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The Constitution of a Common Frame of Reference for European Contract Law

CHANTAL MAK*

Abstract: This sectoral report is meant to sketch in broad lines the current views on the so-called 'constitutionalisation' of European contract law. To what extent does the application of fundamental rights in the regulation of contractual disputes refer or contribute to an underlying system of values of contract law in Europe? And how do such underlying values affect the drafting of the Common Frame of Reference that is at present being developed for European contract law? It is submitted here that a combination of different types of internal and external analysis can provide a clearer picture of the Constitution of the Common Frame of Reference, and of what will be the role of the European judges in civil cases in safeguarding this constitutional order.

I. Introduction

Despite their roots in constitutional law, in recent years fundamental rights have drawn the attention of many contract law scholars. When recalling the various conferences organised on the theme of the further harmonisation of contract law in Europe, many have had at least one presentation on the constitutional aspects of the process on their programmes.¹ Moreover, a steadily growing number of publications attest to a keen interest in the topic in many legal systems.² The wish to conduct a comparative analysis of the effects of

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1 For instance, the conferences on: *Diritti fondamentali e formazione del diritto privato europeo* (Univerisità Roma Tre, 28 June 2002); 'European Constitutionalisation of Private Law' (University of Amsterdam, 28 March 2003); 'Codes & Constitutions. Processes and Cross-influences in the European Union and its Member States' (European University Institute, Florence, 8–9 October 2004); 'Fundamental Rights and Private Law in the European Union' (Pisa, 13 November 2004); 'Constitutional Values and European Contract Law' (Society of European Contract Law (Secola), Berlin, 8–9 September 2006).

2 See 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, 2008), with further references. See also O.O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party. A Comparative Analysis of the Constitutionalization of Contract*

fundamental rights in private law has even inspired international co-operation between European scholars, the results of which will shortly be published.³ Surveying the area, it may thus be predicted that the theme will also be of considerable importance for the further harmonisation process and, in particular, for the establishment of the Common Frame of Reference (CFR) for European contract law that the European Commission is planning to enact.⁴ In order to make a constructive contribution to this last discussion, it seems high time to evaluate the different views on the so-called ‘constitutionalisation of European contract law’ and on that basis define some starting points for the analysis and application of the CFR.

This report will sketch an overview of the various theoretical perspectives on the constitutionalisation of European contract law and then relate them to the CFR. First, therefore, three accounts of constitutionalisation will be given (section II). These will be followed by a brief analysis of the constitutional aspects of the drafting process of the CFR and a comment on the role of the judiciary in the elaboration of this instrument (section III). Finally, some conclusions will be drawn (section IV).

Two disclaimers apply as to the objectivity of the overview. In the first place, I have written my PhD thesis on the subject under scrutiny and the emphasis on various aspects of the theme will therefore to some extent be coloured by my views on them. In the second place, and for the same reason, the description of the ideas of other authors may sometimes be accompanied by a critical side note. The reader is kindly asked to consider these two ‘flaws’ as being in line with the analytical perspective that will be presented in section II.3, that is, to keep in mind that I am aware of the legal-political bias that may shine

Law, with Emphasis on Risky Financial Transactions (Munich: Sellier, 2007); S. Grundmann (ed), *Constitutional Values and European Contract Law* (Alphen a/d Rijn: Kluwer, 2008); A. Colombi Ciacchi, ‘The Constitutionalization of European Contract Law’ (2006) *European Review of Contract Law* 167–180.

3 The EC-funded Research Training Network ‘Fundamental Rights and Private Law in the European Union’, contract no. HPNR-CT-2002-00228, which has prepared the following publications: G. Brüggemeier / A. Colombi Ciacchi / G. Comandé (eds), *Fundamental Rights and Private Law in the European Union. I. A Comparative Overview and II. Comparative Analyses of Selected Case Patterns* (Cambridge: Cambridge University Press, forthcoming).

4 See the European Commission’s 2001 Communication on European Contract Law to the Council and the European Parliament, COM(2001) 398 final; its Action Plan on a more coherent European Contract Law of 2003, COM(2003) 68 final; and its Communication ‘European Contract Law and the revision of the *acquis*: The way forward’ of 2004, COM(2004) 651 final. A draft academic CFR has been published in March 2008: C. von Bar / E. Clive / H. Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Interim Outline Edition* (Munich: Sellier, 2008).

through in my representation of the state of affairs, but that such awareness can prove fruitful for the further discussion of the theme.

II. Three accounts of the constitutionalisation of European contract law

1. An internal perspective: direct and indirect effects

The origins of the application of fundamental rights in contract law can be traced back to the early 1950s, when the German Federal Courts referred to the principle of equality in relation to equal pay for men and women⁵ and to the right to free speech in relation to allegedly tortious statements.⁶ In the wake of these decisions, a scholarly debate commenced on the question whether fundamental rights, which were written for the protection of citizens against the State, could be directly translated to the relationship between citizens. Two schools of thought emerged: one advocating the direct application of fundamental rights in private law, the other promoting a more indirect approach. The doctrine of direct effect (*unmittelbare Drittwirkung*) in short assumes that private parties can pose serious threats to fundamental rights and that the adequate safeguarding of these rights thus requires that citizens are bound to them in the same way as the State is.⁷ The theory of indirect effect (*mittelbare Drittwirkung*), on the other hand, does not consider private individuals to be addressees of fundamental rights and does therefore not oblige citizens to take into account these rights in their interrelations. On this view, the values protected by these rights may influence private law through the interpretation of open norms such as ‘good morals’ and ‘good faith’.⁸

The conceptual framework defined by the distinction between direct and indirect effects of fundamental rights has played an important part in the development of legal theory and practice on the subject of the constitutionalisation of contract law in Europe. In Dutch and Italian law, for instance, the analysis of case law is usually based on these concepts, whereas in English law, the enactment of the Human Rights Act 1998 sparked debate on the question whether fundamental rights can directly affect private relations.⁹

5 H.C. Nipperdey, ‘Gleicher Lohn der Frau für gleiche Leistung’, *Recht der Arbeit* 1950, 121–128.

6 *BVerfG* 15 January 1958, *BVerfGE* 7, 198 (*Lüth*).

7 Nipperdey, n 5 above, 124.

8 G. Dürig, ‘Grundrechte und Zivilrechtsprechung’, in Th. Maunz (ed), *Vom Bonner Grundgesetz zur gesamtdeutschen Verfassung* (Festschrift Nawiasky) (Munich: Isar Verlag, 1956) 157–158.

9 See Mak, n 2 above, in particular Chapter 2, with further references.

Although the analysis of the application of fundamental rights in terms of direct and indirect effects has contributed to a better understanding of the relationship between contract law and constitutional law, it has certain limitations. Most importantly, it regards the subject matter from an internal perspective: how does the judge use fundamental rights argumentation to reach an answer to a legal question? Since the legal system itself leaves space for both the defence of the theory of direct effect and that of indirect effect, the debate on which doctrine should prevail has, however, not reached a conclusion. As a consequence, it follows that the distinction between direct and indirect effects cannot give further guidance as to the intensity that fundamental rights should have in the private sphere.¹⁰ This limitation of the traditional analytical framework has lately been addressed from various external perspectives, which place the topic in a broader context: how can developments in case law be explained and what does the explanation mean for the drafting and adjudication of (European) contract law?

2. An external perspective: rebalancing private law through constitutionalisation

When taking an outsider's perspective on legal reasoning, questions underlying contract law come to the surface. In particular, it has to be investigated how private interests can be reconciled with collective goods or collective welfare. Hugh Collins submits that in the course of the twentieth Century the balance of these underlying values in common law reasoning gradually shifted from a strong emphasis on individual rights to a more policy oriented approach.¹¹ Social regulation, for instance in the field of employment, housing and consumer affairs, induced courts to introduce arguments of policy into their otherwise principle-based line of reasoning.¹² Eventually, this process resulted in a form of hybrid legal reasoning in common law, which combined reference to legal principle with the analysis of the consequences of different policy choices.¹³ In today's contract law, this approach is challenged from the point of view that it wanders too far from traditional 'pure' private

¹⁰ See further Mak, n 2 above, Chapter 3.

¹¹ H. Collins, 'Utility and Rights in Common Law Reasoning: Rebalancing Private Law Through Constitutionalization' (2007) 30 *Dalhousie Law Journal* 1–26, also available as an LSE working paper on <http://ssrn.com/abstract=1011727> (last consulted on 1 August 2008). A similar statement has been made for Dutch law by E.H. Hondius, 'De zwakke partij in het contractenrecht; over de verandering van paradigma's van het privaatrecht', in T. Hartlief / C.J.J.M. Stolker (eds), *Contractvrijheid* (Deventer: Kluwer, 1999) 387–393.

¹² Collins, n 11 above, 8.

¹³ Collins, n 11 above, 9–10.

law reasoning. A rebalancing of the underlying values of contract law would therefore, according to some, be called for.¹⁴

It is at the point where the current state of legal reasoning would be in need of a revision, that Collins brings in fundamental rights argumentation:

‘(...) I suggest that to the extent that a rebalancing between the collective and individual interest may be required in the reasoning processes of private law, it can be achieved by the means of inserting fundamental rights discourse into private law as another layer in the reasoning process.’¹⁵

From Collins’s point of view, judges should, however, be careful not to use public law concepts in a private legal context. Rather, an approach based on ‘inter-textuality’ or ‘inter-legality’ should be adopted, which translates fundamental rights into concepts that ‘fit within the structures and coherent principles of private law’.¹⁶ The right to privacy, for example, should not be understood as excluding protection to an employee who is dismissed because of activities conducted in his spare time.¹⁷ According to Collins, the right to privacy in this context has a different content, that is the employee is arguing that ‘what he does in his spare time, provided that it is legal, is none of his employer’s business’.¹⁸

While this account of constitutionalisation explains some tendencies in common law reasoning, it leaves several questions unanswered. In the first place, if it were accepted that a certain rebalancing of the underlying values of private law is asked for, then why would fundamental rights reasoning be the best way to achieve this? In the second place, the adaptation of fundamental rights to the context of contract law might imply an inflation of these rights; how can the chance of this happening be minimised? In the third place, how does the ‘inter-legality’ approach relate to the view held on the distinction between public law and private law; in other words, to what extent does this approach respect the autonomy of the latter field from State interference? The answers to these questions are of particular importance for the legal analysis of the constitutionalisation process, especially if the scope is broadened to include other European legal systems. A further harmonisation

14 Collins, n 11 above, 12.

15 Collins, n 11 above, 13.

16 Collins, n 11 above, 18–19.

17 In this case, running a small business in goods used in sado-masochistic practices, *Pay v Lancashire Probation Service* [2004] ICR 187, EAT; Collins, n 11 above, 18. Compare the Dutch case *Hoge Raad* 14 September 2007, *JAR* 2007, 250 (*Hyatt/Dirksz*); see also the comment on this case by W.L. Roozendaal, ‘Het grondrecht op snuiven, of de grenzen aan de gezagsbevoegdheid’ (2008) *Arbeidsrechtelijke Annotaties* 43–76.

18 Collins, n 11 above, 19.

of contract law, I submit, cannot be achieved without explicitly addressing these fundamental issues.

3. An other external perspective: legal analysis as institutional imagination

The picture that has gradually developed during the years of my own research on the impact of fundamental rights on contractual relationships does not take the broad view of contract law reasoning in general, but focuses on case law regarding the specific topic.¹⁹ It maps the effects that fundamental rights have had in German, Dutch, English and Italian cases and presents a critical assessment of the differences between similar cases that have been resolved either on the basis of ‘pure’ private law reasoning or (partially) on the basis of fundamental rights reasoning.²⁰ The most distinctive feature in this picture may be captured by the thesis that fundamental rights tend to bring out the policy questions underlying contractual disputes and, thus, induce judges to explicitly consider the policy choices reflected by the case-solutions they choose.

An example may further clarify what this means. In the well-known German *Bürgschaft* case, which by now has become one of the leading cases on the topic, the *Bundesgerichtshof* (German Federal Supreme Court) initially upheld a surety agreement of a young, impecunious woman on behalf of her father’s business, even though performance of the contract exceeded her economic powers by far.²¹ According to the Court, the principle of *pacta sunt servanda* prevailed and, since the daughter had attained the age of majority and was of sound mind when signing the contract, the rules of contract law offered no possibility of release from the contractual ties. On the basis of traditional contract law reasoning, the *Bundesgerichtshof* did not consider any other solution to be possible.

In a groundbreaking judgment, the *Bundesverfassungsgericht* (German Federal Constitutional Court) reproached the *Bundesgerichtshof* for taking such a severe stand.²² It held that the Federal Supreme Court had failed to verify whether the way the contract was concluded had left the daughter enough space to effectively have her rights to autonomy and self-determination re-

19 Mak, n 2 above, in particular Chapters 3, 5 and 6.

20 Compare R. Mangabeira Unger, ‘Legal Analysis as Institutional Imagination’ (1996) *Modern Law Review* 1–23.

21 BGH 16 March 1989, (1989) *Neue Juristische Wochenschrift* 1605–1606.

22 BVerfG 19 October 1993, BVerfGE 89, 214 (*Bürgschaft*). This case is often considered as a sequel to the judgment of the BVerfG of 7 January 1990, BVerfGE 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, n 2 above, 70–82.

spected (Article 2(1) *Grundgesetz*). In other words, the Court would have had to make sure whether the bank obtaining the surety had not dominated the negotiations to such an extent that it factually had been able to unilaterally establish the contents of the contract.²³ In particular, the judges should have investigated whether the bank employee had adequately informed the daughter of the risks attached to the suretyship and whether she had been able to evaluate these. When the case was eventually redirected to the *Bundesgerichtshof*, the Court followed the *Bundesverfassungsgericht*'s instructions and, through a more lenient interpretation of the general clause of 'good morals' (§ 138(1) *BGB*), came to the conclusion that the surety agreement had to be deemed invalid.²⁴

The German example shows how fundamental rights have been integrated into contract law reasoning. Its bearing thus seems similar to the development of hybrid legal reasoning and fundamental rights argumentation that Collins detects in English common law. However, when further exploring the topic of unfair suretyships, it turns out that similar solutions to the problem of unfair suretyships have been reached in Dutch and English law *without reference to fundamental rights*.²⁵ Recourse to fundamental rights is thus not always needed to convince judges to make policy choices that deviate from earlier legislation and case law. Fundamental rights, as well as the inter-textual approach to them, do not by themselves explain why these rights should be applied in a process of rebalancing contractual values. In order to justify the application of fundamental rights in European contract law, it is submitted, a broader external (legal-political) perspective should be taken.

The analysis of European cases²⁶ demonstrates, in my opinion, that fundamental rights relate to the policy questions that underlie contractual disputes. In the *Bürgschaft* case, for instance, the relevant provisions of the German Constitution were of significance for assessing the factual pressure on the daughter's autonomous decision making in the light of emotional motives and the incorrect evaluation of risks. While fundamental rights application may not always be needed to bring to the fore such policy issues, the study of court judgments shows that in any case such matters of policy nearly always emerge in cases in which these rights have explicitly been taken into account.²⁷ The added value of fundamental rights argumentation in the contractual discourse from that perspective is that it raises awareness among

23 *BVerfGE* 89, 214, 231–234.

24 *BGH* 24 February 1994, *Neue Juristische Wochenschrift* 1994, 1341–1344.

25 Mak, n 2 above, 242–246.

26 Mak, n 2 above, Chapter 6, in which several case studies are presented.

27 Mak, n 2 above, 292 ff.

judges as to the policy choices available for the solution of legal questions and as to the influence of the courts on the policy that will be pursued through their judgments.²⁸ This awareness may result in a rebalancing of the underlying values of contract law, but it should be kept in mind that the rebalancing acts performed by the judges are not free from legal-political bias: their decisions will either emphasise party autonomy or favour the opposing ideal of solidarity and, once aware of the political stakes in the legal question, judges might steer their decisions towards the policy that corresponds to their own legal-political preferences.²⁹

As to the nature of fundamental rights application in contract law, I would rather speak of ‘mediation’ than of ‘inter-textuality’ or ‘inter-legality’.³⁰ Fundamental rights are then seen as mediating in the dichotomy of law and politics: on the one hand, the fundamental rights argument is legal, since it is based on one of the enacted rules of the legal system (ie rights safeguarded by a Constitution or international human rights treaty); on the other hand, it is normative or political, since it has the form of an assertion about the translation of a pre-existing, ‘outside’ right into law.³¹ Rather than the elaboration and application of a private law conception of a fundamental right (as opposed to the public law original), in my view the double-faced legal-political character of the fundamental right determines its importance for the solution of contractual disputes: it clarifies how private law judgments affect the balance of political, public values.

4. Preliminary conclusion: A true story?

The three accounts of constitutionalisation presented in this section do not necessarily exclude each other; all three tell the story of fundamental rights and contract law from a different perspective. The question, therefore, is not which one is the true story, but which one can make a useful contribution to

²⁸ Mak, n 2 above, 305–309.

²⁹ For a further explanation of judicial behaviour in respect to political stakes in contract law, see Mak, n 2 above, 226–229 and 308, with further references. See also D. Kennedy, ‘The Political Stakes in “Merely Technical” Issues of Contract Law’ (2002) *European Review of Private Law* 7–28.

³⁰ Based on D. Kennedy, *A Critique of Adjudication [fin de siècle]* (Cambridge, Massachusetts: Harvard University Press, 1997) 308.

³¹ Kennedy, n 30 above, 308. He defines an ‘outside right’ as ‘something that a person has even if the legal order doesn’t recognize it and even if “exercising” it is illegal’. Examples of abstract, outside rights that have been codified in the German, Dutch and Italian Constitutions are: the right of free speech (Article 5 *Grundgesetz*; Article 7 *Grondwet*; Article 21 *Costituzione*) or the right to enjoy one’s property (Article 42 *Costituzione*; see also Article 1 of the 1st Protocol to the European Convention on Human Rights).

the further harmonisation of contract law in Europe and, in particular, to the development of a Common Frame of Reference. In the following, it will be argued that an external perspective is called for and, moreover, an attempt will be made to show that the third perspective described above can bring the drafters of the CFR closest to the fundamental policy choices they have to make.

III. Fundamental rights and the constitution of a Common Frame of Reference

1. Drafting European contract law: Formal and substantive harmonisation

The Draft Common Frame of Reference (Interim Outline Edition)³² (DCFR) that has been published in March 2008 refers to fundamental rights on several occasions. Article I.–1:102(2) stipulates that the rules of the DCFR ‘are to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws’. Article II.–7:301 determines 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’. Moreover, Chapter 2 of Book II of the DCFR contains general rules on non-discrimination in private law relationships. Although the comments to the DCFR are not yet available at the time of writing of this report, it may be assumed that the notions of ‘fundamental rights’ and ‘fundamental principles’ that are referred to are the same as the ones in the Principles of European Contract Law (PECL). In line with Article 15:101 PECL, common principles can thus be derived from the EC Treaty and the ECHR, as well as from the comparative study of national legal systems.³³

In the light of the traditional distinction between direct and indirect effects of fundamental rights, two possible scenarios come to the fore regarding the ‘constitutionalisation of the CFR’. In the first place, it is possible that a direct action by one individual against another on the basis of a fundamental right is allowed, if no specific provision reflecting the value safeguarded by this right is available in the applicable EU law (direct effect). In the second place, it may

³² Von Bar / Clive / Schulte-Nölke, n 4 above.

³³ O. Lando / E. Clive / A. Prüm / R. Zimmermann (eds), *Principles of European Contract Law. Part III* (The Hague: Kluwer Law International, 2003) 211–212. Compare the case law of the European Court of Justice in the field of fundamental rights protection: Case 4/73 *Nold v Commission* [1974] ECR 491 (ECJ); case 46/87 *Hoechst* [1989] ECR 2859 (ECJ); case 94/00 *Roquette Frères SA v Directeur general de la concurrence, de la consommation et de repression des frauds* [2002] ECR I-9011 (ECJ).

be argued that in such a case a 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 (indirect effect). This distinction leaves the drafters (and the European Commission, which should eventually adopt a CFR) with the question how in detail the CFR-provisions should incorporate fundamental rights: in the first scenario, recourse to fundamental rights would always remain a possibility, whereas in the second scenario it would remain uncertain to what extent fundamental rights could affect contract cases. The first scenario could, however, imply a submission of contract law to constitutional law, whereas the second one would fully respect the autonomy of contract law.³⁴ Which scenario should prevail? The drafters of the academic CFR do not yet seem to have made up their minds: Article I.-1:102(2) DCFR points in the direction of the doctrine of indirect effect, whereas Article II.-7:301 DCFR can be understood as allowing for the direct effect of fundamental rights. Here, the CFR meets the same problem as domestic legal systems, viz. the impossibility to justify a preference for either direct or indirect effect *within* the system of contract law.

The ‘rebalancing perspective’, on the other hand, confronts problems of an existential nature when applied to the CFR. This theoretical framework regards the search for a new equilibrium between rights and utility and, accordingly, sees fundamental rights as a means to guide contract law reasoning in the direction of that equilibrium.³⁵ As a consequence, this approach can only be applied once it is clear what policy goals are meant to be pursued through the CFR; the continuous check against fundamental rights can then help ensure that these goals are achieved.

From the ‘institutional imagination perspective’, finally, an explanation may be given for the absence of a conclusive answer in the other two theoretical frameworks. Generalising to some extent, it is submitted that fundamental rights directly address the policy questions underlying contract law, but do not provide clear-cut solutions to these questions.³⁶ Policy choices made by the legislature – or in this case: the drafters of the CFR – might therefore go in two directions: either towards party autonomy and a strict compliance with the principle of *pacta sunt servanda*, or towards solidarity and protection of the weaker contract party.³⁷ The choice has to be made by

34 For a more detailed analysis, see O. Gerstenberg, ‘Private Law and the New European Constitutional Settlement’ (2004) *European Law Journal* 771–776.

35 Compare Collins, n 11 above, 17.

36 Mak, n 2 above, 310.

37 On the concept of a continuum between these two principles of contract law, see Mak, n 2 above, Chapter 4, with further references. See, in particular, Kennedy, n 29 above.

the legislature and in principle only finds its limits where a breach of fundamental rights occurs.³⁸

On the basis of this brief analysis, in sum, the drafters of the CFR (and the European Commission) are called upon to more explicitly consider the policy questions underlying the CFR-provisions. The vaguer these provisions are formulated (e.g. in terms of general clauses), the more room is left to the judiciary to fill in their meaning at a later stage. Apart from posing a threat to the full respect for fundamental rights, this also affects the level of harmonisation that will be reached in European contract law. If the CFR contains many provisions that are formulated in such a way as to leave space for multiple interpretations, domestic case law may still change considerable from one country to another. Formal harmonisation will then fail to coincide with substantive harmonisation.³⁹

2. Judging European contract law: From principle to policy

Anticipating on the manner in which national courts and the European Court of Justice (ECJ) will deal with the aforementioned CFR-provisions, it can be predicted that similar questions will arise as in German, Dutch, Italian and English case law. If the legislature remains silent on the topic, or does not make a clear choice,⁴⁰ then to what extent is the judiciary required to directly or indirectly apply fundamental rights in contract cases? And, arguably more importantly, how will the courts affect the policies pursued in European contract law?

In line with both the inter-textual approach and the idea of fundamental rights as mediators between law and politics, a case may be made for the explicit consideration of these rights in disputes directly or indirectly⁴¹ gov-

38 The legislature, as a State organ, is usually considered to be bound by fundamental rights when enacting new legislation. See for Germany, *BVerfG* 15 January 1958, *BVerfGE* 7, 198 (*Lüth*); for Italy, Articles 134–137 *Costituzione*, which regulate the Constitutional Court's review of laws; for England, section 19 HRA 1998. In the Netherlands, the fact that Parliament has to consider the constitutionality of legislation during the drafting process is one of the reasons why judicial review of legislation is prohibited (Article 120 *Grondwet*).

39 Of course, for some issues it may be desirable to leave space for divergence on the national level. The point that is made here, is that the choice whether to leave such space should be made by taking into account all relevant factors.

40 Eg as in case of the apparent contradiction of Article I.–1:102(2) and Article II.–7:301 DCFR.

41 Depending on the status of the CFR: a direct impact could be felt if the judge were to use the CFR as a point of reference, an indirect influence would occur through the application of EU Regulations and Directives that have been drafted in accordance with the CFR.

erned by the CFR. Given the close relationship between European contract law rules and the development of the internal market, it seems difficult to maintain that judges can resolve contractual disputes on the basis of legal principles alone, without taking into account policy arguments.⁴² An open discussion of the policy choices available would therefore serve the further development of European contract law and the definition of an equilibrium between rights and utility, or autonomy and solidarity, in this field. The application of fundamental rights would provide a means for bringing out the policy questions involved as well as offer safeguards for the protection of the parties' interests.

Although it might be objected that the judiciary would thus take over part of the legislature's task,⁴³ it might also be maintained that this application of fundamental rights is merely revealing a practice that is already taking place. Of more concern is the question whether the European courts will indeed prove bold enough to enter into this policy oriented fundamental rights discourse or will rather remain in denial of the legal-political stakes in contractual disputes.⁴⁴ In this context, the fact that the DCFR in so many words requires for its provisions to be read in the light of fundamental rights may be welcomed as an appeal to the judges to take seriously their responsibilities regarding the protection of the underlying values of contract law.

IV. Conclusion

From a bird's-eye view on the theories concerning effects of fundamental rights in European contract law it appears that several accounts of the so-called 'constitutionalisation' of this field of law may be given. In this report it has been argued that the traditional internal analysis in terms of direct and indirect effects of fundamental rights cannot sufficiently explain and guide the ongoing harmonisation process. Inspiration should rather be taken from a combination of this type of analysis with external perspectives, which take into account the policy issues underlying questions of contract law. An inter-textual or inter-legal approach, if clearly defined, may serve to integrate fundamental rights argument into contract law reasoning. An

42 Compare Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto' (2004) *European Law Journal* 653–674. See also Mak, n 2 above, Chapter 5.

43 J.M. Smits, 'Constitutionalisering van het vermogensrecht', in *Preadviezen uitgebracht voor de Nederlandse Vereniging voor Rechtsvergelijking 2003* (Deventer: Kluwer, 2003) 64. On the relationship between legislature and judiciary, see also Kennedy, n 30 above, Chapter 2.

44 Compare Gerstenberg, n 34 above, 784.

analysis of the mediation of fundamental rights between public values and private interests, furthermore, can explain which legal-political processes steer the development of European contract law. Through these types of analysis, the CFR that the European Commission plans to enact may be better adapted to the policies it aims to pursue. Moreover, they can help strike the balance between legislature and judiciary as regards their tasks in constituting the CFR.