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Judicial Governance in European Private Law: Three Judicial Cultures of Fundamental Rights Horizontality

Aurelia Colombi Ciacchi

Abstract: This article sketches and compares, in the light of the author’s approach to judicial governance, different models of application of fundamental rights by civil courts. It proposes a taxonomy of three cultures of fundamental rights horizontality: (1) the post-authoritarian culture, (2) the old continental culture, and (3) the Nordic-insular culture.

The first culture is characterized by a relative distrust in Parliament, a relatively strong judicial activism, and the primacy of national constitutional rights. It can be observed in relatively young continental European democracies that had transformed themselves into totalitarian or authoritarian regimes at some point in the 20th century, such as Germany, Italy, Portugal, Spain, and new EU Member States such as Poland.

The second culture is characterized by a relative trust in Parliament, a moderate judicial activism, and the primacy of international human rights. It can be observed in France and the Benelux countries, which are old continental European democracies that did not transform themselves into authoritarian regimes in the 20th century.

The third culture is characterized by judicial restraint and the difficulty to internalize international human rights law. It can be observed both in the Nordic countries and in the UK, which are old European democracies based on non-continental constitutional models.

Résumé: Dans le contexte des travaux de l’auteur sur la gouvernance judiciaire, cet article esquisse et compare différents modèles selon lesquels les tribunaux appliquent des droits fondamentaux dans le droit privé européen. Il propose une taxonomie de trois cultures de l’horizontalité des droits fondamentaux: (1) la culture post-autoritaire, (2) l’ancienne culture continentale et (3) la culture nordique-insulaire.

La première culture est caractérisée par une méfiance relative pour le parlement, un activisme judiciaire relativement déclaré, et la primauté des droits nationaux constitutionnels. On peut l’observer dans les démocraties continentales européennes relativement jeunes qui se sont transformées dans des régimes totalitaires ou autoritaires au cours du 20ème siècle, comme l’Allemagne, l’Italie, le Portugal, l’Espagne et de nouveaux états-membres de l’UE tels que la Pologne.

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La deuxième culture est caractérisée par une confiance relative dans le parlement, un activisme judiciaire modéré, et la primauté des droits de l’homme internationaux. On peut l’observer en France et les pays du Benelux, qui sont des démocraties anciennes européennes qui ne se sont pas transformées en régimes autoritaires au 20ème siècle.

La troisième culture est caractérisée par une retenue judiciaire et la difficulté d’internaliser les droits de l’homme internationaux. On peut l’observer dans les pays nordiques ainsi que dans la Grande-Bretagne, qui sont des démocraties anciennes européennes basées sur des modèles constitutionnels non-continentaux.

**Zusammenfassung**: Dieser Aufsatz skizziert und vergleicht verschiedene Modelle der Grundrechtsanwendung durch Zivilgerichte im Licht der Herangehensweise der Autorin zum richterlichen Regieren (judicial governance). Vorgestellt wird eine Systematik von drei Kulturen der horizontalen Wirkung der Grundrechte: (1) die post-autoritäre Kultur, (2) die alte kontinentale Kultur und (3) die nordisch-insulare Kultur.


Die dritte Kultur wird durch judizielle Selbstbeschränkung (judicial restraint) sowie die Schwierigkeit, internationale Menschenrechte ins nationale Recht zu inkorporieren, gekennzeichnet. Beobachten kann man sie in den skandinavischen Ländern und im Vereinigten Königreich, welche alte europäische, nicht auf kontinentalen Verfassungsmodellen basierte Demokratien darstellen.

**1. Introduction**

This article is structured in five sections. Section 1 outlines, from the background of the current scholarly debate, the author’s approach to judicial governance, and argues that the application of fundamental rights in private litigations is a form of judicial governance. Section 2 clarifies this article’s understanding of (European) fundamental rights, private law, direct horizontal effect, and indirect horizontal effect. Section 3 demonstrates that the horizontal effect of fundamental rights is a topic which challenges the traditional legal families’ taxonomies in comparative
private law. Section 4 proposes a new taxonomy, specific to the analysis of the application of fundamental rights in private law in Europe. This new taxonomy identifies four groups of countries: (1) relatively young continental European democracies that replaced former authoritarian or totalitarian regimes in the 20th century, (2) old continental European democracies such as France and the Benelux countries, (3) old European democracies based on non-continental constitutional models, such as the ones of the Nordic countries and the UK. Section 5 draws some conclusions and proposes a taxonomy of three cultures of fundamental rights horizontality: (a) the post-authoritarian culture, (b) the old continental culture, and (c) the Nordic-insular culture.

2. Judicial Governance

Scholars from different disciplines and backgrounds use the term ‘judicial governance’ to describe fairly different phenomena. Giving a complete overview of the relevant literature would exceed the limited space and scope of this article. Therefore, the following paragraphs will only mention some current uses of the term ‘judicial governance’, before explaining the understanding of this notion underlying the present article.¹

In her monograph on ‘judicial governance in the European legal community’,² Frerichs analyses the jurisprudence of the European Court of Justice in the light of social science theories on multilevel governance. In particular, she adopts a sociological institutionalist theory viewpoint to explain how the Court of Justice adjudicates conflicts concerning the European economic and societal constitution. Frerichs views judicial governance in the EU as a social field that comprises, besides the Court of Justice, ‘a whole bunch of private, public, national, supranational and transnational actors competing for the right interpretation of EU law in general and the European economic constitution in particular’. In this field, the Court of Justice acts as an arbiter of the transforming European political economy, which ‘sometimes cannot but “govern”- in the Platonian sense – “beyond the law” as it is written’.³

² S. Frerichs, Judicial Governance in der Europäischen Rechtsgemeinschaft. Integration durch Recht jenseits des Staates (Nomos 2008).
Petersmann deals with ‘multi-level judicial governance’ when he describes how transnational disputes in Europe (especially on economic law) are adjudicated by different supranational courts on the basis of different legal methodologies and constitutional backgrounds. In this context, he draws attention to the sometimes inadequate responses of supranational courts to the governance gaps created by globalization.

While Frerichs and Petersmann focus their judicial governance analyses on the adjudication by supranational courts, Whytock focuses on adjudication by domestic courts. He defines ‘transnational judicial governance’ as ‘governance of transnational activity by domestic courts’. In his analyses, he concentrates on the role of US courts as global governance actors in adjudicating private international law cases.

Mate speaks of judicial governance with reference to the adjudication by domestic courts. He focuses on the Supreme Court of India as policy-maker in a number of governance-sensitive issues. In fact, over the last 50 years, this Court has exercised judicial activism in its strongest form, asserting the power to invalidate constitutional amendments under the basic structure doctrine; control judicial appointments; govern in the areas of environmental policy; monitor and investigate government corruption; and promote electoral transparency and accountability.

A general notion of judicial governance, comprising the activity of both national and supranational courts, is proposed by Schmid. He explicitly links judicial governance to judicial activism, i.e. ‘the prominent phenomenon of courts assuming tasks which are, under the classic separation of powers doctrine, reserved

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to the executive and legislative power’. Schmid does not criticize judicial activism as such. He starts from the assumption that adjudication is always embedded in a wider social context and is, therefore, always influenced by the political, economic and social circumstances under which it operates and which influence the minds of jurists and informs their decisions. Schmid deems such an influence not undesirable, but instead indispensable to adapting the law to its changing social environment.

This article’s approach to judicial governance is partly similar to Schmid’s approach. Both in this and in her previous publications, the author of this article understands judicial governance as societal policy-making through adjudication at both national and supranational level. This governance analysis focuses on the conflicting interests and policies at stake in a certain private litigation. Indeed, one of the most important goals in governing both private and public institutions and relationships is that the interests of all participants are well represented and realized. Governance as ‘policy-making with or without politics’ implies accommodating and balancing different policy objectives and interests of different actors, and taking decisions based on this balancing. The interests and policies to be balanced and accommodated are both the economic and non-economic interests of individuals or collective entities, including human rights and basic societal values such as democracy, and efficiency goals. A large number of those interests are protected at a national, European or constitutional level as fundamental rights or constitutional principles.

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

3. Fundamental Rights and Private Law: Direct and Indirect Horizontal Effect

With ‘fundamental rights’, this article means both national and European fundamental rights, including: international human rights, rights laid down in the Charter of Fundamental Rights of the European Union (hereinafter: EU Charter), rights enshrined in the constitutions or constitutional traditions of individual states, and rights generally acknowledged as fundamental in a national or supranational legal system.

The concept of ‘European fundamental rights’ is much older than the EU Charter. In the 1960s-1970s, the European Court of Justice (ECJ) introduced and progressively developed the rule according to which human rights laid down in

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13 See A. Colombi Ciacchi, in *The Constitutionalisation of European Private Law* pp 124-125, with further references.


international conventions binding on the Member States of the European Community, and fundamental rights enshrined in the common constitutional traditions of the Member States, are to be observed as general principles of Community law. This rule became established jurisprudence of the ECJ. It was then codified in the Maastricht Treaty, maintained in all successive treaties, and is currently laid down in Article 6 Treaty on European Union (TEU). This article’s understanding of ‘European fundamental rights’ embraces all sources of fundamental rights mentioned in the latter Treaty article.

This article deals with judicial applications of (national or European) fundamental rights in private law cases. The concept of ‘private law’ used in this article embraces all legal rules concerning relationships between private parties, including commercial relationships between undertakings. A private party can be generally defined as a natural or legal person other than a public authority: an individual citizen, a privately owned commercial undertaking, a nongovernmental organization, a trade union, or even a political party organized in the form of a private association.

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

Classic examples of vertical effect of fundamental rights are: legislative reforms realized for the purpose of complying with fundamental rights; declarations of unconstitutionality of legislative rules; and condemnations of states by supranational courts on ground of non-compliance with human rights.

See Case 29/69 Stauder, ECLI:EU:C:1969:57, para. 7: ‘... the fundamental human rights enshrined in the general principles of Community law and protected by the Court’; Case 4/73 Nold v. European Commission, ECLI:EU:C:1974:51, para. 13: ‘... fundamental rights form an integral part of the general principles of law, the observance of which [the Court] ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional tradition common to the Member States. ... Similarly, international Treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of community law’.

This paper, however, only considers substantive private law. The impact of fundamental rights on civil procedure is a different phenomenon, which cannot be explored here.


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

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

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

In the ECJ case law, both the direct and the indirect horizontal effect of EU fundamental rights can be observed. The recent judgments of the Court in

Egenberger, IR v. JQ, and Bauer have definitively confirmed the direct horizontal effect of at least certain rights of the EU Charter in labour relationships.

At the national level, some kind of horizontal effect of fundamental rights is acknowledged in the private laws of most EU Member States. The following sections of this article will identify different groups of countries, corresponding to different models of fundamental rights horizontality.

4. Fundamental Rights Horizontality versus Legal Families in Comparative Law

Comparative lawyers traditionally divide the legal systems in ‘families’. Most taxonomies acknowledge three larger families: civil law, common law, and mixed jurisdictions (i.e. legal systems that combine civil law and common law elements). Each of the two large families ‘civil law’ and ‘common law’ can then be subdivided in further, smaller, families. In particular, the civil law systems of Europe can be subdivided in three smaller families: the Romanistic family, the Germanic (or German) family, and the Nordic family.

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27 Case 68/17, IR v. JQ, ECLI:EU:C:2018:696. For a comment on this judgment see A. Colombi Ciacci, 15. ECLR 2019.


29 Section 3 of this paper partly draws on A. Colombi Ciacci, in EU-Grundrechte und Privatrecht – EU Fundamental Rights and Private Law, pp 297-208.

Obviously, the validity of every taxonomy is relative: it is limited both to the perspective from which the taxonomy was created, and by the criteria on which the taxonomy is based.\textsuperscript{31} The traditional legal families taxonomies in comparative law follow a law-in-the-books perspective: they mainly focus on legislative formants,\textsuperscript{32} first and foremost civil codes. From this perspective, the answer to the question of whether a certain national private law system in continental Europe belongs to the Romanistic or Germanic family practically depends on whether the most general piece of legislation in the private law of that country follows the model of the French Code Civil or the model of the German or Austrian Civil Code.\textsuperscript{33}

Once the law-in-the-books perspective is abandoned in favour of a law-in-action perspective, the traditional legal families’ taxonomies lose validity. This can be demonstrated by analysing the results of the project ‘The Common Core of European Private Law’.\textsuperscript{34} This is a law-in-action oriented comparative law project, based on Schlesinger’s comparative case law methodology and Sacco’s distinction between legal and meta-legal formants.\textsuperscript{35} Each Common Core book project starts from a list of fictitious cases, to be discussed by the national reporters on the basis of how judges and scholars in his/her country would deal with each of these cases. After the completion of the national reports, the book editors have to write comparative remarks for each fictitious case. At this stage, the object of comparison no longer consists in legal formants but in ‘operative rules’, i.e. the remedy-based outcomes of the fictitious cases. The comparative remarks normally divide the countries in groups

\begin{itemize}
\item includes the Scandinavian countries in the Romano-Germanic family, Zweigert and Kötz acknowledge a separate Nordic family, and provide separate descriptions of the histories and features of the Romanistic and German family: K. Z\textsc{WEIGERT} & H. K\textsc{ÖTZ}, \textit{Einführung in die Rechtsvergleichung} (3d ed., Mohr 1996), p 73 et seq. For a discussion of the different legal families taxonomies proposed by comparative law scholars see M. S\textsc{IEMS}, \textit{Comparative Law} (Cambridge University Press 2014), 74 et seq.
\item See K. Z\textsc{WEIGERT} AND H. K\textsc{ÖTZ}, \textit{Einführung in die Rechtsvergleichung}, p 72 et seq., M. S\textsc{IEMS}, \textit{Comparative Law}, p 74 et seq.
\item This paper follows Rodolfo Sacco’s terminology and approach, according to which legislative formants are only one type of legal formants: other two types of legal formants are case law and scholarly writings. For a definition of ‘legal formant’ see R. S\textsc{ACCO}, ‘Legal Formants: a Dynamic Approach to Comparative Law’, 39. \textit{American Journal of Comparative Law} 1991, pp 1-34 (Part 1), 343-401 (Part 2).
\item A. C\textsc{oloMBI C\textsc{IACCHI}}, in \textit{EU-Grundrechte und Privatrecht – EU Fundamental Rights and Private Law}, p 297.
\end{itemize}
according to the likelihood that in a certain country the remedy asked for by the party of the fictitious case would be awarded by the courts. This comparison leads to often completely unexpected groups of countries, which clearly do not match with the legal families taxonomies of comparative law literature.\textsuperscript{36}

The horizontal effect of fundamental rights is a law-in-action based topic, shaped by leading cases decided by courts, and scholarly writings. Previous publications of the author of the present article have compared different models of fundamental rights horizontality in Europe and identified new groups of countries, which do not match at all with the traditional legal families described in comparative law books.\textsuperscript{37}

5. Three European Models of Application of Fundamental Rights by Civil Courts

5.1. Preliminary Remarks

The new taxonomy that emerges from a comparison of the modes of horizontal effect of fundamental rights in different European countries can be traced back to two factors. The first one is comparative constitutional law and history. The second one consists in the historical-cultural relation between legislators and courts in the field of private law. With regard to both factors, states that had become totalitarian or authoritarian at some point in the 20th century (such as Germany, Italy, Spain and Poland) belong to the same group, whereas states such as France, the Netherlands, the Nordic countries and the UK, whose governments did not slip into totalitarianism or authoritarianism, follow remarkably different approaches and belong therefore to other groups of countries.\textsuperscript{38}

For what concerns the different models of fundamental rights horizontality in Europe, a distinction can be made between three groups or countries, which are not meant to be exhaustive. The first group includes continental European democracies instituted in the 20th century after the fall of totalitarian


\textsuperscript{38} Section 4 of this paper partly draws on A. Colombi Ciacchi, in \textit{EU-Grundrechte und Privatrecht – EU Fundamental Rights and Private Law}, pp 208-217.
or authoritarian regimes. The second group consists of continental European democracies based on French-style constitutions, which were not challenged by authoritarianism or totalitarianism in the 20th century. The third group embraces Northern European democracies such as the ones in the UK and in the Nordic countries, which were neither replaced by authoritarian regimes in the 20th century, nor were they based on continental-style constitutions.

5.2. The First Group: Young Continental European Democracies

The legal culture in the continental European countries whose governments had become totalitarian or authoritarian at some point in the 20th century, is characterized by the fear of potential abuses committed by political forces holding the majority in Parliament. To prevent and counterbalance potential excesses from legislatures and governments, constitutional norms are entrenched and great power is allocated to the judiciary. Correspondently, three main features of the horizontal effect of fundamental rights in these countries consist in: (1) the central role of entrenched written constitutions, (2) the prominent position of constitutional courts, whose judgments considerably contribute to the evolution of private law, and (3) judicial activism by the civil courts, which often innovate private law by applying constitutional norms.39

In these legal systems, for example in 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 or authoritarian 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.40 Therefore, this phenomenon is as old as their new democratic constitutions: more than 50 years in Italy.41

Germany, more than 20 years in Portugal and Spain, and less than ten 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 consolidated precedents in order to provide a better protection of certain fundamental rights or principles in specific private law cases.

Curiously enough, this paramount role of the constitutional courts in private law development in those countries seems to be generally independent of the possibility of individual complaints of unconstitutionality. For example, Italian and Portuguese citizens have no direct access to the constitutional court, unlike German, Spanish and Polish citizens. However, in Italy and Portugal, indirect access to constitutional justice, through a question of constitutionality raised before a civil court and referred by the latter to the constitutional

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court. As far as it results from first comparative studies, the influence of the constitutional court on the interpretation and application of private law in Italy appears to be as strong as in Germany, and in Portugal as strong as in Spain.

In those countries, the horizontal effect of international conventions such as the European Convention on Human Rights (ECHR) plays a small role, if any. References to the ECHR 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. 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 considered hierarchically superior to the national constitutions nor are they generally acknowledged to have constitutional rank.


See e.g. 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 AG 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 (1994) *Neue Juristische Wochenschrift* 1147.

5.3. The Second Group: Old Continental European Democracies

France and the Benelux countries (Belgium, the Netherlands, and Luxemburg) have written, continental-style entrenched constitutions like the first group of countries. Their constitutions, however, were not replaced by authoritarian or totalitarian regimes in the 20th century. Therefore, the written and unwritten constitutional norms in France and the Benelux countries reflect a much greater trust in the parliamentary majority, and much less trust in the judiciary, than in the first family of countries. The smaller room for manoeuvre for the judiciary is arguably one of the reasons why in France and the Benelux countries the national constitutions play a much smaller role in private law than in the first family of countries.

In France, before 2010 the Constitutional Council (Conseil Constitutionnel) was not competent to decide on the application of the Constitution by ordinary courts in civil cases. Questions of constitutionality could only be raised in the abstract, and about legislation which had not yet come into force. Contesting the constitutionality of legislation was 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). Only after a constitutional reform of 2008, implemented through a legislative Act entered into force on 1 March 2010, now in France the ordinary courts can ask the Constitutional Council to review the constitutionality of legislation in a special form of procedure called ‘la question prioritaire de constitutionnalité’ (QPC).

In the Netherlands, neither a constitutional court exists, nor does the ordinary judiciary have the competence to review the constitutionality of legislative norms. Article 120 of the Constitution (Grondwet, Gw) clearly states: ‘De rechter treedt niet in de beoordeling van de grondwettigheid van wetten en verdragen’ (The courts shall not judge on the constitutionality of legislative acts and international conventions). Thus the judiciary is not allowed to review the conformity of

51 For a comparison of different European countries’ models of constitutional review see M. de Visser, Constitutional Review in Europe: A Comparative Analysis (Hart Publishing 2013).
legislative norms with the *Grondwet*. This radical prohibition of constitutional review corresponds to the old French model, which however in France was progressively abandoned, step by step, in the course of the last 50 years.

The Netherlands relatively recently started a political process aimed at the introduction of some form of judicial review of constitutionality. Since the beginning of the 2000s, some fractions of the Dutch Parliament have been advocating for an (at least partial) abandonment of the prohibition of constitutional review under Article 120 Gw. A legislative proposal of 2002 for a partial derogation from this prohibition was approved from the First Chamber (*Eerste Kamer*) of the Dutch Parliament in 2004, and from the Second Chamber (*Tweede Kamer*) in 2008. However, in order to become definitive, the proposal would have needed the approval of two thirds of both Chambers in a second round of voting, which was politically unfeasible. Moreover, Dutch legal scholars did not seem enthusiastic about the proposal either. The proposal was finally withdrawn in 2018.

Independent of the possibilities of constitutional review of private law norms, in France and the Netherlands the horizontal effect of constitutional norms has been acknowledged and practiced by the judiciary for several decades.

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59 See D.-J. Elzinga, in *Handboek van het Nederlandse Staatsrecht*, p 161: the proposal was approved by a small majority in the First Chamber, which made it unlikely that a two-third majority could be reached in the second round of voting.


62 As Biesheuvel demonstrates, the Dutch scholarly discussion on the effect of constitutionally protected fundamental rights in relationships between private parties goes back to the year 1900:
The practical relevance of horizontal effect seems greater in the Netherlands than in France. Since the mid-1990s, however, French courts have also made an increasingly wide use of constitutional norms and international human rights in solving private law cases.

In fact, French and Dutch courts have been referring to fundamental rights in deciding private law cases for half a century. They have applied


This impression arises from the case-law materials collected in the framework of the project whose results are published in G. BRÜGGEHEER, A. COLONIERI CACCHI & G. COMANDE (eds), in Fundamental Rights and Private Law in the European Union. Volume 1: A Comparative Overview (Cambridge University Press 2010).

For an early case of horizontal effect in France, see Tribunal de la Seine, 22 January 1947, Dalloz 1947, p 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, NJ 1949, 331 (on the invalidity of a clause of a farming lease contract on grounds of violation of freedom of religion). This is the first known Dutch civil judgment mentioning a fundamental right. However, some Dutch scholars have questioned the horizontal effect nature of this case, as the Court did not expressly refer to constitutional sources. See F. DE GRAAF & MJ.O.M. DE HAAS, ‘Horizontale werking van grondrechten: een heilloos leerstuk’, Nederlands Juristenblad 1984, p 1354. The first known Dutch civil judgments explicitly referring to a fundamental right enshrined in the Grondwet are HR 31 October 1969, NJ 1970, 57 (Mensendieck I) and HR 18 June 1971, NJ 1971, 407 (Mensendieck II). On these see among others V. VAN DEN BRINK, De rechtshandeling in strijd met de goede zeden (Den Haag: Boom Juridische uitgevers 2002), p 38 et seq.; O. CHEREDNICHENKO, Fundamental Rights, Contract Law and the Protection of the Weaker Party, p 124, at 566; C. MAK, Fundamental Rights in European Contract Law., p 36, at 79.
horizontally not only provisions of their national constitutions, but also – and to a greater extent – the ECHR and other international conventions. Arguably, the vast majority of French and Dutch horizontal effect cases concern ECHR provisions. The opposite is true in the first group of countries, where the vast majority of horizontal effect cases concern national constitutional provisions. This difference may be explained bearing in mind two aspects: Firstly, in France and the Benelux countries, international law instruments such as the ECHR have supremacy over national law and are considered directly effective insofar as self-executing. Secondly, the limited applications of the national constitution in private law cases are consistent with a legal culture that considers constitutional norms a purely public law matter. Indeed, the legal systems of France and the Benelux countries still reflect to a great extent the strict separation between public law and private law, a separation which – being a typical characteristic of the 19th century continental European legal thinking – in the second family of countries arguably never played a major role, and in the first family of countries has been increasingly losing ground since World War II.


5.4. The Third Group: Non-continental European Democracies

For what concerns the horizontal effect of fundamental rights, the UK and the Nordic countries arguably belong to the same group of legal systems. These differ from the ones of most other EU Member States as they are not based on continental-style written constitutions, nor foresee institutions comparable to a constitutional court. The UK and the Nordic countries are old democracies not replaced by authoritarian regimes in the 20th century. Unlike other European democracies that did not slip into authoritarianism in the 20th centuries, such as the ones of France and the Benelux countries, which follow monist models for what concerns the relationships between national and international law, the UK and the Nordic countries follow dualist models. Last but not least, both the UK and the Nordic countries only relatively recently incorporated the ECHR into national law.68

For example, Sweden has a written constitution that differs notably from the continental-style entrenched written 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. The competence of constitutional review lies with ordinary courts and administrative agencies, which however have made very little use of this power.69 National constitutional provisions are normally not provided with horizontal effect in Sweden,70 while the opposite is true for the ECHR.71 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.72

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70 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 see I. Cameron, ‘Protection of Constitutional Rights in Sweden’, Public Law (1997), p 488. See A. Lauer and A. Comolli Ciacchi, Fundamental Rights and Private Law in the European Union. Volume 1: A Comparative Overview, p 662 et seq.
Similarly, in the UK, the ECHR was incorporated into national law with the Human Rights Act 1998 (HRA). 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 as the courts are, as ‘public authorities’ under section 6(3)(a) HRA, obliged to act in a way compatible with Convention rights. Since 1998, the civil courts have increasingly taken the Convention into account 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. 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.

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73 In force as of 2 October 2000.
76 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.
6. Conclusion: Three Judicial Cultures of Fundamental Rights
Horizontality in Europe

Despite of the great differences between the individual countries within one and the same group, one may argue that three judicial cultures of fundamental rights horizontality exist in Europe: (1) the post-authoritarian culture, (2) the old continental culture, and (3) the Nordic-insular culture.

The first culture is characterized by a relative distrust in Parliament, a relatively strong judicial activism, and the primacy of national constitutional rights. It can be observed in relatively young continental European democracies that had transformed themselves into totalitarian or authoritarian regimes at some point in the 20th century, such as Germany, Italy, Portugal, Spain, and new EU Member States such as Poland.

The second culture is characterized by a relative trust in Parliament, a moderate judicial activism, and the primacy of international human rights. It can be observed in France and the Benelux countries, which are old continental European democracies that did not transform themselves into authoritarian regimes in the 20th century.

The third culture is characterized by judicial restraint and the difficulty to internalize international human rights law. It can be observed both in the Nordic countries and in the UK, which are old European democracies based on non-continental constitutional models. Written catalogues of fundamental rights are extraneous to the national legal cultures in the latter group of countries. This explains both their late incorporation of the European Convention of Human Rights, and the political resistance of the UK government towards the latter Convention. This also explains why in this group of countries the judicial applications of fundamental rights in civil litigations are much less frequent than in the first two groups.

