Fundamental Rights and Private Law

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Fundamental rights and private law: A relationship of subordination or complementarity?

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1. Introduction

Originally, fundamental rights, *i.e.* human rights embodied in international human rights treaties and constitutional rights enshrined in national constitutions, and private law were considered to be wide apart due to the sharp distinction between public and private law. For a long time, therefore, private law was considered to be immune from the effect of fundamental rights, the function of which was limited to being individual defences against the vigilant eye of the state. Recently, however, in many European legal systems, and in German law in particular, fundamental rights and private law have started to converge with ever increasing speed. The growing influence of fundamental rights on the relationships between private parties under private law, *i.e.* the horizontal effect of fundamental rights in private law, which can now be traced in many European legal systems, makes it possible to speak of the tendency towards the constitutionalisation of private law[1] and clearly shows that fundamental rights and private law no longer exist in isolation of each other.[2] Therefore, the major issue at present is no longer *whether* fundamental rights may have an impact on the relationships between private parties under private law but *to*

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1 The term 'constitutionalisation' has been widely used by Dutch scholars in particular. See, for example, F.W. Grosheide, 'Constitutionalisering van het burgerlijk recht?', 2001 *Contracteren*, p. 48; J.M. Smits, 'Constitutionalisering van het vermogensrecht', in *Preadviezen uitgebracht voor de Nederlandse Vereniging voor Rechtsvergelijking*, 2003, p. 1; O.O. Cherednychenko, 'The Constitutionalization of Contract Law: Something New under the Sun?', 2004 *Electronic Journal of Comparative Law* 8.1, http://www.ejcl.org/81/art81-3.html; S. Lindenbergh, 'The Constitutionalisation of Private Law in the Netherlands', in T. Barkhuysen & S. Lindenbergh (eds.), *Constitutionalisation of Private Law*, 2006, p. 97. In other legal systems, however, many authors have also signalled the growing impact of fundamental rights in private law in general and contract law in particular, occasionally also using the term 'constitutionalisation'. For Germany, see, for example, C. Starck, 'Human Rights and Private Law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court' and A. Heldrich & G.M. Rehm, 'Importing Constitutional Values through Blanket Clauses', in D. Friedmann & D. Barak-Erez (eds.), *Human Rights in Private Law*, 2001, p. 97 and p. 113; G. Brüggemeier, 'Constitutionalisation of Private Law – The German Perspective', in Barkhuysen & Lindenbergh, *supra*, p. 59. For the UK, see, for example, H. Beale & N. Pittam, 'The Impact of the Human Rights Act 1998 on English Tort and Contract Law', in Friedmann & Barak-Erez, *supra*, p. 131; L.M. MacQueen, 'Delict, Contract, and the Bill of Rights: a Perspective from the United Kingdom', 2004 *Edinburg Law Review*, p. 359.

2 Although until recently the tendency towards the constitutionalisation of private law has primarily manifested itself within domestic legal systems, private law, in particular contract law, may potentially also be considerably affected by fundamental rights as a result of the case law of the European Court of Human Rights and the European Court of Justice. On this, see O.O. Cherednychenko, 'Towards the Control of Private Acts by the European Court of Human Rights?', 2006 *Maastricht Journal of European and Comparative Law*, p. 195 and O.O. Cherednychenko, 'EU Fundamental Rights, EC Freedoms and Private Law', 2006 *European Review of Private Law*, p. 23, with further references. European contract law is also unlikely to escape from the influence of EU fundamental rights. For an analysis of the potential for the constitutionalisation of European contract law, see, for example, M.W. Hesselink, 'The Horizontal Effect of Social Rights in European Contract Law', in M.W. Hesselink *et al.* (eds.), *Privaatrecht tussen autonomie en solidariteit*, 2003, p. 119; A. Colombi Ciacchi, 'The Constitutionalization of European Contract Law: Judicial Convergence and Social Justice', 2006 *European Review of Contract Law*, p. 167; O.O. Cherednychenko, 'Fundamental Rights and Contract Law', 2006 *European Review of Contract Law*, p. 489.

what extent this will occur.[3] In other words, the real issue today is not *whether* but *how* fundamental rights and private law relate to each other and the answer to this question will determine the future of private law.

This article will consider how fundamental rights (may) affect the relationships between private parties under private law and what consequences this effect has for the relationship between fundamental rights and private law. The primary aim of this article is thus to establish how fundamental rights and private law (may) relate to each other at present in different legal systems. The focus of the analysis will be on German, Dutch and English law. The choice of these legal systems is explained by the fact that whereas in Germany the relationship between fundamental rights and private law is largely determined by the constitutional court, in the Netherlands and the UK in the absence of such a court this issue falls exclusively within the competence of the ordinary courts.

It will be demonstrated that depending on the extent of the effect of fundamental rights on the relationships between private parties under private law, the relationship between fundamental rights and private law in these legal systems tends to take the form of either the subordination of private law to fundamental rights or complementarity between the two. The qualification of the relationship between fundamental rights and private law in terms of subordination or complementarity will accordingly be used to illustrate the differences in the extent to which fundamental rights affect the relationships between private parties under private law in different legal systems. Although the line between the relationship of subordination and that of complementarity is not always clear-cut and the distinction between the two is a matter of emphasis rather than a strict divide, it is nevertheless helpful in assessing the impact of fundamental rights on private law. It should be borne in mind that the way in which fundamental rights and private law relate to each other in national legal systems may also be significantly influenced by the international supervisory bodies such as the European Court of Human Rights and the European Court of Justice. Due to lack of space, however, the European aspects of the constitutionalisation of private law fall outside the scope of this article.[4]

In the light of the foregoing, this essay will first define the relationship between subordination and complementarity in Section 2. Building upon these definitions, in the subsequent Sections 3 and 4 the nature of the relationship between fundamental rights and private law in German, Dutch and English law as it has developed in the case law of the national courts will be discussed. In the course of this analysis it will become clear that the labels used to describe ways in which fundamental rights may affect the relationships between private parties under private law, such as 'direct' and 'indirect' horizontal effect, do not always accurately reflect the extent of such an effect in a particular legal system in practice. In Section 5, therefore, it will be argued that there is a need for further differentiation between the kinds of horizontal effect of fundamental rights along the lines of the distinction between the relationship of subordination and that of complementarity between fundamental rights and private law. As will be concluded in Section 6, making such a differentiation is absolutely necessary because the major task at present is to determine the desirable degree of the constitutionalisation of (a particular field of) private law.

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3 For a comprehensive study of the phenomenon of the constitutionalisation of contract law, see O.O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions*, 2007.

4 On the impact of human rights enshrined in the European Convention on Human Rights and the Nice Charter of Fundamental Rights of the EU on the relationship between fundamental rights and private law in national legal systems, see Cherednychenko 2007, *supra* note 3, Chap. 4.

The fundamental issue to be resolved in this respect is which body of law substantially determines the outcome of the dispute between private parties – fundamental rights law or private law.

2. Subordination/complementarity defined

It is submitted that depending on the extent of the effect of fundamental rights on the relationships between private parties under private law, the relationship between fundamental rights and private law tends to take the form of either the subordination of private law to fundamental rights or complementarity between the two. In the present context, the terms 'subordination' and 'complementarity' as indications of the two different forms of relationship between fundamental rights and private law will be used in the following meaning.

Under the subordination of private law to fundamental rights I understand the situation where the relationships between private parties are no longer substantially governed exclusively by private law as a conceptually distinct category, but by fundamental rights enshrined in national constitutions or other national or international human rights instruments, *i.e.* fundamental rights law. Fundamental rights have a direct binding effect on private parties, and fundamental rights law has an immediate impact on private law. It is fundamental rights which determine the relationships between private parties, and the role of private law is limited to providing tools for their effect in a private sphere. The existing private law is not only interpreted in the light of fundamental rights, but is replaced by the new rules derived from fundamental rights. In this model, the fact that fundamental rights were accommodated within private law according to the logic of the latter is not always sufficient to satisfy the requirement of compatibility with fundamental rights law because that which in the conduct of private parties is compatible with fundamental rights is no longer substantially determined by private law itself, but by fundamental rights law. Fundamental rights thus do not simply *influence* private law. They *govern* private law, thereby enjoying priority over private law values. In this sense, the subordination of private law to fundamental rights in the present context does not mean that in a hierarchy of norms private law is formally subordinate to fundamental rights law as a higher law. This fact is undisputed. What it means is that fundamental rights law exercises *total* control over private law by weakening its ability to regulate the relationships between private parties based on its own theory and turning it into a tool for advancing fundamental rights. In contract law disputes, for example, this implies that private autonomy can be limited directly on the basis of fundamental rights without contract law having a possibility to have a *substantial* impact on the outcome of the dispute.

By contrast, the complementarity between fundamental rights and private law implies that although fundamental rights law enjoys a higher position in the hierarchy of norms, this does not lead to the substitution of private law as the law governing relationships between private parties by fundamental rights. Private law does not lose its ability to regulate the relationships between private parties according to its own logic and thus preserves its autonomy. Private parties are not bound by fundamental rights, and their relationships are formally and substantially governed by the norms of private law. In this model, fundamental rights only *influence* private law, and it is private law which determines how the values embodied therein are to be accommodated within it. In other words, fundamental rights affect private law and private law affects the way in which fundamental rights affect it. Depending on whether or not the private law courts are bound by the duty to develop private law in a way which is consistent with fundamental rights, one may distinguish two forms in which the complementary relationship between fundamental rights and private law can develop. On the one hand, such a relationship may result from the private law courts using fundamental rights as a source of inspiration when establishing the content of open

private law norms, albeit there is no explicit *obligation* to this effect. In such a case, it is possible to speak about the *spontaneous* complementarity between fundamental rights and private law arising mainly from the need for the private law courts to have a source of inspiration when making open and undefined private law norms concrete. The main feature of this kind of complementarity is that the courts have discretion as to whether or not to consistently take into account fundamental rights when resolving disputes between private parties. On the other hand, if the courts are *obliged* to develop private law in a way which is consistent with the values embodied in fundamental rights and to accommodate them within private law, one can speak about the relationship of *obligatory* complementarity between fundamental rights and private law. In this case, private law is only considered to be compatible with fundamental rights law if it takes into account the impact of the values embodied in fundamental rights and absorbs them into itself. How this is supposed to be done, however, is mainly for private law to determine. The private law legislator and the courts enjoy a wide discretion as to how they embed fundamental rights within the fabric of private law.

At the heart of the distinction between the subordination of private law to fundamental rights and the complementarity between the two accordingly lies the issue of which body of law substantially determines the outcome of a dispute between private parties – fundamental rights law or private law. What the subordination and complemetarity models imply in practice will become clear in the next sections where the case law of the German, Dutch and English courts will be discussed through the prism of these models.

3. Towards the subordination of private law to fundamental rights: The German experience

It would not be an exaggeration to say that the constitutionalisation of private law in Europe has currently reached its most advanced stage in Germany where the way in which this process takes place has been determined by the Federal Constitutional Court. The essence of the German approach to the relationship between fundamental rights and private law can be summarized as follows.[5]

Firstly, since the famous *Lüth* case[6] decided by the German Constitutional Court almost half a century ago, fundamental rights enshrined in the German Constitution (*Grundgesetz*) are regarded not only as individual defences against the state, but also as an 'objective system of values', which must apply throughout the whole legal order, directing and informing legislation, administrative acts and court decisions.

Secondly, since the Constitution contains an 'objective system of values' for the whole legal order, private law obviously also cannot escape from the influence of values underlying constitutional rights: under the *Lüth* doctrine, no rule of private law may conflict with these values, and all such rules must be construed in a way that gives effect thereto. The values enshrined in the Constitution are the same for the whole legal order and therefore should be honoured both in a public law relationship between an individual and the state and in a private law relationship between individuals. They permeate the state and society, public and private law, wherever the line between the two is to be drawn.

Thirdly, the logical consequence of such reasoning is that constitutional rights should be given effect in private law and the most controversial issue is how this should be done. The German legal literature and practice offers three concepts which can be used for this purpose.

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5 For the relationship between fundamental rights and private law in German law in more detail, see Cherednychenko 2007, *supra* note 3, s. 3.2.
6 BVerfG 15 January 1958, *BVerfGE* 7, p. 198 (*Lüth*).

a) Direct horizontal effect

Before the *Lüth* case, the prominent German scholar Nipperdey advocated the concept that constitutional rights should apply not only against the state, but should also be *directly* applicable in private law relations – at least in the case of the most important constitutional rights.[7] This theory has come to be known as the 'theory of direct effect on third parties' (*Lehre der unmittellbaren Drittwirkung*). The implication of such an approach is that certain constitutional rights should ordinarily be binding on individuals and private groups in approximately the same manner and to the same extent as they are binding on the government. Thus, the legality of private persons' transactions and other acts becomes directly dependent upon the basic-rights clauses, and, if their violation is found, the role of established private law is only limited to providing for the consequences of illegality such as invalidity or damages.[8] Accordingly, the idea of direct horizontal effect implies that a private party has, in his action against another private party, a claim or a defence which is directly based on a constitutional right which overrides an otherwise applicable rule of private law. However, neither in *Lüth* nor in its subsequent case law did the German Constitutional Court adopt Nipperdey's theory and grant direct effect to constitutional rights in disputes between private parties under private law. Instead, it resorted to such concepts as indirect horizontal effect and the state duties to protect constitutional rights which are considered below.

b) Indirect horizontal effect

The most widely used concept which was introduced in the *Lüth* case and is still followed in practice is the idea of the indirect horizontal effect of constitutional rights. In contrast to direct horizontal effect, in this case a claim or defence is based on a provision in the Civil Code, which is not automatically overridden by the constitutional right in question, but only interpreted in the light thereof. According to the Constitutional Court in *Lüth*, a certain intellectual content radiates from constitutional law into private law and affects the interpretation of the existing private law rules.[9] A dispute between private parties on the rights and duties that arise from rules of conduct thus influenced by fundamental rights, the Court emphasized, 'remains substantively and procedurally a dispute of private law'.[10] Thus, even though the interpretation of private law should comply with the public law of the Constitution, it is nonetheless *private* law which is interpreted and applied to relationships between private parties. The best suited for the realization of such an influence are the general clauses of the Civil Code, such as Section 826 concerning good morals, which are considered to be the entrance gates through which constitutional values may gain access to the private law sphere. In reaching this conclusion the Federal Constitutional Court adopted what has come to be known as the 'theory of indirect effect on third parties' (*Lehre der mittellbaren Drittwirkung*), which was first defended by Dürig in response to the theory of direct effect proposed by Nipperdey.[11] Dürig's major concern, which led him to reject the idea of the direct effect of constitutional rights in private law and to opt for an intermediary solution, which he saw in the idea of indirect effect, was the concern about the preservation of the principle of private autonomy and the independence of private law.[12]

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7 See, for example, H.C. Nipperdey, 'Die Würde des Menschen', in K.A. Bettermann & H.C. Nipperdey (eds.), *Die Grundrechte: Handbuch der Theorie und praxis der Grundrechte*, Part II, 1954, pp. 748 *et seq.*; L. Enneccerus & H.C. Nipperdey, *Allgemeiner Teil des Bürgerlichen Gesetzbuchs*, Part I/1, 1959, pp. 92 *et seq.*

8 Compare Enneccerus & Nipperdey 1959, *supra* note 7, p. 95.

9 *Lüth*, *supra* note 6, at p. 205.

10 *Lüth*, *supra* note 6, at p. 205, (my translation).

11 G. Dürig, 'Grundrechte und Zivlrechtsprechung', in T. Maunz (ed.), *Vom Bonner Grundgesetz zur gesamtdeutschen Verfassung*, 1956, p. 157.

12 *Ibid*., at pp. 183 *et seq.*

c) State duties to protect constitutional rights

After many years of granting horizontal effect solely on the basis of the concept of indirect horizontal effect adopted in *Lüth*, in the *Handelsvertreter* case[13] discussed in more detail below the German Constitutional Court introduced a concept of 'state duties to protect constitutional rights' ('*grundrechtliche Schutzpflichten'*), which had previously only been applied in the context of public law, within the ambit of private law. By doing so the Constitutional Court followed the theory of 'state duties to protect constitutional rights', which had primarily been developed by Canaris who saw in it a new legal basis for the effect of constitutional rights in private law.[14] The Court, however, did not formally reject the theory of indirect effect. Rather, it opted for the complementary use of both the old and the new foundation for the purposes of giving effect to constitutional rights in private law.

The protective function of constitutional rights (*Schutzgebotsfunktion der Grundrechte)*, which imposes on the state the duty to protect constitutional rights, or, in other words, *positive* obligations, differs from the classical function of constitutional rights as defensive rights against the state (*Eingriffsverbotsfunktion der Grundrechte*), which prohibits any intrusions on the part of the state into constitutional rights and thus imposes *negative* obligations on the state. While the latter presupposes the duty of the state to *refrain* from action, the former, by contrast, imposes on the state a duty to *act* when constitutional rights of one individual are violated by another individual (and thus not by the state itself). Accordingly, the issue which lies at the heart of the duty of the state to protect its citizens is not whether public authorities have actively encroached upon the constitutional rights of private individuals, but whether, by failing to act, they allowed *private individuals* to encroach upon the constitutional rights of other private individuals. The main purpose of such a duty is thus to protect individuals against each other.[15]

The case law of the German Constitutional Court contains the most telling examples of the far-reaching effect of constitutional rights on the relationships between private parties particularly under contract law. Thus, for example, in its judgment in the *Handelsvertreter* case[16] in 1990 the Constitutional Court essentially invalidated a non-competition clause in a contract between a commercial agent and his principal on the ground that it was contrary to the agent's constitutional right to freedom of profession guaranteed by Article 12 (1) of the Basic Law. According to this clause, the agent was barred from working in any capacity for any competitor of the principal for two years after the termination of the contractual relationship, and in the event that the termination was brought about by culpable behaviour on his part he would not be entitled to any compensation. Although this clause was compatible with the mandatory provisions of the German Commercial Code introduced by the German legislator with a view to regulating the conflict of interests between the principal and the agent and, in particular, protecting the agent who often had only little negotiating power, the Federal Constitutional Court overturned the decision of the German Supreme Court in private law matters in which the clause in question was upheld and it declared the respective provisions of the Commercial Code to be unconstitutional. In the view of the Constitutional Court, in those cases where the legislator omits adopting mandatory contract law for particular areas of life or types of contract, it is the private law courts

13 BVerfG 7 February 1990, *BVerfGE* 81, 242 (*Handelsvertreter*).

14 C.-W. Canaris, 'Grundrechte und Privatrecht', 1984 *Archiv für die civilistiche Praxis*, p. 201, in particular, at pp. 210 *et seq.*, 225 *et seq.* See also C.-W. Canaris, *Grundrechte und Privatrecht*, 1999.

15 Compare C. Starck, 'State Duties of Protection and Fundamental Rights', http://www.puk.ac.za/lawper/2000-1/starck.html, s. 2.2.

16 *Handelsvertreter*, *supra* note 13.

which are obliged to *protect* constitutional rights in situations of disturbed contractual parity using the means available within private law.

Another revolutionary judgement was delivered by the Constitutional Court in 1993 in the famous *Bürgschaft* case.[17] In this case, a daughter, who was 21 years of age, did not have a high level of education, owned no property and worked as an unskilled employee at a fish factory for a modest salary, had acted as a surety for her father's debts to the amount of DM 100,000 (50,000 Euros). Essentially, the Court invalidated the suretyship contract concluded by the daughter on the basis of her constitutional right to private autonomy, which follows from the constitutional right to the free development of one's personality, in conjunction with the principle of the social state (Articles 2 (1) and 28 (1) of the Basic Law). According to the Court, in cases where a 'structural inequality in bargaining power' has led to a contract which is exceptionally onerous for the weaker party, the private law courts are obliged to protect the constitutional right to private autonomy of this party by intervening within the framework of the general clauses (§ 138 (1) and § 242 of the German Civil Code concerning good morals and good faith, respectively).

In addition to commercial agents and sureties, extensive protection on the constitutional level was also given to tenants as a result of the Constitutional Court's decision in the *Parabolantenne* case.[18] In this case the Constitutional Court obliged a landlord to allow the tenant of Turkish origin to install an additional antenna in order to be able to receive Turkish TV programmes. The decision of the private law courts which upheld the refusal of the landlord to permit such an installation on the basis of the contract concluded between the parties was considered by the Constitutional Court to be unconstitutional. According to the Court, by interpreting § 242 of the Civil Code on good faith, which was applicable in this case, in a very restricted manner, the private law courts had violated the tenant's constitutional right to freedom of information guaranteed by Article 5 (1) of the Basic Law.

Despite fierce criticism of this approach in the German literature not only from lawyers with a private law background, but also from those with a public law background,[19] the more recent case law of the Constitutional Court does not show any signs of the Court retreating from this stance. On the contrary, by two spectacular judgments of 26 July 2005[20] in which the Court declared clauses in life insurance contracts to be unconstitutional, it has demonstrated its readiness to interfere further with contract law and to subject contractual agreements between private parties to control as to their compatibility with constitutional rights. In the judgments in question, the Court held *inter alia* that the state's duties to protect the insured person's constitutional right to the free development of one's personality (Article 2 (1) of the Basic law) and the constitutional right to property (Article 14 (1) of the Basic Law) ensure that in the case of the assignment of claims out of life insurance contracts, the assets created with the insurance company through the payment of the fees by the insured will not be negatively affected to the detriment of the insured.

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17 BVerfG 19 October 1993, *BVerfGE* 89, p. 214 (*Bürgschaft*).

18 BVerfG 9 February 1994, *BVerfG* 90, p. 27 (*Parabolantenne*).

19 See, for example, U. Diederichsen, 'Das Bundesverfassungsgericht als oberstes Zivilgericht – ein Lehrstük der juristischen Methodenlehre', 1998 *Archiv für die civilistiche Praxis*, p. 171, at pp. 210 *et seq.*; A. Röthel, 'Verfassungsprivatrecht aus Richterhand? Verfassungsbindung und Gesetzesbindung der Zivilgerichtsbarkeit', 2001 *Juristische Schulung*, p. 424; D. Medicus, 'Der Grundsatz der Verhältnismäßigkeit im Privatrecht', 1992 *Archiv für die civilistiche Praxis*, p. 35, at pp. 54 *et seq.*; K. Hesse, *Verfassungsrecht und Privatrecht*, 1988, p. 24; K. Stern, *Das Staatsrecht der Bundesrepubliek Deutschland*, III/1, 1988, § 76 IV, p. 1583.

20 BVerfG *NJW* 2005, p. 2376. For a more positive assessment of the Federal Constitutional Court's case law in question, see, for example, T. Simon, ' "Grundrechtstotalitarismus" oder "Selbstbehauptung des Zivilrechts"?', 2004 *Archiv für die civilistiche Praxis*, p. 264; J. Hager, *Grundrechte im nationalen Vertragsrecht*, a paper presented at the annual conference of the Society of European Contract law on 'Constitutional values and European Contract Law', Berlin, 7-8 September 2006.

A characteristic feature of this case law of the Constitutional Court is the leading role of fundamental rights in the resolution of disputes arising under contract law. Although in all of the cases mentioned fundamental rights were not formally directly applied to the relationships between private parties and it was contract law which remained applicable, in practice the Constitutional Court determined the outcome of the case on the constitutional law level by balancing the competing fundamental rights involved in each case against each other. Thus, for example, in the *Bürgschaft* case, the conflict arose between the daughter's constitutional right to private autonomy in conjunction with the principle of the social state and the bank's constitutional right to private autonomy, and the good morals clause which was formally applicable in that case could not change the outcome of this balancing.[21] Moreover, in those cases where the private law courts were held to be *obliged* to protect the constitutional rights of certain actors and for this purpose to intervene in contractual relationships by means of the general clauses, the role to be played by contract law, in particular general clauses, in determining when, under what conditions, and to which extent to incorporate constitutional values into its own fabric seems to have been rather limited.[22] Private law norms, especially general clauses, are increasingly becoming mere tools for giving effect to constitutional rights between private parties, since what is constitutional tends to be determined by the German Constitution and not by private law influenced by the Constitution.

Such case law of the Federal Constitutional Court raises the question whether it still follows its own formula of the relationship between fundamental rights and private law, as established in the *Lüth* case. According to the theory of 'indirect effect' adopted by the Court in this case, constitutional rights as objective values were only to *influence* private law by affecting the interpretation of its existing rules whereas a dispute between private parties on the rights and duties that arise from rules of conduct, thus influenced by constitutional rights, was to remain '*substantively* and procedurally a *private law* dispute'.[23] This reasoning seemed to suggest that it was private law which determined the outcome of the case. It appears, however, that in practice, a distinctive feature of the constitutionalisation of private law, in particular contract law, in Germany is that it is no longer private law influenced by constitutional rights, but constitutional law which tends to determine the outcome of the disputes between contractual parties, and that the role of private law tends to be limited to implementing this outcome within itself.

As a result, it can be argued that there is a tendency in German law towards private law becoming subordinate to the Constitution, which entails a growing relevance of fundamental rights for the relationships between private parties under private law. This tendency is not a consequence of the specific constitutional complaint procedure existing in Germany. It has to do with a substantive approach to the relationship between fundamental rights law and private law as such. The key issue in this respect is which body of law – constitutional law or private law – plays a decisive role in regulating relationships between private parties. The existence of a constitutional court in a particular legal system thus does not necessarily lead to the subordination of private law to fundamental rights since such a court may be reluctant to interfere with private law on the basis of fundamental rights considerations. Equally, the absence of a constitutional court does not automatically entail the complementarity between fundamental rights and private law because such a court may proceed on the basis of a 'substantive' hierarchy between funda-

21 On this in more detail, see Cherednychenko 2007, *supra* note 3, s. 5.6.2. Compare Hager 2006, *supra* note 20.

22 Compare, for example, J. Eschenbach & A.F. Niebaum, 'Von der mittelbaren Drittwirkung unmittelbar zur staatlichen Bevormundung', 1994 *Neue Zeitschrift für Verwaltungsrecht*, p. 1079, at p. 1081; W. Zöllner, 'Regelungsspielräume im Schuldvertragsrecht', 1996 *Archiv für die civilistiche Praxis*, p. 1, at p. 12.

23 *Lüth*, *supra* note 6, at p. 205 (my translation and emphasis).

mental rights and private law. Whether the relationship between fundamental rights and private law in a particular legal system tends to take the form of subordination or complementarity mainly depends on the substantive approach followed by the national court which has the final say on this issue, be it a constitutional court or the highest court in private law matters.

4. Towards complementarity between fundamental rights and private law

4.1. Dutch experience

In the Netherlands, the issue of the applicability of fundamental rights in private law relationships between private parties has been discussed under the denominator of the 'horizontal effect'.[24] The case law of the Dutch courts, especially after the Constitutional Reform of 1983,[25] provides evidence that the courts tend to consider the relevance of fundamental rights contained in the Dutch Constitution and the ECHR in private law disputes. A striking feature of the Dutch case law, in which fundamental rights came into play, is the absence of any dogmatic approach to the issue. In contrast to the German Constitutional Court, the Dutch Supreme Court has so far not made any general pronouncement as to how fundamental rights relate to private law in the Dutch legal order and how they are to affect private law. Instead, it has given effect to fundamental rights in different ways, without really explaining why one form of horizontal effect in a particular case was preferred to another.[26]

Such an approach by the Dutch courts concerning the effect of fundamental rights in private law disputes has been supported by the fact that, according to the prevailing opinion in the academic literature, fundamental rights laid down in the Dutch Constitution do not embody *all* fundamental principles of law and therefore do not have a monopoly position in the Dutch legal order.[27] Thus, for example, even such a fundamental provision as the prohibition of slavery is not laid down in the Constitution, but in the Civil Code.[28] The German conception of constitutional rights as an over-arching system of values for the *whole* legal order as adopted in *Lüth* has not been recommended for the Dutch legal order. According to Koekkoek, for example, it is much more reasonable to draw a distinction betwen public and private law norms and there is accordingly no need for the all-embracing constitutional law with its indefinite character.[29]

At present, one can in principle distinguish between three categories of cases concerning the way in which fundamental rights affect private law relationships in Dutch law: (1) when fundamental rights are granted direct horizontal effect, (2) when they are explicitly granted indirect horizontal effect, and, finally, (3) when they are granted indirect horizontal effect implicitly without this being unequivocally acknowledged.[30] These categories will be discussed in more detail below.

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24 See, for example, J. Boesjes, 'De horizontale werking van grondrechten', 1973 *Nederlandse Juristenblad*, p. 905; M.B.W. Biesheuvel, 'Horizontale werking van grondrechten', 1981 NJCM-Bulletin, p. 147; A.K. Koekkoek, 'De betekenis van grondrechten voor het privaatrecht', 1985 *Weekblad voor privaatrecht, notariaat en registratie*, pp. 385, 405, 425; L.F.M. Verhey, *Horizontale werking van grondrechten, in het bijzonder van het recht op privacy*, 1992. For the relationship between fundamental rights and private law in Dutch law in more detail, see Cherednychenko 2007, *supra* note 3, s. 3.3.

25 In the Explanatory Memorandum to the Bill on the Constitutional Reform, the Dutch Government explicitly acknowledged that constitutional rights could apply between private parties.

26 The Dutch Government also made an attempt to distinguish between different forms of horizontal effect according to the degree of its intensity based on the 'sliding scale' developed by Boesjes. See *Kamerstukken II* 1975-1976, 13 872, no. 3; Boesjes 1973, *supra* note 24. However, one can hardly find the Government's 'sliding scale' in the case law of the Dutch courts.

27 See, in particular, M.C. Burkens, *Algemene leerstukken van grondrechten naar Nederlands constitutioneel recht*, 1989, p. 167, at p. 179 *et seq.*; Verhey 1992, *supra* note 24, p. 24; Koekkoek 1985, *supra* note 24, p. 405 *et seq.*

28 Burkens 1989, *supra* note 27, pp. 179 *et seq.*

29 Koekkoek 1985, *supra* note 24, p. 412.

30 For an analysis of these categories, see also Verhey 1992, *supra* note 24, pp. 180 *et seq.*

a) Direct horizontal effect

Although cases in which fundamental rights enshrined in the Dutch Constitution and the ECHR have been granted direct horizontal effect are extremely rare, they nevertheless exist. A good example of direct horizontal effect in a contract law context can be found in the recent decision of the Supreme Court in the *Aidstest II* case.[31]. 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 persons with a higher risk of being infected with the HIV virus, had come into contact with the blood of a dentist. The latter requested a court order for the patient to undergo an AIDS test. In defence of his refusal to do so, the patient claimed that the demanded blood test constituted a violation of his constitutional right to bodily integrity (Article 11 of the Constitution) and of his constitutional right to privacy (Article 10 of the Constitution). In its decision, which was upheld by the Supreme Court, the District Court recognized the patient's constitutional right to bodily integrity. At the same time, it held that this right is limited by restrictions laid down by or pursuant to the law as they follow from Article 6:162 of the Civil Code on tort as well as from the contract between the parties. Because the parties had concluded a medical treatment contract, in the circumstances connected with the contract or following therefrom they owed each other a duty of care. For this reason, according to the Court, also 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 the medical treatment. After these considerations the Court turned to the balancing of the competing interests of the parties. In its view, a relatively slight infringement of the patient's constitutional right to bodily integrity in this case was confronted with the compelling interest of the dentist in knowing whether or not he had been infected with the HIV virus. Therefore, by refusing to co-operate in the blood test, the Court concluded, the patient had failed to perform his obligations under the contract and thus had acted illegally towards the dentist.

At first sight, such an approach by the Dutch courts constitutes the furthest-reaching effect of fundamental rights between private parties: the courts apply a fundamental right directly and examine whether its restriction can be justified on the basis of the limitation clauses envisaged in the Constitution, or – as in other cases of this type – the ECHR. Whether the direct horizontal effect as it is applied by the Dutch courts is indeed the furthest-reaching form of the horizontal effect with the most far-reaching consequences for private parties is, however, rather questionable in view of the fact that, as has been exemplified by the *Aidstest II* case, limitations to the exercise of fundamental rights are found in open private law norms such as a general tort norm or good faith. As a result, ultimately, in order to resolve a conflict between the parties, the courts resort to balancing competing interests. For this purpose, they translate a fundamental right into a private law interest connected with the exercise of this right and 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. This appears to be the only possible way of balancing the competing interests of the parties against each other because a fundamental right, as such, is not susceptible to such balancing.[32] Under such circumstances, it does not make that much sense to accept the furthest-reaching form of horizontal effect, on the one hand, and to limit it by private

31 HR 12 December 2003, no. C02/193 HR, *JOL* 2003, p. 652. For other cases on direct horizontal effect, see, for example, HR 5 June 1987, *NJ* 1988, p. 702 and HR 2 February 1990, *NJ* 1991, p. 289 (*Goeree*); HR 18 June 1993 *NJ* 1994, p. 347 (*Aids Test I*).

32 Compare Burkens 1989, *supra* note 27, p. 186.

law norms, on the other, which leads to nothing more than a balancing of interests within private law.[33]

Against this background, it is submitted that in the way in which it has been granted to fundamental rights in private law by the Dutch courts, the direct horizontal effect does not lead to the subordination of private law to fundamental rights, but to the relationship of complementarity between the two. The interests protected by fundamental rights and purely private law interests interact with each other. Which of them is given the most weight depends on the circumstances of the case. A strong presumption in favour of the fundamental right of one party, which is inherent in the direct horizontal effect, is thus significantly weakened by private law which in its role of the limitation clause protects the interests of the other party.

b) Explicit indirect horizontal effect

In most cases, in particular in the field of contract law, Dutch courts have tended to give effect to fundamental rights indirectly. What the 'indirect effect' of fundamental rights means in Dutch law can be seen from the following two examples.

In 1948 the Court of Appeal had to deal 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.[34] When the tenant changed his religious beliefs and became a Jehova's Witness, the landlord (the Protestant Church) terminated the contract. After an equitable balancing of the interests of both sides, the Court of Appeal found the term in question to be contrary to good morals and public order (the old Article 3:40 of the Dutch Civil Code) because it seriously impaired the tenant's freedom of religion.

In another case decided by the Dutch Supreme Court in 1969 the question to be answered was whether a contractual clause which barred the person concerned from teaching Mensendieck physiotherapy exercises for the rest of her life if she failed to obtain the required diploma was void.[35] This question was answered in the affirmative by the Court of Appeal which ruled that such a clause is *per se* contrary to public order and good morals. This decision by the Court of Appeal was, however, overturned by the Supreme Court. According to the latter, when considering whether a clause is contrary to public order and good morals, regard should also be had to the interest which the contract serves, as well as the question whether this interest is of such importance as to justify an encroachment on the freedom of education.

Although the courts did not apply fundamental rights directly, in both examples they nevertheless took them into account when interpreting and applying general clauses of a private law character. The interests protected by fundamental rights were thus not ignored by the courts. At the same time, in contrast to those cases in which the direct horizontal effect was granted, the courts did not start from the formal priority of fundamental rights over private law interests. Moreover, the Supreme Court made it clear that fundamental rights are just *one of* the factors to be considered when balancing the competing interests of the parties.

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33 On this issue in more detail, see O.O. Cherednychenko, 'Verplichting patiënt tot verlenen medewerking aan door (tand)arts verlangd bloedonderzoek? Noot bij HR 12 december 2003, nr. C02/193 HR, JOL 2003, 652', 2004 *Nederlands Tijdschrift voor Burgerlijk Recht*, p. 188, at pp. 190 *et seq*.

34 Hof Arnhem 25 October 1948, *NJ* 1949, p. 331 (*Protestantse Vereniging/Hoogers*). See also Hof Arnhem 15 November 1958, *NJ* 1959, p. 472 (*Diaconie Dirksland*) and Hof Arnhem 24 June 1958, *NJ* 1959, p. 473 (*Diaconie Nieuwe Tonge*). Since the Lease Act of 1958 the problems involved in that case are no longer likely to arise. On that, see Smits 2003, *supra* note 1, p. 35.

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

c) Implicit indirect horizontal effect

Apart from the cases in which the Dutch courts unequivocally refer to fundamental rights while deciding a dispute between private parties, there are also cases which can be considered to be relevant in the context of the effect of fundamental rights in private law even though no explicit reference to fundamental rights was made. A clear illustration of such an approach is provided by the *Suikerfeest* case[36] in which a Turkish employee was dismissed without notice after she had not turned up for work because of the celebration of the Ramadan. Dealing with a conflict between the interests of the employer in the normal operation of his business and that of the employee in having a possibility to celebrate a religious holiday,[37] the Court of Appeal and the Supreme Court came to different conclusions. The Court of Appeal clearly granted indirect horizontal effect to the fundamental right to freedom of religion by holding that this freedom implied that Islamic employees were in principle entitled to a day off on the days which were holy for them. According to the Court of Appeal, it is only possible to deviate from this rule on the ground of the same circumstances which would allow the employer to demand that his employees be present at work on an established Christian holiday. For the Supreme Court, however, such a conclusion went too far. In its opinion, because Christian holidays are recognized by Dutch society as a whole as days when one does not have to work regardless of one's religion, they cannot be set on a same par as Islamic holidays.

In light of this, the Supreme Court formulated another rule with the following content. In the absence of special provisions in the employment contract, the presence at work cannot in principle be reasonably demanded from an employee who has asked for permission to take a day off for celebrating a religious holiday, which is important to him, in advance and has specified the reasons for this request; a deviation from this rule can be made if it can be expected that the absence of the employee on that day would cause serious damage to the operation of the employer's business; whether or not this is the case is to be determined on the basis of the circumstances of the case.

Although no reference was made by the Supreme Court to the fundamental right to freedom of religion as laid down in Article 6 of the Constitution and Article 9 of the ECHR and the rule is expressed in purely private law terms of the old Article 7:677 of the Civil Code on 'compelling reasons' for dismissal, the fundamental right obviously influenced the reasoning of the Court and the interest protected by it was included in its decision.[38] Again, this interest was not given absolute priority over other interests involved.

Accordingly, the relevance of the arguments based on fundamental rights in many private law disputes decided by the Dutch courts shows the recognition by the courts of the fact that the Dutch judiciary does not ignore the impact of fundamental rights in private law relationships between private parties. Many fundamental rights enshrined in the Constitution and the ECHR are generally believed to give expression to the general principles or values of the Dutch legal order. Yet, in contrast to the position of constitutional rights in German law, fundamental rights contained in the Dutch Constitution and the Convention are not considered to constitute an all-pervasive objective system of values for the whole legal oder. As a result, although Dutch private

36 HR 30 March 1984, *NJ* 1985, p. 350 (*Turkse werkneemster*).

37 Compare B. Labuschagne, 'Accommodating Religious Diversity in Employment', in T. Loenen & P.R. Rodrigues (eds.), *Non-Discrimination Law: Comparative Perspectives*, 1999, p. 135, who points out that the issue of Islamic holidays is mostly covered by Collective Labour Agreements.

38 Compare Verhey 1992, *supra* note 24, p. 185. See also the note to this case by M.B.W. Biesheuvel, 1983 *NJCM-Bulletin* 1983, pp. 256 *et seq*.

law certainly does give expression to many values which also lie at the roots of fundamental rights,[39] the Dutch courts do not regard private law as a whole to be grounded on the values embodied in constitutional law or international human rights law. Therefore, not every private law issue entails a fundamental rights issue. When this is indeed the case is determined by the ordinary courts on a case by case basis.

The three categories of cases described above demonstrate that although the techniques used by the Supreme Court for granting effect to fundamental rights in private law relationships between private partes are different, they all boil down to giving the interests protected by fundamental rights a role as *one of the factors* which are taken into account when resolving a dispute between private parties *within the framework of private law and with due regard to private law*. This is not only true for cases of explicit and implicit indirect horizontal effect, but also for those cases in which the courts have formally resorted to the concept of direct horizontal effect. The application of this concept in practice was significantly deprived of its far-reaching implications as a result of the fact that the role of the limitation clauses was assigned to the norms of private law. Thus, the direct horizontal effect in Dutch law has not led to the primacy of fundamental rights over private law either, but instead has merely entailed fundamental rights coming into play as one of the interests to be considered when deciding private law disputes. Consequently, despite the absence of any dogmatic approach to the issue of how fundamental rights are to affect private law, the relationship between fundamental rights and private law in the Dutch legal order can be charachterised in terms of complementarity between the two.

Moreover, a characteristic feature of the Dutch legal order is that, in most cases, the interaction between fundamental rights, in particular those rights which are contained in the Constitution, and private law has occurred spontaneusly, *i.e.* without an explicit obligation on the part of the courts to take fundamental rights into account when resolving disputes between private parties. Reading the judgments in the field of contract law, one gets the impression that the Supreme Court did not really consider the rights enshrined in the Constitution to be norms of a higher order with which its decision in a private law case had to be compatible. Instead, it looked at constitutional rights as a source of inspiration or, in other words, as a means of assistance when making the open norms of private law concrete in the light of the general principles of law which in many cases find their expression in fundamental rights.[40] In this respect, one can speak about 'spontaneous complementarity' between fundamemtal rights and private law which in the Dutch legal order can be explained by a large degree of freedom enjoyed by the courts as to whether, and, if so, how to grant horizontal effect to fundamental rights. This form of complementarity can be contrasted with 'obligatory complementarity' when the courts are *obliged* to develop private law in a way which is consistent with the values embodied in fundamental rights and to accommodate them within private law. At present, however, with the growing willingness of the Dutch courts to take into account fundamental rights and thus to act in conformity with the values embodied in the Constitution and especailly the ECHR, as well as the increasing willingness of the European Court of Human Rights (ECtHR) to grant horizontal effect to Convention rights,[41] it is more and more difficult to draw a line between 'spontaneous complementarty' and 'obligatory complementarity'. This is especially true concerning those

39 Compare Smits 2003, *supra* note 1, p. 161. See also the answer by Smits to my question at the discussion of his Preliminary Report at the meeting of the Dutch Society of Comparative Law, in *Verslag van het debat over het preadvies 'Constitutionalisering van het vermogensrecht?' van J.M. Smits*, 2004, p. 120.

40 Compare, Burkens 1989, *supra* note 27, p. 184.

41 On the issue of the horizontal effect in the case law of the European Court of Human Rights, see Cherednychenko, 2006 *Maastricht Journal of European and Comparative Law*, *supra* note 2, p. 195.

cases in which the courts interpret national legislation, including legislation in the field of private law, in a way which is compatible with human rights contained in the ECHR,[42] a practical reason for that being their willingness to prevent the Netherlands from being brought before the Strasbourg Court.

4.2. English experience

The major peculiarity of the constitutionalisation of English private law is that it is a European rather than British constitutionalisation.[43] Because Britain does not have a written constitution, let alone a constitutional court, the whole debate on the effect of fundamental rights between private parties has started in relation to fundamental rights enshrined in the ECHR after they were incorporated into the domestic law of the United Kingdom by the Human Rights Act in 1998. The importance of this Act lies, to use the words of the White Paper that preceded the Human Rights Act, in 'bringing Convention rights home' by making them enforceable in domestic law. This means that British citizens will not have to take the 'long slow road to the Court in Strasbourg'[44] but will be able to secure Convention rights in their own UK courts. These Convention rights, according to the Human Rights Act, are, and are limited to, the rights and freedoms set out in certain stated articles of the European Convention,[45] and thus no new rights are conferred upon UK citizens by the Act. The domestication of the fundamental rights contained in the ECHR has given the European legal community an opportunity to hear what English judges and academics think about the effect of fundamental rights between private parties.

The silence in the text of the Human Rights Act on the issue of the applicability of fundamental rights embodied in the ECHR between private parties and the absence of unambiguous and exhaustive guidelines on that issue in the legislative history of the Act provoked a large-scale debate in the legal literature as to whether and, if so, how Convention rights were to affect relationships between private parties governed by common law. At some risk of over-simplification, there seem to be four positions expressed in this debate: 'no effect', 'direct horizontal effect', a 'strong indirect horizontal effect' and a 'weak indirect horizontal effect'.

a) 'No effect'

At the one extreme, there is a view advanced by Sir Richard Buxton which excludes any effect of Convention rights between private parties.[46] According to this view, the European Convention itself only applies against the State and while the Human Rights Act makes Convention rights enforceable in English law, the content of these rights cannot have changed in the course of that process of transmission. They still apply only against the State.[47] In Sir Richard's opinion, even in the case of positive obligations, the duty to protect Convention rights remains that of the State, and '[t]hat cannot be translated into a direct right held by the applicant against those other subjects'.[48] It is evident that with the adoption of this approach, fundamental rights and private common law in the UK would hardly interact with each other and would continue to exist in parallel.

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42 See, for example, HR 19 May 1995, *NJ* 1996, p. 115 (*Sogelease*).
43 For the relationship between fundamental rights and private law in English law in more detail, see Cherednychenko 2007, *supra* note 3, s. 3.4.
44 Lord Irvine of Lairg, 'The Development of Human Rights in Britain under an Incorporated Convention on Human Rights', 1998 *Public Law*, p. 221.
45 Section 1 (1) of the Human Rights Act 1998.
46 R. Buxton, 'The Human Rights Act and Private Law', 2000 *The Law Quarterly Review*, p. 48.
47 *Ibid*., at pp. 51 *et seq*.
48 *Ibid*., at p. 53.

b) 'Direct horizontal effect'

At the other extreme is the view advanced by Wade who has been the foremost proponent of 'full' or 'direct horizontal effect' for ECHR rights in the UK.[49] Two arguments were advanced by him in support of this position – one derived from the letter of the law and the other from its spirit. As he has said, the literal argument is 'extremely simple'.[50] Section 6 of the Human Rights Act makes it unlawful for a public authority to act incompatibly with a Convention right. Section 6 (3) (a) expressly includes courts and tribunals in this category of public authorities. Thus, any court deciding a case must do so in a way which is compatible with the ECHR – even when the parties before it are both private. Concerning the spirit of the Act, Wade responds to the argument by Buxton that the ECHR itself is enforceable only against States by arguing that it does not follow logically from this that the Human Rights Act is similarly limited.[51] Although it is true that the original purpose of the European Convention was to protect individuals from dictatorial and oppressive governments, in his view, nowadays a new culture of human rights as 'general principles of justice' has developed in the Western world in which 'the citizen can legitimately expect that his human rights will be respected by his neighbours as well as by his government'.[52] Accordingly, the incorporation of the ECHR must mean that there should now be a direct right as against that other individual and a UK court is unable to do 'otherwise than enforce the Convention rights'.[53]

The approach outlined by Wade presupposes that if the existing common law does not ensure adequate protection, new private causes of action can be invented by the courts.[54] Thus, for example, if the tort of privacy does not exist in English law, the courts would simply be obliged to create it in order to comply with their obligations under Article 8 of the Convention which guarantees respect for one's private life. The adoption of such an approach would mean a clear subordination of private common law to the fundamental rights embodied in the ECHR.

c) 'Strong indirect horizontal effect'

The idea of a 'strong indirect horizontal effect' is aimed at achieving a compromise between the 'no effect' and the 'direct horizontal effect'. On the spectrum between these extremes, however, this idea can be placed closer to 'direct horizontal effect' rather than 'no effect'. The adoption of this approach with regard to the Human Rights Act was first defended by Hunt who does not call it 'strong indirect horizontal effect' himself, but 'Application to All Law'.[55] This model is taken by Hunt from the dissenting opinion of Justice Kreilger in the South African Constitutional Court decision in *Du Plessis* v. *De Klerk* who argued that although a private person cannot be sued for a breach of another's fundamental rights, he cannot rely upon the law to enforce his rights-infringing actions.[56] Following this line of reasoning, Hunt contends that the intention behind the inclusion of courts and tribunals within the definition of 'public authorities' in the

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49 H.W.R. Wade, 'Horizons of Horizontality, 2000 *The Law Quarterly Review*, p. 217. For other proponents of this view in the UK see, for example, J. Morgan, 'Privacy. Confidence and Horizontal Effect: 'Hello' Trouble', 2003 *Cambridge Law Journal*, p. 444, at p. 473; T. Raphael, 'The Problem of Horizontal Effect', 2000 *European Human Rights Law Review*, p. 493, in particular, at p. 511.

50 Wade 2000, *supra* note 49, at p. 217.

51 *Ibid*., at p. 218.

52 *Ibid*., at p. 224.

53 *Ibid*., at p. 220.

54 Wade himself does not see any significance in speaking of new private causes of action: *ibid*., at pp. 221 *et seq*. It is obvious, however, that his approach presupposes this. Compare G. Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: a Bang or a Whimper?', 1999 *Modern Law Review*, p. 824, at p. 831.

55 M. Hunt, 'The "Horizontal Effect" of the Human Rights Act', 1998 *Public Law*, p. 423, at p. 434. For a similar view, see also A. Lester & D. Pannick, 'The Impact of the Human Rights Act on Private Law: The Knight's Move', 2000 *The Law Quarterly Review*, p. 380, at p. 384; J. Beatson & S. Grosz, 'Horizontality: a Footnote', 2000 *The Law Quarterly Review*, p. 385, at p. 386.

56 Hunt 1998, *supra* note 55, at p. 434.

sense of Section 6 (1) of the Act is to ensure that 'all law, other than unavoidably incompatible legislation, is to be subjected to Convention rights, which thereby attain the all-pervasive status'.[57] It follows from this that being 'public authorities', courts and tribunals are *obliged* to act compatibly with Convention rights, including when they decide on disputes between private parties governed solely by common law. Such a duty will require the courts and tribunals 'actively to modify or develop the common law in order to achieve such compatibility'.[58]

The difference between this model and the 'direct horizontal effect' model, however, is that the courts are not allowed to create entirely new causes of action and in this way to go beyond their 'legitimate function of incremental common law development'.[59] Nevertheless, this correction does not alter the fact that the idea of a 'strong indirect horizontal effect' starts from the absolute priority of Convention rights over common law and thus the subordination of private common law to fundamental rights. In the case of conflict with each other, non-Convention considerations cannot override Convention rights. As Phillipson rightly observes:

> 'Courts, under the Hunt model, would thus simply have to disregard the rules of the relevant current tort and the values underpinning it and change automatically all its pre-existing rules into compliance with whatever the relevant Convention Article demanded. Such an approach cannot be glossed as 'development' of the common law: one does not 'develop' something when one uses it purely as a wholly malleable vehicle for forwarding constitutional rights.'[60]

The adoption of the 'strong indirect horizontal effect' model may entail the subordination of the common law of contracts, in particular, to Convention rights, since the ECHR does not contain an express commitment to the main contract law principles such as freedom of contract and testamentary freedom, which have been given due regard in the development of the common law. Therefore, if the right to freedom of contract is not derived from other broad provisions of the Convention, such as the right to private and family life guaranteed by Article 8, the Convention rights will always override incompatible common law rules and this will entail the inability of the common law of contract to play a decisive role in disputes between private parties.[61]

d) 'Weak indirect horizontal effect'

Finally, there is a widely shared view in the legal literature that fundamental rights enshrined in the ECHR will/must have a 'weak indirect horizontal effect'.[62] The difference between this approach and the 'strong indirect horizontal effect' lies in the degree to which the courts will be bound by Convention rights in private litigation.[63] The idea behind the 'weak indirect horizontal effect' model, which has been outlined by Phillipson in great detail,[64] is that the courts should apply and develop the existing law in the light of the *values* and principles represented by the

57 *Ibid.*, at pp. 440 *et seq.*
58 *Ibid.*, (my italics).
59 Hunt 1998, *supra* note 55, at p. 441.
60 Phillipson 1999, *supra* note 54, at p. 839.
61 Compare Phillipson 1999, *supra* note 54, at p. 840; I. Leigh, 'Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?', 1999 *International and Comparative Law Quarterly*, p. 57, at p. 73.
62 See, for example, Phillipson 1999, *supra* note 55, at pp. 843 *et seq.*, 847 *et seq.*; Beale & Pittam 2001, *supra* note 1, at pp. 136 *et seq.*; Leigh 1999, *supra* note 61, at pp. 82 *et seq.*
63 H.L. MacQueen & D. Brodie, 'Private Rights, Private Law and the Private Domain', in A. Boyle *et al.* (eds.), *Human Rights and Scots Law*, 2002, p. 141, at p. 154.
64 Phillipson 1999, *supra* note 54, at p. 824.

Convention rights.[65] Hence, the courts' duty to act compatibly with Convention rights means in the private sphere a duty to develop and apply the law by reference to the *values* they enshrine and thus not an absolute duty to achieve the conformity of the common law with Convention *rights* which lies at the heart of the 'strong indirect horizontal effect' model.[66] In practice, this means that under the 'weak horizontal effect' model the courts shall have a *discretion* to intervene in private relations.[67] Plaintiffs seeking to invoke Convention rights in private common law cases will not be able to rely solely on the right in question, but will have to anchor their claim in existing common law rules; the relevant Convention rights may only be invoked in support of their claim.[68] As a consequence, the Convention rights will generally be used to clarify 'the ingredients of the particular common law action' which are 'inherently broad and open to a wide variety of interpretation'.[69] Therefore, in contrast to the 'strong' model, under the 'weak' one the Convention considerations will come into play with the non-Convention, *i.e.* common law, considerations, such as English tort law rules, and compete with them rather than automatically prevail over them in every case.[70] This means that if this model is followed by the courts, the relationship between fundamental rights and private common law can develop towards a complementarity between the two.

Although the English courts have (still) not addressed the doctrinal debate as to how fundamental rights embodied in the ECHR are to affect the relationships between private parties under private common law, their case law has shed some light on the prevailing attitude of the judiciary. The best current example of the approach taken by the courts in cases governed by the common law is those cases relating to the protection of privacy. This area of the law is particularly interesting due to a certain tension between the common law and the law of the ECHR. Whereas Article 8 of the Convention explicitly contains the right to respect for private and family life, traditionally, the common law does not recognize a general right to privacy.[71] This explains why the judicial development of a remedy for invasion of privacy by the media was eagerly anticipated by many commentators as one of the most dramatic and controversial likely effects of the introduction into English law of Article 8 of the European Convention via the Human Rights Act 1998.[72] Moreover, this area is also problematic due to the fact that the Convention right to freedom of expression protected by Article 10 can also be in conflict with the common law. Therefore, the way in which the judges have dealt with privacy cases after 2 October 2000 when the Human Rights Act came into force deserves special consideration. In this context, the *Douglas* v. *Hello! Ltd* case[73] provides a good illustration of the position taken by the English courts in cases between private parties under common law.

A dispute in this case arose between the film stars Michael Douglas and Catherine Zeta-Jones and 'Hello!' magazine. In November 2000 the film stars were married in New York.

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65 *Ibid*., at p. 843 (my italics).
66 *Ibid*., at p. 837 (my italics). For criticism of the distinction between *rights* and *values* see M. Kment, 'Comparative Analysis of the "Horizontal Effect" of the Human Rights Act', 2002 *German Yearbook of International Law*, p. 363, at p. 390 *et seq.*
67 *Ibid*., at p. 843.
68 *Ibid*., at p. 847.
69 *Ibid*., at pp. 843 *et seq.*
70 *Ibid*., at p. 839.
71 In 1990 the Court of Appeal declared that there was no tort of privacy known to English law (*Kaye* v. *Rovertson* [1991] FSR 62). See also *Wainwright* v. *Home Office* [2003] 3 WLR 1137, 4 All ER 969 (HL).
72 Compare G. Phillipson, 'Judicial Reasoning in Breach of Confidence Cases under the Human Rights Act: Not Taking Privacy Seriously', 2003 *European Human Rights Law Review* (Special Issue: Priv), p. 1, at p. 2.
73 *Douglas* v. *Hello! Ltd* [2001] Q.B. 967, C.A., 2 All ER 289 (interlocutary stage); *Douglas* v. *Hello! Ltd* [2003] WL 18228877 (Ch D), [2003] 3 All E.R. 996 (trial).

Exclusive rights to photographs of their wedding had been sold to 'OK!' magazine, the results to be published in the UK. However, somehow, unauthorized photographs were taken by others at the wedding and sold to 'OK!'s rival magazine 'Hello!' for publication, also in the UK. As a result, 'Hello!' published the unauthorized photographs on the same day as that on which 'OK!' published parts of the fully authorized portfolio of photographs covering the event, approved by the couple, for which it had paid. The Douglases and 'OK!' sought an interim injunction against publication by 'Hello!'. Although in its particulars the claim was put in terms of breach of confidence, which is an established tort under English law, during the arguments, the lawyer who represented the couple, Mr Tugendhat, said that the case had more to do with privacy than with confidentiality. The Court of Appeal lifted the interim injunction which had been granted at first instance. This was done, however, not on the ground that there was no right to privacy in England & Wales. Rather, the injunction was lifted on the basis that the balance of convenience favoured the defendants and the claimants' loss of privacy could readily be compensated by an award of damages after further trial, given that they had already commercialized their privacy by selling exclusive rights to 'OK'. With regard to the right to privacy, of particular interest is the following bold pronouncement offered by Sedley LJ in favour of the recognition of a right to privacy distinct from a right to confidentiality and thus the direct horizontal effect of Convention rights:

> 'I would conclude, at lowest, that Mr Tugendhat has a powerfully arguable case to advance at trial that his two first-named clients have a right to privacy which English law will today recognize and, where appropriate, protect. To say this is in my belief to say little, save by way of a label, that our courts have not said already over the years. It is to say, among other things, that the right, grounded as it is in the equitable doctrine of breach of confidence is not unqualified. (…) What a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognize privacy itself as a legal principle drawn from the fundamental value of personal autonomy.'[74]

However, when the case came back for trial to the High Court of Justice Chancery Division, 'Hello!' magazine was held to be liable towards the couple and the magazine 'OK!' under the law of confidence. Lindsay J gave a summary of the relevant general principles developed by the courts in previous post-Human Rights Act privacy cases which, in his opinion, 'represent a fusion between the pre-existing law of confidence and rights and duties arising under the Human Rights Act'[75], [76]. Among these principles, the following three are of particular importance in the present context. Firstly, according to Lindsay J, the scope of breach of confidence needs to be evaluated in the light of fundamental rights conferred by Articles 8 and 10 of the ECHR; these rights are to be regarded as absorbed into the action for breach of confidence.[77] Secondly, the Article 10 (1) right to freedom of expression is subject not only to the Article 8 right of respect for private and family life but also to rights recognized by the law as to confidence, even where those latter rights are not themselves protected by the ECHR; this follows from the fact that Article 10 (1)

74 *Douglas* v. *Hello! Ltd* [2001] Q.B. 967 C.A., 1001.
75 *Douglas* v. *Hello! Ltd* [2003] WL 18228877 (Ch D), 186.
76 The cases Lindsay J referred to are the following: *Douglas* v. *Hello! Ltd* [2001] Q.B. 967 C.A.; *Venables and Thompson* v. *News Group Newspapers Ltd.* [2001] 1 All E.R. 908; *A* v. *B* [2002] 3 W.L.R. 542 C.A. and *Campbell* v. *MGN Newspapers Ltd* [2002] E.W.C.A. Civ 1373.
77 *Douglas* v. *Hello! Ltd* [2003] WL 18228877 (Ch D), 186 (i).

of the Convention is, by Article 10 (2), 'subject to such conditions (…) as are prescribed by law and are necessary in a democratic society (…) for the protection of the (…) rights of others [and] for preventing the disclosure of information received in confidence (…)'.[78] Thirdly, there is no 'presumptive priority' given to freedom of expression when it is in conflict with another Convention right or with rights under the law of confidence.[79]

Applying these principles to the facts of the present case, Lindsay J balanced the right to confidence against that of the freedom of expression and struck the balance in favour of the former. Accordingly, 'Hello!' magazine was held to be liable towards Mr Douglas and Ms Zeta-Jones as well as its rival magazine 'OK!' under the law as to confidence.

In his judgment, Lindsay J also addressed the argument by Sedley LJ in favour of the direct horizontal effect of Article 8 of the Convention expressed at the interlocutory stage in this case and gave the following response thereto:

> 'Sedley LJ's case for a general tort [of privacy, OOC]) depends, on my reading of his judgment, on our law otherwise being so inadequate in relation to the protection and enforcement of individual rights to private and family life as to fall short of compliance with the Convention, the Human Rights Act and the requirements of decisions of the European Court of Human Rights. Even accepting the attractive argument so raised, it does not point to any need for the creation of new law in areas in which (for example, by way of reference to the law of confidence) protection and enforcement are already not only available in theory but in practice even in the particular case. As I have held Mr and Mrs Douglas to have been protected by the law of confidence, no relevant hole exists in English law such as, on the facts of the case before me, a due respect for the Convention requires should be filled'.[80]

The major reason behind such a reluctance to accept the view of Sedley LJ is that the subject of privacy is better left to Parliament which can consult relevant interests far more widely than the courts.[81] According to Lindsay J, the courts will only be obliged to step in if the existing law of confidence gives no or inadequate protection.[82]

This approach by the courts was also confirmed in a more recent decision by the House of Lords in *Campbell* v. *MGN Newspapers Ltd*.[83] In this case, the House held that the action for breach of confidence could be used to provide a remedy for the 'supermodel' Naomi Campbell in respect of an article and photograph published in the *Daily Mirror* newspaper exposing the falsehood of Campbell's earlier public denials of her drug addiction. Under the influence of Article 8 of the Convention, the tort of breach of confidence was extended so that private personal information was protected. Subsequently, the right to confidence so extended was weighed against the right to freedom of expression, the balance being struck in favour of the former.

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78 *Ibid*., 186 (ii).
79 *Ibid*., 186 (v).
80 *Ibid*., 229 (ii).
81 *Ibid*., 229 (iii).
82 *Ibid*., 229 (iii).
83 [2004] UKHL 22; 2 WLR 1232; 2 All ER 995 (HL). On this case, see H.L. MacQueen, 'Protecting Privacy', 2004 *Edinburgh Law Review*, p. 420.

From the willingness of the courts to consider the Convention-based arguments in private common law disputes, it can be concluded that the 'no effect' approach taken by Buxton LJ has been rejected. In the same way, no support can be found in the case law in favour of another extreme view defended by Wade in favour of the 'direct horizontal effect' of Convention rights. The persistent reluctance of the courts to create a new cause of action by accepting the general right to privacy, and their readiness to give necessary protection only via the existing cause of action provided by breach of confidence shows that the courts are unwilling to proceed in the direction of the subordination of private common law to Convention rights. What the courts have already been doing and are likely to continue doing in the future is to develop the *existing* common law in the light of the Convention rights. This finding is supported not only by the approach of the English courts in the post-Human Rights Act privacy cases between private parties under common law, but also by the approach taken in the cases decided prior to the adoption of the Human Rights Act[84] and those post-Human Rights Act cases in which the relationship between private parties was governed by the legislation.[85] In all these cases, a desire to act compatibly with the Convention went hand-in-hand with cautiousness in applying Convention rights and a deferential attitude to the legislator. Although no case has yet arisen in which it was impossible to extend the existing common law rules so as to accommodate a Convention right within them, it seems that the judges have tacitly made a more or less definitive choice in favour of such a '"developmental" approach', [86] and thus for 'indirect horizontal effect'.

What is however not entirely clear from the case law available so far is which form of 'indirect horizontal effect' will prevail – 'strong' or 'weak'. A critical issue to be answered still remains whether the obligation of the courts under Section 6 (1) of the Human Rights Act to act compatibly with the Convention is satisfied merely by taking into account the relevant Convention rights, as Phillipson has argued, or whether it requires that those rights must override any and all existing principles in the common law, in order to achieve compliance with the Convention, as Hunt has suggested. Although, at present, it is too early to make any definitive conclusions in this respect, it appears that the courts tend to give preference to the weaker version of 'indirect horizontal effect'. The strong emphasis on the *common law* and its *development* in the light of the Convention, which permeates the judgments of the courts like a distinguishing thread, seems to provide evidence that the common law will be allowed to exercise a substantive impact on the way the Convention rights, or more exactly, the values behind them, are accommodated within it and thus will not only play a formal role as a 'vehicle for forwarding constitutional rights'. By stating that the right to freedom of expression does not enjoy automatic priority over the common law right to confidentiality, Lindsay J in his judgment in the *Douglas* v. *Hello! Ltd* case makes it clear that Convention rights cannot automatically override the common law. Rather, the judges are obliged to take them into account within the common law and with due regard to common law values.[87] Especially in contract law cases, such an attitude also seems to be more likely than an active reshaping of the common law of contract, considering the general culture in the UK

84 See, for example, *Rantzen* v. *Mirror Group Newspapers* [1994] Q.B. 670; *John* v. *Mirror Group Newspapers* [1996] 2 All ER 35; *Middlebrook Mushrooms* v. *TGWU* [1993] I.C.R. 612.

85 See, for example, *Ashdown* v. *Telegraph Group LTD* [2001] All ER 666; *Wilson* v. *The First County Trust LTD* [2003] 4 All ER 97 (HL); *Copsey* v. *WBB Devon Clays Ltd* [2005] EWCA Civ 932, [2005] ICR 1789.

86 Morgan 2003, *supra* note 49, at p. 468.

87 Several other dicta by judges as to the nature of Convention rights can also be quoted in support of this conclusion. See, for example, *Douglas* v. *Hello! Ltd* [2001] Q.B. 967 C.A., 997 (Keene LJ); *Douglas* v. *Hello! Ltd* [2001] Q.B. 967 C.A., 997 (Phillips MR); *Campbell* v. *MGN Newspapers Ltd* [2004] UKHL 22; 2 WLR 1232; 2 All ER 995 (HL), [17], [18] (Lord Nicholls) and [49], [50] (Lord Hoffmann).

characterized by 'pragmatism, scepticism and incrementalism'[88]. This means that the following remark by Gearty concerning the approach of the courts in criminal law can be even more true for their approach in private law: '[A]t times it has seemed as though the operating assumption has been that the Human Rights Act 1998 must be interpreted 'as far as possible' to be compatible with pre-existing law, rather than the other way around'.[89]

If the assumption that the English courts will favour the 'weak indirect horizontal effect' is correct, especially broad concepts are most likely to be interpreted and applied in the light of the Convention's values. In contract law, for example, this means that the courts may use the doctrine of 'implied terms' to the effect that each contractual party will respect the 'rights of the other in the sense of respecting the values underlying Convention rights'. Such a duty may simply be implied by the courts in contracts between, for example, employer and employee, landlord and tenant, mortgagee and mortgagor, doctor and patient, trade union and member.[90] Moreover, the concept of 'public policy' may be interpreted in such a way as to prevent the parties from excluding the duties to respect each other's fundamental rights from their contracts by holding such terms void.[91] Thus, the adoption of the 'weak indirect horizontal effect' of fundamental rights enshrined in the ECHR will not mean that private common law will be left completely unchanged. Rather, private common law and the Convention rights will interact with each other and in the course of the interplay between the two the Convention rights will influence private common law without undermining its independent value.

5. The need for further differentiation between the kinds of horizontal effect of fundamental rights in private law

Distinguishing between the relationship of subordination and that of complementarity between fundamental rights and private law has shown that the labels used to describe the ways in which fundamental rights may affect the relationships between private parties under private law do not always accurately reflect the extent of this effect in a particular legal system in practice. Thus, as we could see above, the indirect horizontal effect of constitutional rights in German law can be much more far-reaching than the direct horizontal effect in Dutch law where private law is regarded as limiting the exercise of fundamental rights. In particular, a most commonly made differentiation between the direct and indirect horizontal effect of fundamental rights can be rather misleading. In the most widely understood meaning, the difference between the two lies in the fact that while in the case of direct horizontal effect a private party has - in his or her action against another private party - a claim or a defence which is directly based on a fundamental right which overrides an otherwise applicable rule of private law, in the case of indirect horizontal effect the claim or defence is based on the private law rule which is interpreted in the light of the constitutional right in question and a dispute between private parties on the rights and duties that arise from rules of conduct thus influenced by fundamental rights remains '*substantively* and procedurally a *private law* dispute'.[92] However, the problem with this distinction, or, more accurately, the way in which it has been applied in practice, is that it does not make it unequivo-

88 D. Oliver, *Constitutional Concepts, Sources and Cultures and Their Influence upon Private Law Systems – Codified or Uncodified*, paper presented at the colloquium 'Codes and Constitutions', Florence, 8-9 October 2004, p. 14.

89 C. Gearty, 'The Human Rights Act and the Criminal Law: an Overview of the Early Case-Law', in A. Boyle *et al.* (eds.), *Human Rights in Scots Law*, 2002, p. 294.

90 See D. Oliver, 'The Human Rights Act and Public Law/Private Law Divides', 2000 *European Human Rights Law Review*, p. 343, at p. 352, with other examples of how common law can accommodate the values underlying Convention rights.

91 *Ibid.*

92 *Lüth*, *supra* note 6, at p. 205 (my translation and emphasis).

cal which body of law substantially determines the outcome of disputes between contracting parties. Thus, for example, the German *indirect* horizontal effect may not necessarily differ a great deal from the *direct* horizontal effect if in both cases the role of private law in resolving disputes between private parties is limited to implementing the outcome of the balancing between fundamental rights achieved on the level of constitutional law. As a consequence, there is a pressing need for a clearer differentiation between the types of horizontal effect which would allow one to determine the kind of relationship between fundamental rights and private law, *i.e.* that of subordination or that of complementarity in a particular legal system.

In the light of the debate on the way in which fundamental rights are to affect private law, a debate which has been conducted, in particular, in English and German literature, it is submitted that both in theory and in practice it is useful to draw a distinction between the following three forms of the horizontal effect on relationships between private parties – the 'direct horizontal effect', the 'strong indirect horizontal effect' and the 'weak indirect horizontal effect'.

a) Direct horizontal effect

The *direct horizontal effect* of fundamental rights in private law implies that private parties are bound by fundamental rights in approximately the same way and to the same extent as the State. In contrast to the State, however, private parties may also invoke fundamental rights in relations with each other. In such a case, a claim or a defence is directly based on a fundamental right, and there is accordingly no need to base it on private law rules. The task of the private law courts in private law disputes is limited to applying fundamental rights directly without the need to fall back on private law in order to imbed the outcome of striking a balance between fundamental rights in the existing norms of private law. As a result, for example, the validity of contracts becomes directly dependent upon fundamental rights clauses, and, if their violation has been found, the role of contract law is limited to providing for the consequences of illegality such as invalidity or damages. In essence, therefore, in a private law dispute, it is no longer the parties to a contract which are involved, but the bearers of fundamental rights, the individual agreements of which are subject to the test of their compatibility with fundamental rights.

In practice, the direct horizontal effect of fundamental rights in private law disputes may be at stake not only when fundamental rights are explicitly directly applied, but also in those cases where, like in the German cases discussed in Section 3 above, the decision in a particular case is said to be reached within the framework of the general clauses of private law, but in reality the general clauses have only a purely formal meaning without any substantive impact on the outcome of the case. In other words, the general clauses simply serve as a cover for reaching a desirable outcome of the case solely on the basis of fundamental rights. The direct horizontal effect under the cover of the indirect horizontal effect through the general private clauses is most evident in those cases where the meaning of the general clauses had already been filled in by the private law courts on an earlier occasion based (*inter alia*) on considerations other than those derived from fundamental rights such as legal-ethical principles or the customary rules of trade – which is quite often the case in the field of contract law. In such cases, the real issue in the case of direct horizontal effect would clearly be not a clarification of the meaning of a particular general clause but the substitution of its content by the new content derived solely from fundamental rights. Thus, for example, if in a particular case the good faith norm had already been rendered concrete by deriving from it a precontractual duty to inform the other party about the risks inherent in a particular transaction, but later, in a similar case, the court disregarded this fact when balancing fundamental rights against each other and arrived at the outcome solely on the basis of fundamental rights, one can, in my view, speak about a direct horizontal effect. In all

these instances, the adoption of direct horizontal effect would accordingly mean a clear subordination of private law, and hence individual contracts between private parties, to fundamental rights.

b) Strong indirect horizontal effect

Next to the direct horizontal effect, one can also distinguish the *strong indirect horizontal effect*. This form of horizontal effect implies that fundamental rights do not apply directly, and private parties are in theory not bound by them. It is private law which applies, but its content is not merely *influenced* by fundamental rights but *governed* by them. In other words, what is compatible with fundamental rights is determined not by private law but by *fundamental rights*. The major difference compared to the direct horizontal effect, however, is that the arguments based on fundamental rights must be embedded in private law.[93]

Although this form of indirect horizontal effect presupposes a greater role for private law compared to that designated to private law by the direct horizontal effect, it indirectly leads to private law becoming a vehicle for promoting fundamental rights and therefore looks a lot like bringing the direct horizontal effect of fundamental rights into the realm of private law by means of a Trojan horse. As a consequence, in order to act in conformity with fundamental rights, the private law courts first need to reach a decision on the level of fundamental rights and then to see how this decision can be based on private law rules. It therefore appears that, in the same way as the direct horizontal effect, the strong indirect horizontal effect may potentially also lead to the subordination of private law to fundamental rights and that the distinction between the two may not necessarily be noticeable in practice.

c) Weak indirect horizontal effect

Finally, it is of importance to distinguish the *weak indirect horizontal effect*. This form of horizontal effect starts from the relationship of complementarity between fundamental rights and private law and closely resembles the initial idea behind the German theory of 'indirect effect' developed by *Dürig*. As in the case of the strong indirect horizontal effect, here private parties are also not bound by fundamental rights and it is private law which applies to their relations and thus serves as the basis for the decisions of the private law courts. Therefore, plaintiffs seeking to invoke fundamental rights in private law cases are not able to rely solely on the right in question, but have to anchor their claim in existing private law norms. In contrast to the strong indirect horizontal effect, however, the weak one presupposes that private law is only *influenced* by fundamental rights, and thus not governed by them. It is therefore *private law* which determines how and to which extent the values embodied in fundamental rights are accommodated within it and hence it is *private law* which remains decisive for resolving disputes between private parties under private law.

Under this approach, an important difference from the strong indirect horizontal effect lies in the meaning of the duty of the courts as State bodies to act in a way which is compatible with fundamental rights. Whereas under the 'strong' model, the courts have to achieve the absolute conformity of private law with fundamental rights instruments and in order to do so they first have to resolve the case on the level of fundamental rights and then see how to transpose the outcome reached on this level into private law, the courts' duty to act compatibly with fundamen-

93 In the recent German literature, under the heading 'strong indirect horizontal effect' one can place the view which was advanced by Simon who defended the new meaning of the German concept of 'indirect' horizontal effect of constitutional rights in private law. See Simon 2004, *supra* note 20, at pp. 289 *et seq.*

tal rights under the 'weak' model means a duty to develop and apply private law by *taking into account* the values behind those rights. This means that the starting point for the private law courts is to look for the solution in a particular case at the level of private law and, in doing so, to consider any possible impact of fundamental rights. The private law court is considered to fulfil its duty if it has taken into account the impact of fundamental rights when applying private law. Accordingly, in the case of the weak indirect horizontal effect, private law is considered to be in conformity with fundamental rights once the values underlying fundamental rights are respected within it, and it is private law which determines how this respect is to be ensured.

6. Final remarks

Although within all the legal systems in question different approaches exist as to the course of action to be taken concerning the extent of the constitutionalisation of private law, the currently prevailing approach in each of them can be summarized as follows. Whereas in German law a tendency towards the subordination of private law, in particular contract law, to fundamental rights appears to prevail, Dutch and English law tend to regard the appropriate relationship between fundamental rights and private law in terms of complementarity. In German law, where the way in which the constitutionalisation of private law takes place has been controlled by the Federal Constitutional Court, constitutional law takes the lead in the adjustment of private law, the role of private law in determining whether and how to accommodate constitutional rights being quite often rather limited. Private law norms, especially general clauses, are increasingly becoming mere tools for giving effect to constitutional rights between private parties, since what is constitutional tends to be determined by the German Constitution and not by private law influenced by the Constitution. As a result, private law gradually becomes a servant of constitutional law. By contrast, it is impossible to establish a clear 'substantive' hierarchy between fundamental rights and private (common) law in Dutch and English law where the process of the constitutionalisation of private law primarily lies in the hands of the ordinary courts and has more of an incremental character. In these legal systems, the constitutionalisation of private law is not about private law serving constitutional or international human rights law, but rather about private (common) law and fundamental rights law serving each other. Fundamental rights and private law interact there without undermining each other; in many cases in Dutch law this has even occurred spontaneously when the courts have looked at fundamental rights as a source of inspiration when making the open-ended private law norms concrete in the light of the general principles of law.

Today, when the world of fundamental rights and the world of private law no longer exist in isolation from each other, one cannot underestimate the importance of making a distinction between a relationship of subordination of private law to fundamental rights and one of complementarity between the two. Defining the relationship between fundamental rights and private law in terms of subordination or complementarity allows one not only to determine what kind of relationship between them tends to be adopted in a particular legal system. First and foremost, this enables one to hold an open debate concerning the extent to which private law in general or a particular branch of private law should be constitutionalised. Such a debate would be much more transparent if the national ordinary or constitutional courts which have a final say on the issue of the relationship between fundamental rights and private law in their national legal systems would follow the proposed differentiation between the kinds of horizontal effect and, instead of concealing the real extent of the constitutionalisation of private law behind the traditional labels of direct or indirect horizontal effect, openly adopt either direct, strong indirect

or weak indirect horizontal effect in the sense described in Section 5 above. A fundamental issue to be resolved in this context is which body of law substantially determines the outcome of a dispute between private parties – fundamental rights law or private law. The answer to this question is of crucial importance for the future of private law, as it will determine whether private law will be turned into a wholly malleable vehicle for promoting fundamental rights or whether it will enter into a dialogue with fundamental rights and have a final word in the regulation of private law relationships.