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The Constitutional Momentum of European Contract Law

On the Interpretation of the DCFR in Light of Fundamental Rights

CHANTAL MAK*¹

ABSTRACT: This paper presents a constitutional analysis of the Draft Common Frame of Reference (DCFR) that has been prepared by a network of European legal scholars. The central question is to what extent the DCFR reflects fundamental values shared by the Member States. In order to answer this question, this paper analyses the relevant DCFR provisions in the light of fundamental rights, such as those laid down in national Constitutions and international treaties. Comparative remarks are made on the effects of fundamental rights in the national contract laws of various Member States (the Netherlands, Germany, England, and Italy), since the DCFR provisions that refer to fundamental rights correspond to some typical cases (or *Fallgruppen*) of fundamental rights application that have arisen in these countries. The structure of the analysis accordingly follows three main categories: the interpretation of the rules of contract law, non-discrimination in contractual relationships, and the validity of the contract. Attention is paid to direct and indirect effects of fundamental rights in European contract law cases as well as to the legal-political implications of these effects. On the basis of the comparative analysis, finally, it is submitted that choices will have to be made regarding the extent to which legislators and judges have to take into account the values expressed in these rights and, importantly, which form should be given to the provisions of a Common Frame of Reference in order to reach the highest possible level of protection of these values in contract law throughout Europe. Only then will the further harmonisation of European contract law truly contribute to the establishment of a European Constitution.

RÉSUMÉ: Cet exposé présente une analyse de droit constitutionnel concernant le Projet de Cadre Commun de Référence (PCCR) qui a été préparé par un réseau de chercheurs européens en droit. La question principale est celle de savoir dans quelle mesure le PCCR exprime des principes fondamentaux partagés par les États membres. Afin de répondre à cette question, cet exposé analyse les dispositions pertinentes du PCCR dans le cadre de droits fondamentaux, comme ceux consacrés par des constitutions nationales et par des traités internationaux. Des remarques comparatives sont faites concernant les incidences des droits fondamentaux sur les droits nationaux des contrats dans plusieurs États membres (les Pays-Bas, l'Allemagne, l'Angleterre, et l'Italie), étant donné que les dispositions du PCCR qui font référence aux droits fondamentaux coïncident avec quelques cas typiques (ou *Fallgruppen*) d'application des droits fondamentaux qui sont survenus dans ces pays. Le plan de l'analyse ainsi suit trois catégories principales : l'interprétation

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des règles de droit des contrats, la non-discrimination dans les relations contractuelles et la validité du contrat. Il porte attention aux effets directs et indirects des droits fondamentaux dans des litiges de droit européen des contrats aussi bien qu'aux implications juridico-politiques de ces effets. À la base de l'analyse comparative, enfin, il est avancé que des choix devront être faits concernant, d'une part, la mesure dans laquelle les législateurs et les juges doivent tenir en compte des valeurs exprimées par ces droits et, d'autre part, la forme qui devrait être donnée aux dispositions d'un Projet de Cadre Commun de Référence afin de réaliser le plus haut degré de protection possible de ces valeurs dans les droits des contrats dans toute l'Europe. C'est seulement dans ce cas que l'harmonisation plus poussée du droit européen des contrats contribuera effectivement à la création d'une Constitution européenne.

ZUSAMMENFASSUNG: Dieser Beitrag analysiert den von einer Gruppe europäischer Professoren vorgelegten Entwurf für einen Gemeinsamen Referenzrahmen (*Draft Common Frame of Reference - DCFR*) aus verfassungsrechtlicher Sicht. Im Mittelpunkt steht dabei die Frage, inwieweit der DCFR die gemeinsamen Grundwerte der Mitgliedstaaten reflektiert. Zur Beantwortung dieser Frage analysiert der Beitrag die einschlägigen Bestimmungen des DCFR im Lichte von Grundrechten, wie sie zum Beispiel in nationalen Verfassungen und internationalen Verträgen enthalten sind. Dabei wird die rechtsvergleichende Bemerkungen auf das nationale Vertragsrecht verschiedener Mitgliedstaaten Bezug genommen (die Niederlande, Deutschland, England und Italien), da die Bestimmungen des DCFR, die auf Grundrechte Bezug nehmen, verschiedenen in diesen Rechtsordnungen auftauchenden Fallgruppen der Anwendung von Grundrechten entsprechen. Demgemäß unterteilt sich der Artikel in drei Hauptabschnitte: die Auslegung der Bestimmungen des Vertragsrechts; Nichtdiskriminierung in Vertragsverhältnissen und die Wirksamkeit von Verträgen. Des Weiteren wird auf die mittelbare und unmittelbare Drittwirkung von Grundrechten in europäischen Vertragsrechtsfällen und die damit zusammenhängenden rechtspolitischen Auswirkungen eingegangen. Auf der Grundlage der rechtsvergleichende Untersuchung wird schließlich die These formuliert, dass Entscheidungen darüber notwendig sind, inwieweit die Gesetzgeber und Gerichte die diesen Rechten zugrunde liegenden Werte beachten müssen und, vor allem, wie die Bestimmungen eines Gemeinsamen Referenzrahmens ausgestaltet werden sollten, um einen höchstmöglichen Schutz dieser Werte im Vertragsrecht innerhalb Europas zu erreichen. Nur so kann die weitere Harmonisierung des europäischen Vertragsrechts einen wirklichen Beitrag zur Schaffung einer europäischen Verfassung leisten.

1. Introduction

Stefano Rodotà once observed that, upon examining the history of many countries of continental Europe, 'we can easily see how the civil codes played an essential role in the development of the national State, representing the real Constitution of civil society'.² The major nineteenth century codifications, most importantly the French *Code Civil* and the German *Bürgerliches Gesetzbuch*, reflected the strong private legal relations that bound the citizens and thus constituted societies. The twentieth century saw a gradual change in this political role of the codes, as new constitutional

² S. RODOTÀ, 'The Civil Code within the European "Constitutional Process"', in *The Politics of a European Civil Code*, ed. M.W. HESSELINK (The Hague: Kluwer Law International, 2006), 115 at 118.

documents took their place. Nowadays, the French *Constitution* and the German *Grundgesetz*, as well as other Constitutions of European states and the EC treaty, express values with which in principle also the provisions of contract law have to comply.³

Surveying the current developments in European contract law, nevertheless, we may discern a partial revival of the nineteenth century ideal of codification. In particular, the European Commission's initiative to develop a 'Common Frame of Reference' (CFR) for this field of law recalls the French and German projects. The resemblance is a strong one, since the drafting of European principles and model rules aimed at enhancing the coherence of contract law coincides with the search for shared fundamental values that represent a 'lasting constitutional settlement' within the European Union (EU).⁴ The rules of contract law could thus go further than merely regulate market processes – they could contribute to building a closer social and political Union complementing the economic cooperation of the Member States.

This paper presents a constitutional analysis of the Draft Common Frame of Reference (DCFR) that has been prepared by a network of European legal scholars.⁵ The main question is to what extent the DCFR reflects fundamental values shared by the Member States. In order to answer this question, this paper will analyse the relevant provisions in the light of fundamental rights, such as those laid down in national Constitutions and international treaties.⁶ In this context, comparative remarks will be made on the effects of fundamental rights in the national contract laws of various Member States (the Netherlands, Germany, England, and Italy). The DCFR provisions that refer to fundamental rights correspond to some typical cases (or *Fallgruppen*) of fundamental rights application that have arisen in these countries.⁷ The structure of the analysis will therefore follow three main categories: the

³ RODOTÀ, 118; H. COLLINS, *The European Civil Code. The Way Forward* (Cambridge: Cambridge University Press, 2008), 253.

⁴ STUDY GROUP ON SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW, 'Social Justice in European Contract Law: A Manifesto', *European Law Journal* (2004): 653 at 667.

⁵ C. VON BAR, E. CLIVE, & H. SCHULTE-NÖLKE (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition* (Munich: Sellier, 2009).

⁶ It is not aspired to take a stand in the debate on whether a fundamental right is 'fundamental' because it is entrenched in a Constitution or, on the other hand, is laid down in a Constitution because it is fundamental. The focus is on the effect of rights that have obtained constitutional protection on the solution of contractual disputes. On the question why these rights should be considered 'fundamental', see R. ALEXY, *Theorie der Grundrechte* (Baden-Baden: Nomos, 1985), 39.

⁷ Examples are taken from German, Dutch, English, and Italian law, in accordance with the analysis presented in C. MAK, *Fundamental Rights in European Contract Law. A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Alphen a/d Rijn: Kluwer Law International, 2008a). For a comparative study on a larger group of European countries (that is, Germany, Italy, England, the Netherlands, Poland, Portugal, Spain, and Sweden), see the forthcoming publications: G. BRÜGGEMEIER, A. COLOMBI CIACCHI, & G. COMANDÉ (eds),

interpretation of the rules of contract law (section 2), non-discrimination in contractual relationships (section 3), and the validity of the contract (section 4). Attention will be paid to direct and indirect effects of fundamental rights in European contract law cases as well as to the legal-political implications of these effects. On the basis of the comparative analysis, finally, a conclusion will be drawn regarding the constitutional aspects of the development of a CFR for European contract law (section 5).

2. The Constitutional Interpretation of the DCFR

2.1 *Interpreting the DCFR*

Article I.-1:102(2) of the DCFR stipulates that its rules ‘are to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws’.⁸ In the introductory remarks to the Outline Edition of the DCFR, the editors note that this principle ‘is also reflected quite strongly in the model rules themselves’.⁹ In particular, they point out the provisions on non-discrimination (Books II and III of the DCFR)¹⁰ and on non-contractual liability (Book VI).

The wording of Article I.-1:102(2) does not indicate to what extent fundamental rights should be taken into account when applying DCFR provisions that cannot on first sight be related to constitutionally protected values. In fact, many rules of contract law are often thought to be of a ‘merely technical’ nature; they regulate contractual relationships without implying a policy choice. There would seem to be no need to refer to underlying principles when applying them. For example, as a rule a contract may be considered valid if the parties signing it were of sound mind and had reached the age of majority at the time of its conclusion.

This conception of a-political rules is convincingly challenged by Duncan Kennedy, who demonstrates that even these seemingly technical rules express certain political stakes in contract law.¹¹ These political stakes could be imagined as ranging from an emphasis on party autonomy and self-determination to a relative

Fundamental Rights and Private Law in the European Union: I. A Comparative Overview (Cambridge: Cambridge University Press, 2009a); and *id.*, *Fundamental Rights and Private Law in the European Union: II. Comparative Analyses of Selected Case Patterns* (Cambridge: Cambridge University Press, 2009b).

⁸ In the context of this paper, it is assumed that ‘human rights and fundamental freedoms and any applicable constitutional laws’ correspond to the conception of ‘fundamental rights’ explained in the introductory section of this paper, that is the rights and freedoms laid down in international treaties and national Constitutions. The forthcoming *Comments* to the DCFR are expected to further clarify the definitions.

⁹ VON BAR et al., 14.

¹⁰ See further section 3 below.

¹¹ D. KENNEDY, ‘The Political Stakes in “Merely Technical” Issues of Contract Law’, *European Review of Private Law* (2002): 7–28. See also B. VAN ZELST, *The Politics of European Sales Law. A Legal-Political Inquiry into the Drafting of the Uniform Commercial Code, the Vienna Sales Convention, the*

focus on solidarity and the protection of weaker contracting parties.¹² For example, the remedies for a unilateral mistake, such as a seller naming a too low price for his goods, can vary from holding the seller bound to his word (emphasis on party autonomy and freedom of contract) to limiting the situations in which the other party may recover (emphasis on solidarity between the parties).¹³ Rules of contract law thus always express a certain policy choice, that is, a political decision that is inspired by the idea that it advances or protects a collective goal.¹⁴

Elsewhere, I have argued that fundamental rights affect the manner in which judges deal with political stakes in contract cases.¹⁵ Fundamental rights may be said to mediate between law and politics – that idea implies that the policy choices expressed in seemingly technical rules of contract law become apparent when reading them against the background of human rights and constitutional values. From that perspective, Article I-1:102 (2) DCFR calls for the balancing of stakes of autonomy and solidarity in cases in which the rules contained in this draft document will eventually be applied.

2.2 *Fundamental Rights in European Contract Law*

In national legal systems, the role attributed to fundamental rights in the interpretation of rules of contract law also strongly depends on the view that is taken on the relationship between constitutional law and private law in general. In Europe, the strongest position on this point has probably been taken by the German Constitutional Court. Case law in other countries shows less pronounced views on the role of fundamental rights in contract law, although the growing importance of the phenomenon seems to have found broad recognition.

The German judiciary has recognised a reciprocal effect, or *Wechselwirkung*, of fundamental constitutional rights and norms of private law since the 1950s. The *Bundesverfassungsgericht*, the German Federal Constitutional Court, established that all private law should comply with the objective order of values expressed by the fundamental rights laid down in the Constitution.¹⁶ In case law, this could be realised especially through the interpretation of the general clauses of private law (*Wechselwirkung*). In the 1990s, the Court extended this doctrine to include the judicial review of the contents of contracts, based on the interpretation of ‘good

Dutch Civil Code and the European Consumer Sales Directive in the Context of the Europeanisation of Contract Law (Alphen a/d Rijn: Kluwer Law International, 2008).

¹² KENNEDY, 7 at 14–15; M.W. HESSELINK, ‘The Politics of a European Civil Code’, *European Law Journal* (2004): 675–697; VAN ZELST, 21–27; MAK, 2008a, 200 ff.

¹³ KENNEDY, 9–10.

¹⁴ The definition corresponds to R. DWORKIN, *Taking Rights Seriously* (London: Duckworth, 1977/1984), 82.

¹⁵ MAK, 2008a, Ch. 5.

¹⁶ *BVerfGE* 7, 198 (Lüth).

morals' and 'good faith' in the light of fundamental rights. Thus, a non-competition clause in a commercial agency contract could be contested for its serious restriction of the agent's free choice of profession.¹⁷ And a surety agreement signed by an impecunious daughter on behalf of her father could be annulled with an eye on the protection of human dignity and the principle of the social state.¹⁸

Italian law also demonstrates how fundamental rights have affected the development of private law doctrines from the 1950s onwards. The Italian Constitutional Court (*Corte costituzionale*) and Supreme Court (*Corte di Cassazione*), after a tentative start, have established a steady practice of reading provisions of private law in the light of constitutionally protected rights.¹⁹ In contrast to most examples from German law, the influence of the Italian Constitutional Court is a more indirect one, given that the *Corte costituzionale* does not handle individual complaints of unconstitutionality, but only adjudicates the compliance of laws with the Constitution in cases that are referred to it by the civil courts.²⁰ Nevertheless, the judgments of the *Corte Costituzionale* have also had an impact on certain areas of private law, for instance on the recognition of non-pecuniary damages.²¹ The Court has developed a method of reading specific provisions of law, mostly general clauses, in the light of constitutionally protected rights, the so-called '*combinato disposto*'.²² In contract law, the Italian Supreme Court has applied this method to the general clause of 'good faith', determining that the principle of solidarity, safeguarded by Article 2 of the *Costituzione*,²³ requires the civil courts to make sure that contract parties have substantively been able to contribute to the content of their contract.²⁴ Furthermore,

¹⁷ *BVerfGE* 81, 242 (*Handelsvertreter*).

¹⁸ *BVerfGE* 89, 214 (*Bürgschaft*).

¹⁹ Early cases go back to the 1950s, for instance *Cass. civ.* 10 Aug. 1953, *Giust. civ.* 1953, 2687. The impact of fundamental rights, however, seems to have expanded mostly from the 1970s and 1980s onwards. Compare F.D. BUSNELLI, 'Diritti umani e civiltà giuridica. Riflessioni di un civilista', *Rassegna di diritto civile* (1991): 243-254; M.L. CHIARELLA, 'La tutela dei diritti fondamentali nei rapporti interprivati: elaborazioni teoriche e stato dell'arte', in *Diritto privato europeo e diritti fondamentali*, ed. G. COMANDÉ (Torino: G. Giappichelli Editore, 2004), 39-74.

²⁰ Although German law also has a preliminary ruling procedure, the possibility of individual complaints results in a more direct impact of the *Bundesverfassungsgericht's* judgments on contractual disputes.

²¹ *Corte cost.* 14 Jul. 1986, n. 184 and *Corte cost.* 11 Jul. 2003, n. 233. The latter judgment affirms the Italian Supreme Court's decisions *Cass. civ.* 31 May 2003, n. 8827 and 8828, *Foro it.* 2003, I, 2273.

²² S. MORELLI, 'L'applicazione diretta della Costituzione nei rapporti interindividuali', *Giustizia civile* (1996): 539.

²³ Article 2 *Cost.*: 'La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale.'

²⁴ *Cass. civ.* 20 Apr. 1994, n. 3775, *Giust. civ.* 1994, 2159-2173.

also on the basis of Article 2 of the Italian Constitution, the *Corte di Cassazione* has established an *ex officio* power of the civil courts to reduce manifestly excessive contractual penalties.²⁵

In European countries that experienced less dramatic post-war constitutional changes than Germany and Italy, the discourse gathered momentum in a later phase, often inspired by the German cases and the rapidly expanding amount of literature on the topic. In Dutch law, rules similar to the German ones have been developed in case law determining the impact of fundamental rights on the colouring of general clauses of private law. The Dutch Supreme Court, the *Hoge Raad*, has for instance held that the legality of a contractual waiver of the right to practice the mensendieck method for improvement of posture should be assessed in light of the fundamental right to teach.²⁶ Moreover, the Court has ruled that contractual good faith can set a limit to the right to physical integrity, insofar as it obliges a patient to co-operate to a blood test in order to establish whether his doctor may have been infected with the HIV virus.²⁷ Although the Dutch courts tend to lean towards a somewhat less dogmatic approach than their German counterparts, the rules established in these cases resemble the German theory of reciprocal effect or *Wechselwirkung* between fundamental rights and private law: on the one hand, fundamental rights affect the interpretation of rules of private law and, on the other hand, private interests can justify a restriction of fundamental rights.

In English law, finally, the debate on effects of fundamental rights in contract cases has been rekindled by the Human Rights Act 1998 (HRA), which came into force on 2 October 2000 and aims to give further effect to ECHR rights in British law. Should the Act also apply in relations between private parties? Although legal academics have fervently debated about the role of the HRA in private disputes,²⁸ the courts

²⁵ *Cass. civ.* 24 Sep. 1999, n. 10511, *Foro it.* 2000, I, 1929; *Cass. civ.*, joint divisions, 13 Sep. 2005, n. 18128, *Foro it.* 2005, I, 2985; *Cass. civ.* 28 Sep. 2006, n. 21066.

²⁶ *NJ* 1970, 57 (*Mensendieck I*) and *NJ* 1971, 407 (*Mensendieck II*). The case concerned a student who followed a programme to qualify as a teacher of mensendieck exercises for the improvement of one's posture. Her contract with the institute providing the teaching programme, the Dutch Mensendieck Union, stipulated that she would refrain from teaching these exercises if her training was interrupted. Although the student failed her exams, she started practicing as a mensendieck teacher. The *Hoge Raad* confirmed that a limitation of the woman's freedom to teach was justified in the light of the public interest the contract aimed at serving. The contract could therefore be upheld.

²⁷ *NJ* 2004, 117 (*hiv-test II* or *dentist* case). See also *NJ* 1994, 347 (*Aids-test* or *hiv-test I*), in which it was accepted that the right to physical integrity may be restricted in case the person invoking it is himself liable in tort towards the person requiring his co-operation to the blood test.

²⁸ M. HUNT, 'The "Horizontal Effect" of the Human Rights Act', *Public Law* (1998): 422-443; W. WADE, 'The United Kingdom's Bill of Rights', in *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford: Hart Publishing, 1998), 61-68; G. PHILLIPSON, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?', *Modern Law Review* (1999): 824-849; J. COOPER, 'Horizontality: The Application of Human Rights Standards in Private Disputes', in *An Introduction to Human Rights and the Common Law*, eds R. ENGLISH & P. HAVERS

in civil cases have so far not fully dealt with the question of ‘horizontal effect issues’. In some cases, courts have given a certain effect to Convention rights. However, rather than elaborating on the role of fundamental rights in the further development of private law, judges tend to bring cases under existing doctrines of private law, thus avoiding the question of horizontal application of fundamental rights.²⁹ The protection of privacy, for example, appears to have been affected by Articles 8 and 10 ECHR (respect for privacy and freedom of expression, respectively).³⁰ However, rather than considering the duties of the legislature and the judiciary to safeguard these rights in private disputes, the courts have resolved the cases on the basis of an extended interpretation of the doctrine of breach of confidence, which allowed them to remain within the sphere of a balance of private law interests.³¹ In contract law, examples are

(Oxford: Hart Publishing, 2000), 53–69; R. BUXTON, ‘The Human Rights Act and Private Law’, *Law Quarterly Review* (2000): 48–65; H.W.R. WADE, ‘Horizons of Horizontality’, *Law Quarterly Review* (2000): 217–224; J. BEATSON & S. GROSZ, ‘The Impact of the Human Rights Act on Private Law: The Knight’s Move’, *Law Quarterly Review* (2000): 380–386; T. RAPHAEL, ‘The Problem of Horizontal Effect’, *European Human Rights Law Review* (2000): 493–511; H. BEALE & N. PITTAM, ‘The Impact of the Human Rights Act 1998 on English Tort and Contract Law’, in *Human Rights in Private Law*, eds D. FRIEDMANN & D. BARAK-EZREZ (Oxford: Hart Publishing, 2001), 131–159; N. BAMFORTH, ‘The True “Horizontal Effect” of the Human Rights Act 1998’, *Law Quarterly Review* (2001): 34–41; B.S. MARKESINIS, ‘Der wachsende Einfluß der Menschenrechte auf das englische Deliktsrecht’, in *Always on the Same Path. Essays on Foreign Law and Comparative Methodology*, vol. II (Oxford: Hart Publishing, 2001), 111–129 and the same author, ‘Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany’, in *Always on the Same Path. Essays on Foreign Law and Comparative Methodology*, vol. II (Oxford: Hart Publishing, 2001), 131–173; BAMFORTH, ‘Human Rights and Consumer Credit’, *Law Quarterly Review* (2002): 203–209; D. BEYLEV-ELD & S.D. PATTISON, ‘Horizontal Applicability and Horizontal Effect’, *Law Quarterly Review* (2002): 623–646; G. TAYLOR, ‘The Horizontal Effect of Human Rights Provisions, the German Model and Its Applicability to Common-Law Jurisdictions’, *King’s College Law Journal* (2002): 187–218. See also A. CLAPHAM, ‘Opinion: The Privatisation of Human Rights’, *European Human Rights Law Review* (1995): 20–32 and S.K. MARTENS, ‘Opinion: Incorporating the European Convention: The Role of the Judiciary’, *European Human Rights Law Review* (1998): 5–14.

²⁹ S. WHITTAKER, *The Draft Common Frame of Reference. An Assessment, commissioned by the Ministry of Justice, United Kingdom*, November 2008, 67–68, <http://www.justice.gov.uk/publications/eu-contract-law-common-frame-reference.htm> (last consulted on 18 Feb. 2009). See also J. MORGAN, ‘Privacy in the House of Lords, Again’, *Law Quarterly Review* (2004): 563–566 at 564. See also PHILLIPSON, ‘Judicial Reasoning in Breach of Confidence Cases under the Human Rights Act: Not Taking Privacy Seriously’, *European Human Rights Law Review* (2003), special issue on privacy, 54 at 59–60 and 72; and the same author ‘Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act’, *Modern Law Review* (2003): 726 at 728 and 748.

³⁰ *Campbell v. MGN* [2002] EWCA Civ 1373; [2004] UKHL 22; [2004] 2 AC 457 (HL); and *Douglas v. Hello! Ltd* [2001] QB 967; [2001] 2 WLR 992; [2003] EMLR 31; [2006] QB 125.

³¹ PHILLIPSON, 2003, 731: ‘[T]here remains in the judgments a noticeable tendency to gravitate back towards confidentiality principles, even as the new role of Article 8 is apparently accepted: this results in a certain equivocation in the judgments as between the values of confidentiality on the one hand, and privacy on the other.’

even fewer,³² which means that it remains unclear what is or will be the role of fundamental rights in English contract law adjudication. Although the courts have affirmed that one private party cannot *directly* sue another private party for a tort of ‘breach of the Convention’, they have only partly clarified to what extent the *indirect* application of the ECHR rights may affect the balance of interests in contractual disputes.³³

Although these national systems agree that fundamental rights affect contract law, they demonstrate slightly different views on the intensity of the relationship between contract law and constitutional law. It is difficult to interpret Article I-1:102(2) of the DCFR as singling out one of these perspectives; its wording seems to allow for a variety of (mostly indirect) effects of fundamental rights in contract cases.³⁴ Moreover, it does not specify what method should be used to balance conflicting fundamental rights in cases governed by the DCFR.³⁵

In this context, it is remarkable that the European legislature so far does not appear to have taken a clear stand either. Although the preambles of several Directives³⁶ in the field of contract law explicitly refer to in particular the Nice Charter, no guidance is given as to the manner in which fundamental rights should be safeguarded in specific cases.

3. The Principle of Non-discrimination

3.1 *Non-discrimination in the DCFR*

In many EU Member States, a fundamental right that has had a deep impact on a variety of areas of contract law is the principle of non-discrimination (codified in, for instance, Article 3 of the German *Grundgesetz*; Article 1 of the Dutch *Grondwet*;

³² *Wilson v. First County Trust Ltd* [2003] UKHL 40; [2003] 3 WLR 568; [2003] 4 All ER 97; [2003] 2 All ER (Comm) 491; [2003] HRLR 33.

³³ MAK, 2008a, 143-145; J. WADHAM et al., *Blackstone's Guide to the Human Rights Act 1998* (Oxford: Oxford University Press, 2007), 68-69, with references.

³⁴ See also C. MAK, ‘The Constitution of a Common Frame of Reference for European Contract Law’, *European Review of Contract Law* (2008b): 553 at 562.

³⁵ Compare T. PFEIFFER, ‘Von den PECL zum DCFR’, *Zeitschrift für Europäisches Privatrecht* (2008): 679 at 683.

³⁶ For example, Directive 97/7/EC on Distance selling, no. 17: ‘Whereas the principles set out in Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 apply; whereas the consumer’s right to privacy, particularly as regards freedom from certain particularly intrusive means of communication, should be recognized; whereas specific limits on the use of such means should therefore be stipulated; whereas Member States should take appropriate measures to protect effectively those consumers, who do not wish to be contacted through certain means of communication, against such contacts, without prejudice to the particular safeguards available to the consumer under Community legislation concerning the protection of personal data and privacy.’ See also the European Commission’s proposal for a Directive on Consumer Rights, COM (2008) 614 final, no. 66: ‘This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.’

Article 3 of the Italian *Costituzione*; and Article 14 ECHR). Although it initially was not intended for application between private parties, it has inspired the national as well as the European legislatures and has influenced the protection of contract parties in case law.

The right not to be discriminated against has often been translated into specific legal provisions, such as those laid down in the German *Allgemeines Gleichbehandlungsgesetz (AGG)*,³⁷ the Dutch *Algemene wet gelijke behandeling (Awgb)*,³⁸ and the British Equality Act 2006.³⁹ These national legislative instruments have been introduced or revised on the basis of several European Directives, in particular the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC).⁴⁰

The drafters of the DCFR have also taken into account the fundamental right of non-discrimination when formulating their principles, definitions, and model rules. Its inclusion in the Draft in fact implies a significant, although not uncontroversial,⁴¹ upgrading of its status in comparison to national legal systems: Unlike the Civil Codes of the Member States, the DCFR includes specific provisions safeguarding the right not to be discriminated against. Articles II.-2:101 to II.-2:105 guarantee protection against discrimination ‘*on the grounds of sex or ethnic or racial origin in relation to a contract or other juridical act the object of which is to provide access to, or supply, goods, other assets or services which are available to the public*’. Article III.-1:105 of the DCFR, furthermore, extends the scope of application of these protective provisions to obligations regarding public goods and services. The inclusion of these rules in the DCFR gives a strong signal to the European and national legislatures of the prominent role the drafters think the principle of non-discrimination should play in contract law.

³⁷ Law of 14 Aug. 2006, *BGBI. I*, p. 1897.

³⁸ Law of 2 Mar. 1994, *Staatsblad van het Koninkrijk der Nederlanden* 1994, 230.

³⁹ http://www.opsi.gov.uk/acts/acts2006/ukpga_20060003_en_1 (last consulted on 10 Feb. 2009).

⁴⁰ For a comprehensive overview of the anti-discrimination laws in the EU Member States after the adoption of these two Directives, see the report prepared by M. BELL, I. CHOPIN, & F. PALMER for the European Network of Independent Experts in the Non-discrimination Field, *Developing Anti-discrimination Law in Europe. The 25 EU Member States compared*, November 2006, http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/06compan_en.pdf (last consulted on 3 Feb. 2009). See also D. SCHIEK, L. WADDINGTON, & M. BELL (eds), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law* (Oxford: Hart Publishing, 2007), in particular 11-13. For a critical assessment of the Directives, see N.M. PINTO OLIVEIRA & B. MACCRORIE, ‘Anti-discrimination Rules in European Contract Law’, in *Constitutional Values and European Contract Law*, ed. S. GRUNDMANN (Alphen aan den Rijn: Kluwer Law International, 2008), 111-122.

⁴¹ On the opposing views regarding the desirability of including the provisions on non-discrimination in the DCFR, see PFEIFFER, 695. See also J. BASEDOW, ‘Freedom of Contract in the European Union’, *European Review of Private Law* (2008): 901 at 920; M.E. STORME, ‘Freedom of Contract: Mandatory and Non-mandatory Rules in European Contract Law’, *European Review of Private Law* (2007): 233 at 247-250.

3.2 *Non-discrimination in European Contract Law*

Looking at contract cases in national legal systems it appears that these have, in the first place, been affected by the application of legislative instruments.⁴² It would, however, fall outside the scope of the present study to fully describe the application of the aforementioned legislative instruments in the case law of the EU Member States.

In the second place, the principle of non-discrimination has influenced the solution of legal questions that had not yet been answered by the legislator. These included, for instance, equal pay for men and women⁴³ and dress codes at work.⁴⁴ Furthermore, Article 14 ECHR (non-discrimination), in conjunction with Article 8 ECHR (protection of family life), lay at the basis of a House of Lords' judgment condemning statutory provisions on tenancy law that placed a homosexual surviving partner of a tenant in a less favourable position than a heterosexual partner.⁴⁵

Importantly, however, there have also been cases in which the right not to be discriminated against was not deemed strong enough to decide the balance of interests in favour of the party invoking it. In the Dutch *Maimonides* case,⁴⁶ for example, the *Hoge Raad* (the Dutch Supreme Court) ruled that a private school could in principle refuse to accept a pupil on the ground that the child was not Jewish according to the school's interpretation of the Jewish law. The school's interest in applying its religiously inspired admission policy, which was also constitutionally protected (by Article 23 of the Dutch *Grondwet*), outweighed the parents' interest to have their choice of education respected (safeguarded by Article 1 *Grondwet*, Articles 3 and 14 ECHR, and Article 2 of the First Protocol to the ECHR). Particularly in cases in which both parties invoke fundamental rights, justifications may be established for sometimes allowing unequal treatment. The difficulty lies in determining the margins within which private parties may in principle discriminate when choosing whether or not, and with whom, to enter into a contract.⁴⁷ Moreover, as with other

⁴² SCHIEK, WADDINGTON, & BELL; M. BELL, *Anti-discrimination Law and the European Union* (Oxford: Oxford University Press, 2002).

⁴³ See, on this topic, H.C. NIPPERDEY, 'Gleicher Lohn der Frau für gleiche Leistung', *Recht der Arbeit* (1950): 121-128. The topic of equal treatment of men and women in employment relations was later regulated by the EC in Directive 76/207, OJ 1976 L303/16 (amended by Directives 2002/73/EC and 2006/54/EC).

⁴⁴ For a comparative overview of case law, see BRÜGGEMEIER, COLOMBI CIACCHI, & COMANDÉ (2009a).

⁴⁵ *Ghaidan v. Godin-Mendoza* [2004] UKHL 31; [2004] 3 All ER 411. Note that under section 4(2) of the Human Rights Act 1998 English courts can only declare the incompatibility of a statutory provision with a ECHR right, but cannot disapply it.

⁴⁶ HR 22 Jan. 1988, NJ 1988, 891 (*Maimonides*).

⁴⁷ J.M. SMITS, 'Constitutionalising van het vermogensrecht', in *Preadviezen uitgebracht voor de Nederlandse Vereniging voor Rechtsvergelijking 2003* (Deventer: Kluwer, 2003), 69-92; V.A. BERGER, 'Privatrechtlicher Diskriminierungsschutz als Grundsatz im Gemeinsamen Referenzrahmen für Europäisches Vertragsrecht', *European Review of Private Law* (2008): 843 at 849.

fundamental rights, the legislature has to decide whether to regulate these issues or to leave them to the discretion of the judiciary.

3.3 *Non-discrimination and the Political Stakes in Contract Law*

When considering the relevant case law, it appears that the judgments that have been influenced by the principle of non-discrimination often concern specific legal areas, such as employment, tenancy, and education. A common feature of these fields of law is that they place a strong emphasis on the protection of weaker contracting parties.⁴⁸ They presume an imbalance of bargaining power between the parties to the contract – an employer, a landlord, or a school director usually has a stronger position than an employee, a tenant, or a pupil’s parent. In order to redress this inequality, the legislature has established (mostly mandatory) rules that seek to prevent the stronger party from unilaterally setting the terms of the contract.

Many of the rules promoting weaker party protection can be seen as an expression of fundamental values, which find protection in national Constitutions. For example, the free choice of profession has inspired rules limiting the content of non-competition clauses. Judges regularly refer back to these underlying values when deciding on specific cases presented to them. The principle of non-discrimination reflects one of these values and, indeed, a very fundamental one for the protection of weaker contracting parties: Not only does it inspire the creation of specific rules preventing a stronger party from unjustifiably discriminating between weaker parties, but it also relates to the broader concept of intrinsic equality of individual contracting parties, which implies that both parties are put in the position to freely contribute to the conclusion and contents of the contract. The explicit inclusion of the principle of non-discrimination in the DCFR thus underlines the importance awarded to the substantive equality of contracting parties.

4. The Validity of Contracts

4.1 *Validity in the DCFR*

Article II.-7:301 DCFR regulates the validity of contracts that affect the fundamental rights of the parties. It stipulates that ‘*[a] contract is void to the extent that (a) it infringes a principle recognised as fundamental in the laws of the Member States of the European Union; and (b) nullity is required to give effect to that principle*’. The wording of this provision has been criticised for not making clear what ‘fundamental principles’ it covers and for failing to indicate what approach should be taken to overlapping and conflicting principles.⁴⁹ Still, in my view, it may be said

⁴⁸ E.H. HONDIUS, ‘De zwakke partij in het contractenrecht; over de verandering van paradigmata van het privaatrecht’, in *Contractvrijheid*, eds T. HARTLIEF & C.J.J.M. STOLKER (Deventer: Kluwer, 1999), 387-393; BERGER, 850.

⁴⁹ PFEIFFER, 683.

that Article II.-7:301 merely codifies a practice that in national laws is already taking place through the application of open norms. From that perspective, the main issue is to establish to what extent it is indeed intended to encourage this practice through European legislation and whether it is possible to develop a harmonised view on this form of constitutionalisation of contract law. A comparison with the Principles of European Contract Law (PECL) and national case law may clarify this point of view.

The DCFR provision has been inspired by Article 15:101 PECL, which also prescribes the nullity of contracts infringing fundamental principles. The drafters of the PECL explicitly distance themselves from any national concepts of immorality, illegality at common law, public policy, *ordre public*, and *bonos mores*. They advocate a broad idea of ‘fundamental principles of law found across the EU, including European Community law’.⁵⁰ Such principles, according to the Lando Commission, can be derived from the EC Treaty and the ECHR, as well as from the comparative study of national legal systems. Although Article II.-7:301 DCFR has been derived from Article 15:101 PECL, we will see (in section 4.3) that on certain points it deviates from this provision.

4.2 *Validity in European Contract Law*

In national laws, the question whether a contract is valid is often answered on the basis of general clauses, such as ‘good morals’ (section 138 *BGB*; Article 3:40 *BW*; Article 1343 *c.c.*). Judges regularly refer to fundamental rights when ‘filling in’ these open norms.⁵¹

The well-known *Bürgschaft* case⁵² is a good example of this category. The German Constitutional Court in that case explicitly required the courts in civil cases to make sure that the formation of a suretyship contract entered into by a daughter

⁵⁰ O. LANDO et al. (eds), *Principles of European Contract Law. Part III* (The Hague: Kluwer Law International, 2003), 211–212.

⁵¹ Article 3:12 of the Dutch Civil Code even prescribes that in determining what the general clause of ‘good faith’ (*redelijkheid en billijkheid*) requires, ‘reference must be made to generally accepted principles of law, to current juridical views in the Netherlands, and to the particular societal and private interests involved’; translation by P.P.C. HAANAPPEL & E. MACKAAY, *Nieuw Nederlands Burgerlijk Wetboek: het vermogensrecht (zakenrecht, verbintenissenrecht en bijzondere overeenkomsten)*; *New Netherlands Civil Code: patrimonial law (property, obligations and special contracts)*; *Nouveau Code Civil néerlandais: le droit patrimonial (les biens, les obligations et les contrats particuliers)* (Deventer/Boston: Kluwer Law and Taxation Publishers, 1990). These generally accepted principles of law and juridical views can be considered to include fundamental rights; A.S. HARTKAMP, ‘On European Freedoms and National Mandatory Rules: The Dutch Judiciary and the European Convention on Human Rights’, *European Review of Private Law* (2000): 111 at 118.

⁵² *BVerfG* 19 Oct. 1993, *BVerfGE* 89, 214 (*Bürgschaft*). This case is often considered as a sequel to the judgment of the *BVerfG* of 7 Jan. 1990, *BVerfG* 89, 214 (*Handelsvertreter*), in which the Constitutional Court ruled that fundamental rights may be applied to restore the contractual balance between private parties. For a more detailed discussion of these cases, see MAK, 2008a, 70–82.

on behalf of her father had occurred in compliance with fundamental rights. If not, the contract could not be upheld. In the *Bürgerschaft* case, this eventually resulted in the suretyship contract being declared null and void on the basis of the infringement of the right to self-determination (Article 2(1) *GG*) read in conjunction with the principle of the social State (*Sozialstaatsprinzip*; Articles 20(1) and 28(1) *GG*). It was considered doubtful whether the daughter had been in the position to autonomously assess the risks attached to the suretyship and to decide on whether or not to enter into the contract, given the emotional pressure under which she entered into the contract. Therefore, the contract ultimately was declared to be void on the basis of section 138 *BGB* (good morals).

Fundamental rights also play a role in the adjudication of the validity of other types of contracts and contract clauses, for instance those concerning surrogate motherhood⁵³ or non-competition in employment relations.⁵⁴ Again, their effect is mostly felt through the interpretation of general clauses such as ‘good morals’ and ‘public policy’.

Given the fact that often both contracting parties can invoke fundamental rights, judicial reasoning in these cases usually involves a balance of the interests of the parties that are protected by these rights. In the case of surrogate motherhood, the situation is even more complex, since a balance has to be made between the interests of not only the intended parents and the surrogate mother, but the judge also has to take into account what would be in the best interest of the child that is to be born from the surrogacy arrangement. It largely depends on the circumstances of the specific case which interest will outweigh the other. In cases in which the legislature did not wish to leave the outcome to the complete discretion of the judiciary, specific provisions have been enacted – for instance, rules regulating the substance of non-competition clauses (for example, Article 7:653 of the Dutch *BW*) and legal

⁵³ MAK, 2008a, 258 ff.; C. MAK, ‘Baas in eigen buik? De rechtsgeldigheid en nakoming van draagmoederschapsovereenkomsten in het licht van grondrechten’, in J.H. DE GRAAF, C. MAK, & F.K. VAN WIJK (eds), *Rechten van het kind en ouderlijke verantwoordelijkheid* (Nijmegen: Ars Aequi Libri, 2008), 29–41. Examples from case law include the German case *Oberlandesgericht Hamm* 2 Dec. 1985, *NJW* 1986, 781, 782; the Italian cases *Tribunale Monza* 27 Oct. 1989, *Foro it.* 1990, I, 298, with a comment by PONZANELLI, and *Tribunale Rome* 17 Feb. 2000, *Foro it.* 2000, I, 972; *Giustizia civile* 2000, I, 1157, with a comment by GIACOBBE; *Nuova giurisprudenza civile commentata* 2000, I, 310, with a comment by ARGENTESI; the English case *Re C (A Minor) (Ward: Surrogacy)*, also known as *Re A Baby* [1985] *Fam Law* 191; and the Dutch cases *Rb. Utrecht* 18 Jun. 1997, *NJkort* 1997, 59, overruled on appeal by *Hof Amsterdam* 19 Feb. 1998, *NJkort* 1998, 32; *Rb. Rotterdam* 23 Mar. 1998, *NJkort* 1998, 33; *Hof Leeuwarden* 6 Oct. 2004, LJN: AR3391, www.rechtspraak.nl (last consulted on 18 Feb. 2009); *Rb. Utrecht* 26 Oct. 2005, *Rechtspraak Familierecht* 2005, 139; *Rb. Rotterdam* 8 Feb. 2007, LJN: BA0238, www.rechtspraak.nl (last consulted on 18 Feb. 2009).

⁵⁴ MAK, 2008a, 235 ff. A famous example from German case law is *BVerfG* 7 Feb. 1990, *BVerfGE* 81, 242 (*Handelsvertreter*).

regulation (the British Surrogacy Act) or even prohibition (Italy, France, Germany) of surrogacy contracts.

4.3 *Fundamental Rights and 'Fundamental Principles'*

A more in-depth analysis, then, of the wording of Article II.-7:301 of the DCFR, raises several problematic aspects. In the first place, it is not fully clear what is the scope of the provision. For its application, is it enough if a principle is infringed that is recognised as 'fundamental' in only one of the EU Member States? Or can a contract only be declared void in case it violates a principle that is fundamental to the laws of *all* Member States?

In the second place, does the concept 'principle' in Article II.-7:301 merely refer to fundamental rights and European freedoms (compare Article 15:101 PECL) or does it have a broader meaning? The Introduction to the DCFR enumerates a number of 'fundamental principles' underlying the set of rules as such. These are summarised as falling under four headings: freedom, security, justice, and efficiency.⁵⁵ The nature of these principles suggests that Article II.-7:301, though similar in wording, is not meant to include them. Rather, its derivation from Article 15:101 PECL seems to imply that this general clause should be filled in by means of fundamental rights (for example, those laid down in the ECHR), EC freedoms, and national constitutional rights.

In the third place, it is not clear from the text of the provision what type of effect of fundamental rights the drafters prefer. In its current wording, Article II.-7:301 DCFR would seem to allow for a relatively direct effect, meaning that one individual could make a direct claim against another based on the infringement of a fundamental right, if no specific provision reflecting the value safeguarded by this right is available in the applicable EU law.⁵⁶ This reading would, however, seem to be at odds with Article I.-1:102(2) DCFR.⁵⁷ The latter provision appears to suggest that a case-solution should be found within the provisions of the CFR and that fundamental rights could at most be of use for the interpretation of these provisions, which would imply an indirect effect. As stated before, a further analysis of the policy choices related to these different readings of the relevant DCFR provisions seems appropriate.

In the fourth place, and building on the previous point, a fundamental question arises with regard to the role of the future (political) CFR as foreseen by the drafters of the present academic proposal. If Article II.-7:301 of the DCFR, as it is worded now, is included in the CFR, it seems inevitable that national legislators and judges will interpret it in different ways. Given the fact that the European

⁵⁵ VON BAR et al., 13.

⁵⁶ MAK, 2008b, 562.

⁵⁷ Discussed in section 2 above.

Commission intends the CFR to at least serve as a ‘toolbox’ for the European and national legislatures and judiciaries,⁵⁸ this is a worrying scenario. How can such an open norm contribute to the enhancement of the coherence of European contract law, if it is not clear how it should be interpreted? The ECJ might play a role in guaranteeing the uniform interpretation of the provision through the preliminary questions procedure. However, this would require a deviation from the Court’s practice to refer the filling in of general clauses back to the Member States.⁵⁹ Moreover, the question may be raised to what extent it is necessary and desirable to harmonise legal concepts such as ‘good faith’ and ‘good morals’.⁶⁰

Summarising, while Article II.-7:301 DCFR reflects a practice that is of significant importance in the case law of many Member States, at the same time it raises many questions concerning the position the drafters have taken on the role of fundamental rights in contract law. The current provision thus potentially leaves much discretion to legislators and judges.

5. Conclusion

The efforts made to align the DCFR provisions with fundamental rights represent an important step in the ongoing process of constitutionalisation of European contract law, that is, the alignment of provisions of contract law with constitutionally protected rights and values. The explicit reference to ‘fundamental principles’ in relation to the interpretation of the DCFR and the assessment of the validity of contracts build on a steady practice in national legal systems. The inclusion of provisions on non-discrimination, furthermore, is a novelty for fundamental rights protection through an instrument that, as the DCFR, is comparable to a civil code in structure and systematisation.

Still, the analysis of Articles I.-1:102(2), II.-7:301 and the rules on non-discrimination leave many questions unanswered. Although the forthcoming *Comments* and *Notes* to the DCFR are expected to give some guidance,⁶¹ it is unlikely that they will clarify all issues mentioned in the previous sections. This is neither surprising nor dramatic – the constitutionalisation process of European contract law

⁵⁸ *Second progress report on the Common Frame of Reference*, 11: ‘The Commission considers the CFR a better regulation instrument. It is a longer-term exercise with the purpose of ensuring consistency and good quality of EC legislation in the area of contract law. It would be used to provide clear definitions of legal terms, fundamental principles and coherent modern rules of contract law when revising existing and preparing new sectoral legislation where such a need is identified. Its scope is not a large scale harmonisation of private law or a European civil code.’

⁵⁹ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609 (ECJ); Case C-237/02 *Freiburger Kommunalbauten v. Hofstetter* [2004] ECR I-3403 (ECJ).

⁶⁰ Compare G. TEUBNER, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences’, *Modern Law Review* (1998): 11–32.

⁶¹ See also M.W. HESSELINK, *CFR & Social Justice* (Munich: Sellier, 2008), 57.

is still in development. It will, however, be necessary to address the relevance and form of introducing fundamental rights reasoning into an eventual CFR. In particular, choices will have to be made regarding the extent to which legislators and judges will have to take into account the values expressed in these rights and, importantly, which form should be given to the CFR provisions in order to reach the highest possible level of protection of these values in contract law throughout Europe. Only then will the further harmonisation of European contract law truly contribute to the establishment of a European Constitution.