause subject to the condition that the beneficiary does not get married to a Jew was deemed void on grounds of violation of the public order, to be defined in the light of the 1946 Constitution. A case slightly similar, but concerning contract law, was decided in the Netherlands in the same period of time: Ktr Arnhem 25 October 1948, (1949) Nederlandse Jurisprudentie n 331 (invalidity of a clause of a farming lease contract on grounds of violation of freedom of religion). It must be noted, however, that some Dutch scholars have questioned the horizontal effect nature of this case, as the Court did not expressly refer to constitutional sources: F. De Graaf / M. J. O. M. De Haas, ‘Horizontale werking van grondrechten: een heel loos leerstuk’ (1984) Nederlandse Juristenblad 1354.


21 This impression arises from the case-law materials collected so far in the framework of the project mentioned at n 3 above.
tional review lies in ordinary courts and administrative agencies, which however have made very little use of this power.

National constitutional provisions are normally not provided with horizontal effect, while the opposite is true for the Human Rights Convention. However, the horizontal application of the ECHR is a fairly recent phenomenon as it was triggered by the 1994 Act incorporating the Convention into Swedish law.

4. The British model

In the United Kingdom there is neither a written Constitution nor institutions comparable to a Constitutional Court. Nevertheless, some kind of constitutionalization of private law has also taken place in this country. The ECHR was incorporated into national law with the Human Rights Act 1998 (HRA), and this has sparked an intense debate on the impact of Convention rights in UK private law. In academic literature it is still controversial whether and to what extent human rights can have horizontal effect. However, at least a weak, indirect horizontality seems beyond doubt insofar the Courts as ‘public authorities’ under Section 6(3)(a) HRA are obliged to act compatibly with Convention rights.


24 Scholars are divided on whether an exception could be made for the traditional unwritten fundamental right *Allemansrätt* (right of everybody). This is an old customary right to cross someone else’s property. In favour of a horizontal effect of the *Allemansrätt* I. Cameron, ‘Protection of Constitutional Rights in Sweden’ (1997) *Public Law* 488.


27 In force as of 2 October 2000.


Since 1998, the civil courts have increasingly taken into account the Convention in solving private law cases. They have provided human rights with indirect horizontal effect, i.e., mediated through the application of a traditional private law instrument.\(^3^0\) It should be noted, however, that human rights horizontality in the UK is older than the Human Rights Act: a few cases of horizontal application of Convention rights had already been decided before 1998.\(^3^1\)

5. **The Irish model**

Ireland follows an unique path of private law constitutionalization.\(^3^2\) It has a written Constitution since 1937. The judicial control of constitutionality lies in the competence of the Irish Supreme Court, which can also provide constitutional interpretation of statutory provisions or common law instruments in the field of private law. In the 1960s and 1970s, the Supreme Court acknowledged the doctrine of direct horizontal effect, establishing the principle that constitutional rights are directly applicable between private individuals.\(^3^3\) However, the civil courts have made little use of this powerful tool. They prefer to ground private law judgments on established common law doctrines than on constitutional norms.\(^3^4\)

The horizontal effect of the Human Rights Convention does not seem to have reached the Irish shores yet. This is mainly due to the fact that Ireland was the last country to formally adopt the Convention, with the European Convention of Human Rights Act 2003. Moreover, unlike the British courts, the Irish ones are exempted from ‘organs of the State’ in the sense of Section 1 ECHR Act and therefore do not seem to be under obligation to act in accordance with the Convention.\(^3^5\)

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\(^{30}\) This is particularly evident in privacy cases: claims for damages against tabloids which had unlawfully published photographs or other information about the private life of celebrities were based not directly on the violation of a ‘right to privacy’, but on the traditional equitable doctrine of breach of confidence. See *Douglas v Hello* [2003] 3 All ER 996; *Campbell v MGN Ltd* [2004] UKHL 22.


\(^{33}\) *Educational Co Ltd v Fitzpatrick* (No 2) [1961] IR 345; *Meskel v CIE* [1973] IR 121; *Glover v BLN Ltd* [1973] IR 388.

\(^{34}\) O’Callaghan, n 32 above, 249.

\(^{35}\) O’Callaghan, n 32 above, 252.
III. Common Patterns of Horizontality in European Contract Law

Despite the profound differences in the historical development and constitutional frameworks of the legal systems mapped above, in the practice of the civil courts the horizontal effect of fundamental rights and constitutional principles shows remarkable similarities across Europe. Case-law convergences can be found both in the subject-matter and the methods of horizontality. A comparative research project on the impact of constitutional or Convention rights and principles in the private law adjudication of nine Member States\(^36\) has enabled to detect common ‘fact patterns’. In contract law, case patterns common to more than two countries, which in turn belong to at least two different families of legal systems according to the previous chapter of this paper, include:

(a) invalidity of clauses of employment or agency contracts excessively restricting the employee’s or agent’s freedom of profession\(^37\) or freedom to choose his or her own domicile;\(^38\)

(b) the landlord’s obligation to tolerate the installation of a parabolic dish antenna by a tenant, in consideration of the tenant’s fundamental right to information;\(^39\)

(c) protection of tenants from a termination of the tenancy in violation of constitutional or Convention rights and principles;\(^40\)

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36 See n 3 above.
40 Cf the case law in England, Italy, The Netherlands and Portugal: *Shaws (EAL) Ltd v Walbert Pennycook* [2004] EWCA Civ 100, [2004] Ch 296; [2004] 2 All ER 665 (en-
(d) the tenant’s right to host family members,\textsuperscript{41} or the right of family members to step into the tenancy after the tenant’s death;\textsuperscript{42}

(e) protection of freedom of religion in employment relationships.\textsuperscript{43}

Other, quite interesting contract law case patterns can be observed in countries belonging to the same family of legal systems. For example:

(f) protection from discrimination on grounds of sex in employment relationships,\textsuperscript{44}

\textsuperscript{41} See in France Cass Civ 6 March 1996 n 93-11113, (1997) \textit{Recueil Dalloz} 167 note B. de Lamy: A clause of a tenancy contract barred the tenant from housing in the flat other persons than her two children. The tenant had also permanently accommodated there her sister and the children’s father. The Court ruled that a contractual clause in a tenancy agreement on room may not, by virtue of Art 8 ECHR, have the effect of depriving the tenant of the possibility of accommodating her next of kin.

\textsuperscript{42} See in Poland and Portugal Trybunał konstytucyjny 1 July 2003, P 31/02, available at http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm (the Polish Constitution does not give grandchildren the right to step into their grandparents’ tenancy contract); Ac TC n 225/2000, DR II série, 24 March 2000 (The son of a deceased tenant challenged the constitutionality of a restrictive interpretation given by Portuguese civil courts to a statutory provision according to which a landlord’s notice of terminated tenancy after the tenant’s death is illegal when the tenant’s spouse or relatives in the direct line still live in the apartment. Portuguese civil courts consider this provision only applicable when the spouse or relative is economically dependent on the tenant. The Constitutional Court upheld this interpretation.).

\textsuperscript{43} For similar lines of reasoning in France, Germany, Italy and Spain see Cass Soc 24 March 1998, (1998) \textit{Bull civ} V no 171, 125 (application of Art 1 and 75 French Constitution to declare unlawful the dismissal of a Muslim employee in a grocery refusing to come into contact with pork meat); BVerfG 30 July 2003, \textit{Neue Juristische Wochen-schrift} 2003, 2815 (application of Art 4 and 12(1) German Constitution to declare unlawful the dismissal of a Muslim vendor insisting on wearing a veil at work); Cass 16 June 1994 no 5832, (1995) \textit{Foro italiano} I 875 (balance between freedom of opinion and religion and freedom of education, all protected by the Italian Constitution, in a case where a gymnastics teacher was dismissed from a Catholic school because she was not married in a church); STSJ Baleares 9 September 2002, (2003) \textit{Aranzadi social} 2 (balancing freedom of enterprise and freedom of religion in the case of a bus driver insisting, for religious reasons, on wearing a cap at work).

\textsuperscript{44} See in Germany, Italy and Portugal BVerfGE 85, 191 and \textit{Neue Juristische Wochen-
(g) adjustments of the content of imbalanced contracts through general principles of contract law, such as good faith or immorality, which are to be interpreted in the light of constitutional principles.45

IV. Horizontal Effect, Private Powers and Social Justice

This brief excursus into legal families and fact patterns of contract law constitutionalisation has shown that the horizontal effect of fundamental rights and constitutional principles is a common European phenomenon taking place in the most different legal cultures. This phenomenon is not politically neutral. Two common threads run across the contract law case patterns mentioned above:

1) The first thread is a policy of protection of weaker parties. Courts invoke fundamental rights to defend the interests of employees vis-à-vis employers, small commercial agents vis-à-vis big companies, tenants vis-à-vis landlords, non-professional sureties vis-à-vis banks, etc.

2) The second thread is a policy of protection of democratic values impacted by the contractual relationship: freedom of religion, freedom of speech, equality between men and women, etc. Courts use the horizontal effect to safeguard these values which otherwise would not play any role in classic contract regulation.

To summarize, national courts all across Europe tend to refer to Constitutions and human rights to promote social and distributive justice, equality,
democracy and laicism in contract law. This is true both for the horizontal application of social rights\textsuperscript{46} and traditional fundamental rights and liberties.

Being written by a member of the Study Group on Social Justice in European Private Law,\textsuperscript{47} this paper welcomes this use of horizontal effect in national contract law adjudication. However, this paper’s focus on national solutions should not be interpreted as a hidden plea against a ‘less social’ EC law.\textsuperscript{48} Whether and how European integration affects the ability of Member States’ institutions to promote social justice is a different question, which cannot be dealt with in the limited space of this paper.\textsuperscript{49}

One may argue that the social justice policies mentioned above can be equally well served by applying classic private law instruments without needing to refer to Constitutions or human rights. Under this viewpoint, horizontal effect may appear as a superfluous, merely rhetoric construct which does not effectively change much in contract law.\textsuperscript{50} This paper does not share this criticism. It submits that a fundamental-rights-based legal reasoning in contract law is preferable to a strict separation between private law and public law discourse, at least for two reasons:

First, in their horizontal application in contract law, fundamental rights and constitutional principles mostly serve to counterbalance an excessive dominance of private power by one contractual party to the detriment of the other party. This resembles very much the classic function of the vertical application of these rights and principles: defending the individual from abuse of (public) power. One may argue that fundamental rights in general should protect private persons from abuse of power by whatever kind of entities (public, private or public-private). This function of fundamental rights is perfectly coherent with the features of contemporary society, where the

\begin{itemize}
\item \textsuperscript{46} Cf Hesselink, n 4 above.
\item \textsuperscript{47} See n 4 above.
\item \textsuperscript{48} For the thesis that Europeanisation undermines the distributive capacity of national contract law see eg H. Collins, ‘Good Faith in European Contract Law’ (1994) 14 Oxford Journal of Legal Studies 229.
\item \textsuperscript{49} On this question S. Weatherill, ‘The Constitutional Competence of the EU to deliver Social Justice’, in this issue.
\end{itemize}

Second, in many European legal systems, the final outcomes of contract law cases often depend on the interpretation and application of general concepts such as good faith or the public order. It is true that a judgment may come to identical results by either referring to such private law concepts plainly, or by providing them with a constitutional or human rights interpretation. However, general concepts such as good faith have no pre-determined content. They are just empty boxes to be filled in by courts and scholars with more concrete norms and values.\footnote{The discussion on good faith and other general concepts in European contract law embraces countless contributions. See, for example, Collins, n 48 above; M. W. Hesselink, \textit{De redelijkheid en billijkheid in het Europese privaatrecht}. \textit{Good faith in European private law} (Deventer: Kluwer, 1999); R. Zimmermann / S. Whittaker (eds), \textit{Good Faith in European Contract Law} (Cambridge: Cambridge University Press, 2000); S. Grundmann / D. Mazeaud (eds), \textit{The General Standard in European Contract Law – la clause générale en droit européen des contrats} (The Hague, London, New York: Kluwer, 2004).} It makes sense that judicial decisions determine these norms and values, wherever possible, in connection with primary sources of law such as Constitutions or the Human Rights Convention.\footnote{Cf G. Alpa, ‘The Meaning of “Natural Person” and the Impact of the Constitution for Europe on the Development of European Private Law’ (2004) \textit{European Law Journal} 734 at 736 et seq.} For in all European legal systems considered in this paper, the judiciary must act in conformity with the Constitution and/or the Convention.

Moreover, in all legal systems considered, the judicial power of making value choices is formally limited. When legislation does not make a clear choice and the precedents are unsatisfactory, courts need strong arguments to legitimate a new case-law development. A judgment, referring to a constitutional or Convention norm or value to explain why the legal instrument X should be given the interpretation A, maintains a higher formal and substantive legi-
timacy and coherence than a judgment which simply justifies the result A by referring to X, which however had always led to the result B in the past.

To conclude, the constitutionalization of contract law via horizontal effect is not an artificial, superfluous legal construct. From the viewpoint of legal theory, it creates an important link between the discourse of contract law and that of constitutional and human rights. This link is necessary in a contemporary European multi-level system of governance, where the public and private dimensions are no longer separate.\footnote{Cf eg O. Gerstenberg / C. Joerges (eds), \textit{Private governance, democratic constitutionalism and supranationalism}, Proceedings of a Workshop (COST A 7 seminar) at the EUI, 22-24 May 1997 (Luxembourg: European Commission, 1998); and the authors quoted at n 51 above.} From the viewpoint of legal practice, it provides the judiciary with a powerful tool to adapt traditional contract law instruments to contemporary democratic and social values. In other words, horizontal effect is an important vehicle for social justice policies.